

THE
LAW OF INCOME-TAX IN INDIA

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THE LAW OF INCOME-TAX IN INDIA

BEING

A DETAILED COMMENTARY ON
THE INDIAN INCOME-TAX ACT XI OF 1922
AS AMENDED

BY

V. S. SUNDARAM, G.I.E.
Late of the Indian Audit & Accounts Service

SIXTH EDITION

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IN MEMORY OF MY PARENTS

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PREFACE TO THE SIXTH EDITION.

I have to apologise to users of this book for the delay in bringing out this edition. It has been brought up to date to the end of 1946. The rather long interval of seven years since the issue of the last edition has been marked by extensive addition to case law and changes in statutes ; and as a consequence, the book has undergone equally extensive changes.

I wish to acknowledge the help given to me by Mr. S. Rangachariar, B.A., B.L., and Mr. K. Annadhanam, B.A., both of Messrs. S. Vaidyanath Aiyar & Co., Registered Accountants, Delhi, in reading the manuscript before it was sent to the Press ; and in particular the help of the Madras Law Journal Press in getting the book through against formidable handicaps mostly beyond control.

(Sd.) V. S. SUNDARAM.

NEW DELHI,
20—2—1947.

CORRECTIONS.

- Page 71 line 27 [section 14 (1)]—For 'income' read 'sum'.
- " 72 line 46 [section 16 (3) (a) (iv)]—Omit the first 'and'.
- " 74 line 2 (section 17)—For '17' read '27'.
- " 84 line 40 (section 23-A)—Omit 'of the assessable income'.
- " 84 line 41 (section 23-A)—Omit 'of the assessable income'.
- " 91 line 47 (section 28)—For 'is' read 'a'.
- " 92 line 2 (section 28)—For 'by' read 'be'.
- " 93 line 16 (section 30)—For 'into' read 'with'.
- " 95 line 4 (section 33)—For 'at any time within the expiry of sixty days from' read 'within sixty days of'.
- " 95 line 19 (section 33)—After the words 'new assessment' and before the word 'is', add the words 'of a firm or association of persons'.
- " 98 line 50 (section 41)—For 'judicial' read 'juridical'.
- " 113 line 48 (section 58-C)—For 'Service' read 'Forces'.
- " 117 line 26 (section 58-K)—For '(xii)' read '(xv)'.
- " 123 line 43 (section 64)—After the word 'proceedings' and before 'began' add 'for such assessment'.

ADDENDA.

Page 22.

'Marginal Notes'.—In *Commissioner of Income-tax, Bombay v. Western India Life Insurance Co., Ltd.*, 1945 I.T.R. 405, reference was made to the fact that when the Legislature amended Section 42, it did not amend the marginal note which referred to 'Non-residents'. On the other hand, it would appear that the practice of legislatures is *not* to amend marginal notes, evidently in view of the fact that they are ignored in interpreting the relative sections.

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Plural will include the singular. *Bihar v. P. C. Choudhury*, 1945 I.T.R. 309.

Page 31.

Taxing Act—Construction of.—The Income-Tax Act being a fiscal measure, many of the provisions are of necessity arbitrary; the duty of the Court is to interpret the provisions of the Act, and if they are plain, to give effect to them, regardless of the consequences, and if there is ambiguity, to construe the provisions in favour of the subject, even if it results in his obtaining a double advantage.

Central Provinces and Berar Provincial Co-Operative Bank Ltd. v. Commissioner of Income-tax, C.P. and U.P. 1946 I.T.R. 479.

Page 38.

Permanent Settlement.—The Privy Council Judgment in *Probbhat Chandra Barua v. King Emperor*, 58 Cal. 430, implicitly overrules *Chief Commissioner of Income-Tax v. Singampatti*, 45 M. 518: 1 I.T.C. 181 for in this respect there is nothing to distinguish the Madras regulation from the Bengal one, *Yuvaraja of Pithapuram v. Commissioner of Income-Tax, Madras*, 1946 I.T.R. 92.

Page 43.

Foreign States.—A ruling Chief in India has the same immunity from taxation as any other foreign sovereign, but this immunity does not extend to his wife.

Rani Amrit Kunwar v. Commissioner of Income-Tax, U.P. 1946 I.T.R. 561 (All.).

The following changes have been made in the Rules:

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Rule 8.—Item 26 of group B has been omitted, and to sub-head (3), the following has been added:—

THE INCOME-TAX ACT

"T—Glass manufacturing concerns*

(i) Recuperative and Regenerative Glass melting furnaces 20 per cent

(ii) Other plant and machinery including machinery for the manufacture of Vacuum tubes and Vacuum bulbs 10 per cent

*Replacement of Direct Fire Glass melting furnaces will be allowed as revenue expenditure

Page 144

Rule 11 A —In item 7 of the statement for the words at or in connection with the termination of employment the words from an unrecognised provident fund have been substituted

Page 155

The reference to Note 17 (c) against Depreciation allowable has been changed to 17 (d)

After the above item and before the item Any other etc the following has been added

Scientific Research expenditure (if not charged in arriving at the figure of profit)

(i) Any expenditure (not in the nature of capital expenditure) laid out or expended on scientific research related to the business
See note 17 (c) Give details

(ii) Any sum paid to an approved Scientific research association or an approved University College or other institution for such scientific research—See note 17 (c) Give details

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Reference at the head of part V is made to notes 17 (d) and 17 (e) and in column (2) to 17 (d) In column 3 the mark † has been placed before 'Capital' and the following foot note added

† (3) Capital expenditure on new machinery or plant or new buildings erected should be shown separately and in the Remarks column against each such entry it should be indicated that initial depreciation has been claimed

For existing heads at the bottom the following have been substituted

Total income from property

Less (i) claim for uncovered rent (Give details separately)

(ii) Income from property erected during the period 1st April 1946 to 31st March 1948

Net income from property carried to Part I of the Return

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Addition to Note 1 A

"Super tax in these cases should be calculated at the rates and in the manner specified in the Annual Finance Act "

Page 161

In Note 17, sub para (c) has been relettered as (d), and the following new sub-paragraphs added

(c) Under section 10 (2) (xii), (xiii) and (xiv) of the Act, revenue expenditure incurred by the assessee on scientific research related to a business or to the class of business carried on and sums paid to research associations or institutions will be allowed in the assessment of the profits of the year in which the expenses were incurred Capital expenditure on scientific research will be allowed in five consecutive equal instalments and allowance will be given also in respect of such expenditure incurred not more than three years before the commencement of the business Any expenditure on scientific research incurred in the previous year for the assessment year 1945-46 is admissible as a deduction in the assessment year 1946-47 but not in any subsequent year of assessment

(d) Under section 10 (2) (vi) of the Act special initial depreciation will be admissible in respect of new buildings, plant and machinery In the case of buildings the rate is 10 per cent of the cost except in the case of buildings erected in the period 1st April 1946 to 31st March 1948 for which it is 15 per cent In the case of plant and machinery, the rate is 20 per cent The allowance will not be deducted in computing the written down value

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Section 2 (1).—*Payments out of Agricultural income*—The remuneration that a managing agent of a company receives under the usual type of agreement, viz, a commission at the rate of so much per cent on the annual net profits of the company after making the usual allowances but not depreciation or taxes on income, and provision for a minimum remuneration, is a share of profits using the word 'profits', not in the ultimate sense of the profits divisible by the shareholders, but in a proximate sense of an *ad hoc* fund to regulate the payment for the managing agents' services, compare *British Sugar Manufacturers, Ltd v Harris*, 21 T C 528 (C A), (1938) 1 A E R 149 1939 I T R 101 The managing agent does not step into the shoes of the company as in the case of a usufructuary mortgagee, see *Commissioner of Income-Tax v Sir Kameswar Singh*, 1935 I T R 305 (P C), nor is he a beneficiary under a trust as in *Syed Mohamed v Commissioner of Income tax* 1942 I T R 267 The case is more akin to in re *Habibullah*, 1943 I T R 295, the payment does not depend on the income of the company for the agent is entitled to a minimum remuneration even if the company makes a loss, the percentage is not necessarily payable out of agricultural income and the assets of the company are not vested in the agents Therefore even though a part of the income of the Company may be agricultural, the whole of the managing agents' remuneration is non agricultural

Premier Construction Company v Commissioner of Income-Tax 1945 I T R 391

The case of the managing agent of a company with wholly agricultural income is still open

Page 237

Land assessed to land revenue, etc., in British India must be situated in British India *Commissioner of Income tax, Bombay v Jhamandas Devkishendas*, 1946 I T R 554

Page 243

Forests —Income derived from trees which have grown wild is not agricultural income and to describe it as such would involve a distortion of the meaning of the word 'agriculture' *Yasaraja of Pithapuram v. Commissioner of Income tax Madras*, 1946 I T R 92 Also *Nawab Nawazish Ali Khan v Commissioner of Income tax U P*, 1946 I T R 356

Rani Tara Kumari Devi v Commissioner of Income tax, U P, 1946 I T R 787

Raja Pratap Bikram Shah v Commissioner of Income tax, U P, 1946 I T R 788

Nor is it capital

Raja Bahadur Kamakshya Narain Singh v Commissioner of Income-tax, Bihar and Orissa 1946 I T R 673

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Rule 24 —This rule can apply only where the same person grows and manufactures the tea Where a husband and wife, with separate tea estates (the wife's not being derived from the husband) had a common tea factory and there was no evidence to support a partnership between the two in respect of the tea estates, it was held that the benefit of Rule 24 could not be given to the tea factory *Commissioner of Income tax Bengal v K B Walur Rahman*, 1946 I T R 287

Page 250

Interest on arrears of rent and cess —*Raj Bahadur Kamakshya Narain Singh v Commissioner of Income tax Bihar and Orissa*, 1946 I T R 673, following *Lakshmi Diji v Commissioner of Income tax Bihar and Orissa*, 1944 I T R 309

Page 257

Immediate vicinity —A house 16 miles from the land is not in 'immediate vicinity' *Nawab Nawazish Ali Khan v Commissioner of Income-tax, U P* 1946 I T R 356

Page 238

Local rate —This means a rate imposed for the benefit of a local authority or area as distinct from taxes forming part of the revenue of a Provincial Government Obiter in *Commissioner of Income tax, Bombay v Jhamandas Devkishendas*, 1946 I T R 554

Page 256

Process ordinarily employed by cultivators, etc —The process should not only be that employed by a cultivator, etc., but in order to render the

produce fit to be taken to market. The produce must retain its original character in spite of the process unless there is no market for selling it in that state. If there is a market in its natural state and nevertheless the produce is subjected to processes that change its character e.g. sugarcane into gur the process is not agricultural within the meaning of the definition. *Brihan Maharashtra Sugar Syndicate, Ltd v Commissioner of Income tax, Bombay* 1946 I T R 611

Page 269 Section 2 (4)

Executor's Business —Where there was a clear mandate in a will to convert an existing business into cash as soon as possible it was held that the mere collection of outstanding dues in a money lending business without making any new loan did not amount to the carrying on of a business. *Estate of Lala Shankar Shah v Commissioner of Income tax Punjab*, 1945 I T R 500

Page 304

Section 2 (6) (b) *Firm* —The existence of a partnership being a question of fact, the Court will not interfere unless the facts are inconsistent with the conclusions of the Commissioners. The onus of establishing the existence of a partnership rests on the partners and if it is alleged that the partnership was oral but the partners do not give evidence themselves leaving it to their accountants to make certain submissions the Commissioners will be justified in holding that the onus has not been discharged. *Taylor v Chalklin* 1945 K B D

Page 303

Different partnerships —There is a statement in the judgment of Beaumont C J in *Vissonty Sons & Co v CIT, Bombay*, 1946 I T R 272 that 'in law a firm has no existence independently of its partners and if there are two firms consisting exactly of the same partners, the real position in law is that there is only one firm. It may carry on a separate business and in different names but in fact there is only one firm in law'. In the particular case it should be noted the shares of the individual partners in the two firms were identical and the business of one of the firms was auxiliary to and almost a part of that of that other and as the same Judge points out later the only question before the Court was the limited one of whether there was evidence to justify the finding of fact by the Tribunal.

As to partnership being a question of fact see also *Commissioner of Income tax Bengal v K B Walhur Rahman* 1946 I T R 287

Page 237

Section 2 (6-AA) *Earned income* —There is no difference in this respect between residents and non residents but there is not much chance of a non resident's having earned income except in the foreign incomes of firms etc. controlled in British India in which the assessee works abroad or of salaries or pensions paid from British Indian Funds.

Page 309

Section 2 (9) and 14—*Hindu undivided family* —The existence of a joint estate is not an essential requisite to constitute a Hindu undivided

family and there may be such a family without owning any property. A Hindu coparcenary is a narrower body and includes only those who by birth acquire an interest in the coparcenary property. The jointness of a Hindu family without property consists in mess residence worship etc. There is nothing therefore to prevent the existence of a Hindu undivided family composed of females only though there may be no coparcenary. It was held therefore that an allowance given by the Court of Wards to a widow of a proprietor of an estate under its administration and continued after the death of the only minor stepson was a payment out of the income of a Hindu undivided family. *Commissioner of Income tax U P v Sarvan Kumar*, 1945 I T R 361 (All.)

Page 331

Sections 3 and 41—Association—Executors of a will in which the beneficial interests are clear and precise and take effect from the death of the testator who moreover do not carry on any business cannot be taxed jointly as an association of individuals. *Estate of Lola Shankar Shah v Commissioner of Income-tax Punjab* 1945 I T R 500

Page 339

Mutual concerns—The Calcutta High Court with reference to Assam Agricultural Income-tax was not prepared to follow the ruling of the Madras High Court in respect of the English and Scottish Joint Co-operative wholesale Society 3 I T R 385 it held that the Society was a trading concern and that its distribution of dividends was out of trading profit and not return of excess contributions. The case was more akin to *Last & London Assurance Corporation* 10 App. Cas. 438 than to *Style's case* 14 App. Cas. 381 and the concern was not mutual. *England and Scotland Joint Co-operative Wholesale Society Ltd v Commissioner of Agricultural Income tax, Assam* 1945 I T R 295

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It is not membership or non membership (of the persons with whom a concern has transactions) that governs liability to or immunity from tax in such cases it is the nature of the transactions that has to be examined. If they are mutual the surplus (ex hypothesi it is not profit) is not taxable otherwise the surplus is a profit and taxable. *C I R v Ayrshire Employers Mutual Association Ltd (H L)*

Page 333 and 334

Income of previous year—Burma having been part of British India in 1936-37 income which accrued there in that year is assessable in the British Indian assessment of 1937-38 irrespective of remittance from Burma to India proper. The fact that both Burma and India taxed the profits in Burma for 1937-38 was immaterial because the two were different states then. *E M V Muthappa Chettiar v Commissioner of Income-tax Madras* 1945 I T R 311

Page 328

Excluded Areas—A regulation made by a Provincial Government under Section 92 (2) of the Government of India Act 1935 with the con-

sent of the Governor General can be given effect to retrospectively if its intention to that effect is clear, and it is also not necessary for the preamble to the regulation to say in terms that it is for the peace and good government of the area. Where, therefore in June 1942, a regulation provided that the Finance Act of 1939 should be deemed to have come into force in an excluded area on the 30th March, 1939, and in appeal which was pending before the Appellate Tribunal was disposed of only in 1943 it was held that the Tribunal was bound to apply the Finance Act of 1939 in considering the validity of the assessment. The regulation was not *ultra vires* and the Tribunal rightly held the assessment to be covered by the Finance Act of 1939. *Raja Bahadur Kamakshya Narain Singh v Commissioner of Income tax Bihar and Orissa* 1946 I T R 693. See also *Chatturam and others v Commissioner of Income tax Bihar and Orissa* 1946 I T R 695.

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Free of tax —Recent cases are

In re Tatham, 1945 Ch D (Evershed J)

In re Williams 1945 Ch D (Uthwatt, J)

Commissioners of Inland Revenue v Cook 1945 H L (by majority of 3 to 2)

The question often to decide is whether the payee is to receive a gross sum with reference to the standard rate or to his own personal rate, and the answer ultimately depends on the words of the relative instruments governing the payment of annuity.

Page 378

Annuities under will —It is immaterial from what source a payment is made. What is relevant is the nature of the receipt to the recipient. Therefore an annuity under a will is taxable even if paid out of capital funds. *Jackson's Trustees v Commissioner of Inland Revenue* 25 Tax Cas 13 (K B D)

Page 401

Cancelled contracts —The payment received by a building company from the owner of land as consideration for not objecting to the withdrawing of land from the company's building schemes is a revenue receipt of the company, for the right of the company to build is a trading asset to it i.e. floating capital of the company. *Shadbolt v Salmon Estate*, 25 Tax Cas 52 (K B D)

Similarly compensation for prevention of ribbon development is a revenue receipt in the hands of a land development company. *Johnson v Try Ltd*

Page 381

Payment for good will —K by his will provided that on his death his nephew M was to carry on his business and give K's widow a two annas share in the net profits for twelve months and thereafter whatever M may think proper. There was litigation and under a compromise decree K's widow and M agreed that in lieu of paying a two annas share for one year and an indefinite amount afterwards M would pay her Rs 200 per mensem

from K's death for so long as M carried on the business in the same premises and the name Held that the payments were in lieu of a share of income and not as instalments of the value of goodwill Goodwill can no doubt be valued and paid for, if so the payments would be capital, but on the facts of this case K desired that his wife should participate in the profits and the compromise gave effect to that desire *Commission of Income tax, Sind v Bai Nindhi Bai*, 1946 I T R 600

Page 375

Income from Forests —Receipts from felling trees in a forest (not being an outright sale of the forest) are revenue receipts and not capital *Kamakshya Narain Singh v Commissioner of Income tax, Bihar and Orissa*, 1946 I T R 673

Page 403

Ploughing Grant from Government at so much per acre even if non-recurrent is income *Clyde Higgs v Wrightson*, (1944) 1 All E R 488

Lump sum contributions from Government for meeting cost of extending electric lines to unremunerative areas are capital receipts *Commissioner of Income tax, Bombay v Poona Electric Company*, 1946 I T R 620

Page 396

Interest awarded by a Court in proceedings for recovery of debt or damages is ordinarily taxable irrespective of whether in the absence of the award any interest was due under any contract or arrangement *Regal (Hastings) Ltd v Gulliver and others*, 1945 Tax Rep 205, *Westminster Bank v Riches (C A)*, 1945 Tax Rep 217

Page 331

Release from debt —Where certain shares of a Company are forfeited for failure to pay the call up of capital and re-issued and the amounts already paid by the old shareholder are, under some other arrangement, credited to the old shareholders' account and set off against other debts due from him, the money so credited is neither a revenue nor a capital receipt of the Company, but part of its circulating Capital, the excess of the credit, if any over the debt which may represent interest is taxable *In re Multan Elec Supply Co*, 1945 I T R 457 (Lah)

Page 343

Prior Charges —Allowances paid to widows in a Hindu undivided family under arbitration awards and forming an overriding charge on the income of the family before the other members can receive anything should be excluded from the income of the family the allowances are not received by the widows as members of the family but under the awards *In re Hiralal*, 1945 I T R 512 following *Lala Shankar Shah v Commissioner of Income tax Punjab* 1945 I T R 500 and distinguishing *Bhagwati v Commissioner of Income tax, U P* 1941 I T R 31

If a payment is voluntary i.e., a payment out of the income of the payer it is part of the latter but if it is charged on the income it is the income of the payee and not part of the income of the payer

Page 392

Debt or income —Whether what a person receives is a loan or income is not a matter of what the parties to the transaction choose to call it but one of its true nature. An interest free loan which is not repayable and is identical in amount with what would eventually be due to the payee and to which the payee is entitled from month to month was held by the High Court to be income : *e* of the nature of an annuity but this decision was reversed by the Court of Appeal who however gave leave for appeal to the House of Lords. *Commissioner of Inland Revenue v Wesleyan and General Assurance Society*

Page 323

Basis of Assessment —K a Civil Engineer who kept his accounts on a cash basis and by the calendar year discontinued his profession as on 15th February 1938 and the Income-tax Officer assessed him in 1939-40 on outstanding fees received by him during 1938 but after 15th February. The Income tax Department did not apply Section 25 to the case. It was held (by Kania and Chagla JJ Stone C J dissenting) that the assessment was in order. The dissenting judgment was based on the following reasoning. The proper approach is not to assume that Sections 3 and 4 tax gross receipts and then allocate them under the heads in Section 6 for computation of allowances under Sections 7 to 12 so that the truncated total of gross receipts remains as the taxable balance but to charge nothing to tax until by the process of computation laid down by the Act the status of income profits and gains emerges. Therefore what is taxable should first be capable of being so processed. The scheme of allowances under Section 10 and of set off under Section 24 suggests that the business should be in existence when the receipts come in and it cannot be argued that when the profession ended it automatically gave rise to a new source *viz*, other sources. This view is also strengthened by the omission in 1939 of the previous reference to Section 6 in Section 4 and reference in the same section now to computed in the manner laid down in this Act in stead of to computed in the manner laid down in Section 16. Also in Section 3 the tax is leviable since 1939 not on *all* income etc but on income etc which may be included in total income. The majority view which is in accordance with *In re Beharilal Mullick* 54 Cal 630 rests on the view that there is nothing in Section 10 to require that the business must be in existence at the time of receipt of the income.

Page 367

Development Companies —Income derived from a business of turning into account rights of winning and disposing of minerals is of a revenue nature and not of a capital nature even though the receipts may take the form of shares in or terminable payments from companies taking over the rights or concessions. *British South Africa Co v Commissioner of Income tax Rhodesia* 1946 I T R (Sup) 17 (P C)

Page 330

Royalties on minerals —A payment received by an owner of coal bearing land from a miner lessee not as compensation for surrendering the lease but as the estimated royalty on the abandoned coal in accordance

with the relative agreements, is not a capital receipt *Cossimbazar Raj Wards Estate v Commissioner of Income tax, Bengal*, 1946 I T R 377
In this case the real dispute was as to the construction of the documents

Page 337

Film rights —What was received in return for the assignment of the film rights of a film for ten years (as distinguished from a mere licence) has been held to be capital even in the case of a mere licence for ten years, if the licence allows the right to cut the film to pieces and combine its story with other stories the right diminishes the value of the copyright of the film and therefore the receipt is of a capital nature *Neithersole v Withers (C A)* (reversing J, Macnaghten's judgment)

Page 371

Salami —It is not possible to lay down any hard and fast rule as to when *Salami* is taxable it all depends on the facts of the case, on whether it is really rent paid in advance or a lump payment for transfer of the leasehold interest and the only question of law is whether on the facts, the inference in law is right as to whether it is capital or income

Where the *Salami* is received not on account of rent, but for the settlement of certain disputes as to the validity of the lease the *Salami* is a capital receipt even though one of the considerations may relate to the extension of a prospecting lease for a period of 7 years *Commissioner of Income tax Bihar & Orissa v Kamakshya Narain Singh*, 1946 I T R 738

Page 392

Debt or income —Cesses paid by the Court of Wards in earlier years to Government on behalf of an assessee which according to the assessee should have been paid by a lessee company were reimbursed to the assessee in a later year as part of a settlement in which the assessee who had sought to repudiate the lease altogether on certain grounds agreed to validate them it was held that the money received by the assessee on this account was not taxable, not being of the nature of income and being reimbursement of expenses by which the assessee had been out of pocket through the Court of Wards *Commissioner of Income tax Bihar & Orissa v Kamakshya Narain Singh* 1946 I T R 738 It is not clear however, on what basis the Court of Wards had been taxed in the earlier years whether on the basis of gross royalties or net royalties after deducting cesses

Page 408

Section 4 Brought in —The second proviso applies only to (b) (ii), i.e. income both accrued and brought in during the accounting year. Though grammatically, the second proviso must apply to (b) (iii) there can be no case in which it can give relief. Therefore a person not ordinarily resident is taxable on income of preceding years (but after 1st April 1913) brought into British India during the accounting year under assessment *Raghunath Madhavlal v Commissioner of Income tax, Bombay* 1945 I T R 376

Page 441

There is no presumption either of fact or of law, that for income-tax purposes, a person carries all his money with him wherever he goes and that therefore he must be presumed to keep it where he resides in the absence of evidence to the contrary. A head office and its branches or branches *inter se* are not separate legal entities and the mere invoicing of or adding on of so-called profits in respect of transactions between themselves cannot give rise to profit. If therefore a foreign branch buys goods and sends them to British India where they are sold the profits arise in British India it is not a case of profits being made abroad and then brought into British India merely because the foreign branch debited the head office with not only the cost but a formal profit for which credit was given in the books of the foreign branch. The true profit can only be estimated by deducting from the sale proceeds the actual cost price paid outside plus all relative expenses at all stages up to the sale. It follows *a fortiori* that the Income tax Officer cannot enhance the so-called (but non-existent) profit of the foreign branch and then assume that it had been brought into British India unless the assessee could prove that he had *not* brought in this (*pro forma*) profit to British India. *Ram Lal Becharam v Commissioner of Income tax U P* 1946 I T R 1 (All)

Page 408

Exemption of Rs. 4,500 of unremitted foreign income — A resident cannot be deprived of the benefit of exemption of Rs. 4,500 under the third proviso to Section 4 (1), on the ground that the foreign income would be deemed under Section 42 to have accrued in British India and that it fell under Section 4 (1) (b) (1) and not clause (ii) thereof. The whole of the first part of Section 42 applies clearly to non residents. Apart from the retention of the marginal note which still reads 'Non residents' making the whole of the first paragraph as one and connecting the two parts of that paragraph by and the Legislature has clearly indicated that it was making provision for the assessment of a non resident only by that paragraph. If the section was intended to apply to residents also there would have been two separate parts of the Section the first part covering the cases both of a resident and of a non resident and the second dealing with machinery in the case of non residents. Also the various expressions used in the first part of Section 42 are inappropriate on the case of a resident for in the contingencies mentioned the income would accrue within British India. If Section 42 was intended to apply to residents also its substantive part should have found a place more appropriately in Section 2 (definitions). *Commissioner of Income tax Bombay v Western India Life Insurance Co* 1945 I T R 405

Page 408

If a registered firm has been allowed the rebate of Rs. 4,500 the partners cannot again claim this allowance in their own assessments in respect of their shares of the profits. *Commissioner of Income tax Sirdar Kaliraj Shermul* 1946 I T R 407. In respect of his other income if any, the partner could if it is submitted claim the balance of the rebate if any.

with the relative agreements, is not a capital receipt *Cossumbazar Ray Wards Estate v Commissioner of Income tax Bengal*, 1946 I T R 377
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Film rights —What was received in return for the assignment of the film rights of a film for ten years (as distinguished from a mere licence) has been held to be capital even in the case of a mere licence for ten years, if the licence allows the right to cut the film to pieces and combine its story with other stories, the right diminishes the value of the copyright of the film and therefore the receipt is of a capital nature *Nethersole v Withers (C A)* (reversing J Macnaghten's judgment)

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Where the *Salami* is received not on account of rent but for the settlement of certain disputes as to the validity of the lease the *Salami* is a capital receipt even though one of the considerations may relate to the extension of a prospecting lease for a period of 7 years *Commissioner of Income tax Bihar & Orissa v Kamakshya Naram Singh* 1946 I T R 738

Page 392

Debt or income —Cesses paid by the Court of Wards in earlier years to Government on behalf of an assessee which according to the assessee should have been paid by a lessee company were reimbursed to the assessee in a later year as part of a settlement in which the assessee who had sought to repudiate the lease altogether on certain grounds agreed to validate them it was held that the money received by the assessee on this account was not taxable not being of the nature of income and being reimbursement of expenses by which the assessee had been out of pocket through the Court of Ward *Commissioner of Income tax Bihar & Orissa v Kamakshya Naram Singh* 1946 I T R 738 It is not clear however on what basis the Court of Wards had been taxed in the earlier years whether on the basis of gross royalties or net royalties after deducting cesses

Page 408

Section 4 Brought in —The second proviso applies only to (b) (ii) i.e. income both accrued and brought in during the accounting year Though grammatically the second proviso must apply to (b) (iii) there can be no case in which it can give relief Therefore a person not ordinarily resident is taxable on income of preceding years (but after 1st April 1933) brought into British India during the accounting year under assessment *Raghunath Madharlal v Commissioner of Income tax, Bombay* 1945 I T R 376

Page 441

There is no presumption either of fact or of law, that for income-tax purposes, a person carries all his money with him wherever he goes and that therefore he must be presumed to keep it where he resides in the absence of evidence to the contrary. A head office and its branches, or branches *inter se* are not separate legal entities, and the mere invoicing of or adding on of so called profits in respect of transactions between them selves cannot give rise to profit. If therefore a foreign branch buys goods and sends them to British India where they are sold the profits arise in British India, it is not a case of profits being made abroad and then brought into British India merely because the foreign branch debited the head office with not only the cost but a formal profit for which credit was given in the books of the foreign branch. The true profit can only be estimated by deducting from the sale proceeds the actual cost price paid outside plus all relative expenses at all stages up to the sale. It follows *a fortiori* that the Income-tax Officer cannot enhance the so called (but non existent) profit of the foreign branch and then assume that it had been brought into British India unless the assessee could prove that he had not brought in this (*pro forma*) profit to British India. *Ram Lal Becharam v Commissioner of Income tax, U P, 1946 I T R 1 (All)*

Page 408

Exemption of Rs 4500 of unremitted foreign income — A resident cannot be deprived of the benefit of exemption of Rs 4500 under the third proviso to Section 4 (1), on the ground that the foreign income should be deemed under Section 42 to have accrued in British India and that it fell under Section 4 (1) (b) (1) and not clause (ii) thereof. The whole of the first part of Section 42 applies clearly to non residents. Apart from the retention of the marginal note which still reads 'Non residents making the whole of the first paragraph as one and connecting the two parts of that paragraph by 'and', the Legislature has clearly indicated that it was making provision for the assessment of a non resident only by that paragraph. If the section was intended to apply to residents also there would have been two separate parts of the Section the first part covering the cases both of a resident and of a non resident and the second dealing with machinery in the case of non residents. Also the various expressions used in the first part of Section 42 are inappropriate on the case of a resident, for in the contingencies mentioned the income would accrue within British India. If Section 42 was intended to apply to residents also its substantive part should have found a place more appropriately in Section 2 (definitions). *Commissioner of Income tax Bombay v Western India Life Insurance Co 1945 I T R 405*

Page 408

If a registered firm has been allowed this rebate of Rs 4500 the partners cannot again claim this allowance in their own assessments in respect of their shares of the profits. *Commissioner of Income tax Sind v Valiram Bherumal 1946 I T R 407*. In respect of his other income if any the partner could it is submitted claim the balance of the rebate, if any

Page 403

Inclusion in Income—Though the sum of Rs 4 500 is not taxable in British India it is part of total world income Section 2 (15) and Section 17

There is nothing in the section to justify the view that if income exempted in an earlier year under this proviso is brought into British India in a later year, it is not liable to tax *Commissioner of Income tax, Madras v Rm Ar Ar Rm Arunachalam Chettiar*, 1946 I T R 760

Page 407

Deemed to accrue etc—Section 42 (3) applies only to profits deemed to accrue in British India and not to cases of accrual or receipt in British India Section 42 applies only to certain cases of income not accruing etc., in British India but deemed by that section so to accrue and does not exclude the operation of Section 4 in respect of non residents Therefore, a non resident who manufactures goods abroad but sells them in British India and receives the proceeds there is taxable on the whole of his profits and not merely on his merchanting profits in British India *Hira Mills, Ltd Cawnpore v Income tax Officer, Cawnpore* 1946 I T R 417

Page 410

Section 4 (2) Remittances from husband abroad to wife in British India—Remittances received in British India by the wife of a ruler of an Indian State who is himself immune from taxation are liable to tax even though the remittances are made by the state if there is no dividing line between the public expenditure of the state and the private expenditure of the ruler *Rani Amrit Kunwar v Commissioner of Income tax, U P*, 1946 I T R 561 (All)

Page 453

Section 4 (3) (i) and (11) Charity—The burden lies on the person seeking exemption to establish that his case falls under the exemption 1946 I T R 362 (Cal)

Page 457.

An irrevocable trust need not necessarily be public but a public temple is one intended for a large section of the public who are entitled to worship in it A temple within a private building even if accompanied by poor feeding etc is not necessarily a public religious trust and where a trust provides for such a temple and also a hospital etc only the portion of the income applied to the hospital is exempt In *re Charusila Dass* 1946 I T R 362 (Cal)

Page 457

Whether a religious trust is public or private should be determined by the deed of trust (if any) and other evidence and if the deed is silent on this point the question should be settled with reference to the relevant evidence whether the benefits worship etc are in fact open to the public. *Commissioner of Income tax U P v Shri Dwarka Dheesh Temple* 1946 I T R 440 (All)

Page 457

In order to secure exemption the expenditure on public charitable purposes must be obligatory, it is not sufficient if it is permissive, *e g*, where the trustee of a private religious trust is given power to spend, and spends, surplus funds on public charitable purposes *e g*, a school. In such a case, the whole of the income of the private trust would be taxable without excluding the expenditure on public charitable purposes. *Sri Sri Jyotishwari Kalmata etc v Commissioner of Income tax, Bihar & Orissa*, 1946 I T R 703 (Pat).

Page 456

Where the Karta of a Hindu undivided family carrying on business made an oral declaration of trust to set aside Rs 2 lakhs for charities and after an interval of about a year, created a liability for Rs 2 lakhs in his account books in favour of a charitable trust by transferring thereto credits already in his books (of the nature of profits reserved for expenditure on charities) and also the balance from the Profit & Loss A/c so as to make up Rs 2 lakhs it was held that the trust had failed because there was nothing to show that the settlor had separated the trust properties from his other property and deprived himself of the beneficial interest. *Hanmant ram Ramnath v Commissioner of Income tax Bombay*, 1946 I T R 716 following *Chambers v Chambers*, I L R 1944 Mad 617 (P C).

The *ratio decidendi* was as follows

It was argued that when the Settlor and the trustees agreed that this sum in respect of which the Settlor created a trust was not necessarily to be retained by the trustees but was to be deposited with the (settlor) assessee's firm at interest. It was not necessary for the settlor physically to hand over Rs 2 lakhs to the trustees and for the trustees to hand back the amount to the assessee in the capacity of a debtor. It is not necessary to continue this argument in the present case because this initial step of Rs 2,00,000 being unavailable to the Settlor in cash is not established. In the absence of this fact being proved these entries must be considered as book entries."

There would seem to be no emphasis on the word 'cash' and if, for instance the settlor in this case had set apart a part of his stock in trade or even book debts due to him from others in favour of the trustees the trust would have been valid according to the above line of reasoning. In this case the books of the settlor could not have been balanced except on the assumption that there were assets against the profit and loss account and the two old charity accounts and the Court's objection apparently was only to the *non specific* nature of the assets. If the assessee had (say) borrowed from the Bank Rs 2 lakhs temporarily and repaid it even the next day, after a formal payment to the trustees and deposit by them back with the settlor the trust would probably have been held to be valid.

Page 493

Section 4 (3) (vi) *Casual Receipts* — 'Non recurring nature' means not that the payments have in fact not recurred but that they are not bound to recur. *Ram Amrit Kuntwar v Commissioner of Income-tax U P*, 1946 I T R 561 (All).

Page 468

Gifts —In order to be taxable income need not arise from a business, etc., or as the result of an outlay by the recipient or from an enforceable obligation and may arise from voluntary payments. Occasional gifts however are not taxable even if they recur they are not ordinarily taxable. *Rani Anrit Kunwar v Commissioner of Income tax U P*, 1946 I T R 561 (All)

Page 507

Compensation for loss of employment —An insurance broker with previous business connections was in the service of a company of insurance brokers for many years. His previous clients continued to remain his own and to them he devoted his whole time but the commission in respect of that business went to the Company, who allowed him to retain 50 per cent. of it in addition to a fixed annual sum. The contract of service was oral. In 1937 his share of commission was £10,000. In that year he was asked to give up his job to take up that of Managing Director and as compensation for the loss of his business and commission was paid £30,000. It was held that the sum was a capital receipt in his hands for it had nothing to do with the office of Managing Director and was solely compensation for loss of his own business. *Hose v Warwick* 1946 K B

Page 500

The decision in *Smith Barry v Cordy* was reversed by the Court of Appeal and it was held that the dealings in the life insurance policies in question constituted trade.

Page 515

Section 4 A (b) Residence of firm —'Control and Management should be *de facto* and not merely *de jure*'. The words wholly situated should be liberally interpreted, and the temporary visits of the active partners and the residence of the dormant ones should be ignored in arriving at a decision. Since control and management require the media of human minds, it would appear that when a plurality of persons jointly or severally control and manage a firm the analogy of a Company should be followed and just as in the case of a Company it is seen among other things where the registered office is located it should be seen wherefrom the real control operates. The question is one of mixed fact and law. *Bhimji R Naik v Commissioner of Income tax Bombay* 1946 I T R 334

Page 543

Section 7 Employment —Though a director as such is not a servant of the Company there is nothing to prevent his being one by contractual relation to that effect. It is all a matter of evidence whether there is such a relation or not. The fees of a Director are taxable under Section 12, while the salary of a servant is taxable under Section 7 and the rates of tax under the Finance Act appropriate to the two cases may differ when rates are changed from one year to another. *Commissioner of Income tax Bombay v Armstrong Smith* 1946 I T R 606

See also *Asher v London Films etc* 1945 I T R (Sup) 6 referred to under Section 12 and *Commissioner of Income tax, Bombay v Lady, Narajbhai R J Tata* 1947 I T R 8

Page 544.

Out of pocket expenses.—A student assistant in the research laboratory of a Company had under the conditions of his employment to take his B.Sc. degree, for which he attended evening classes. The Company subsidised his studies and did not reduce his remuneration for his hours of absence. He claimed to deduct from his salary the travelling expenses to attend the B.Sc. classes on the ground that his reading for the B.Sc. was an integral part of the duties of his office but the claim was disallowed; for, it could not be said that when listening to the B.Sc. lectures he was performing his duties as a student assistant of the Company's laboratory. *Blackwell v. Mills*, 1945 K.B.D.

Page 554.

Section 8, Provisos.—The whole of the interest on borrowed capital used in buying securities, whether tax-free or not, is deductible, and it is not open to the Revenue to apportion the interest between tax-free and taxable securities. Also, the whole of the interest receivable on tax-free securities should be excluded from taxable income, even though the assessee may thereby receive a seeming double advantage. *C.P. & Berar Provincial Co-operative Bank, Ltd. v. Commissioner of Income-tax, C.P.*, 1946 I.T.R. 479, dissenting from *Commissioner of Income-tax v. Madras Provincial Co-operative Bank*, 1942 I.T.R. 490

See also notes under Section 10 (2) (iii).

Page 562.

Section 9: Annual value.—The liability being on an artificially defined income, does not depend either on the power of the owner to let the property or his ability to receive the annual value, but solely on the ownership. Therefore, the fact that certain house property under trust is entitled to be occupied free of charge by certain beneficiaries will not absolve the trustees from liability to tax. *D. M. Vakil v. Commissioner of Income-tax, Bombay*, 1946 I.T.R. 298

Page 562.

Of which he is the Owner.—The legal position regarding the ownership of buildings constructed by a lessee upon land belonging to a lessor is different in India from that in England. In India, when a lessee erects a house on his lessor's land, during the period of a demise the house does not become appurtenant to the land but belongs to the lessee who can remove it or demolish it and take away the materials at the termination of the demise unless there is a stipulation to the contrary. A provision, therefore, that the lessors will take possession of the land and structures after the expiry of the full period of the lease does not confer ownership of the structures on the lessor until the expiry of the lease; in the meantime the lessees have the ownership of the structures and are therefore liable to tax under Section 9 of the Income-tax Act.

The Income-tax law does not distinguish between the ownership of 'property' by a Company and by an individual; and in either case the tax is to be computed under Section 9 and not Section 10. *Ballygunge Bank, Ltd. v. Commissioner of Income-tax, Bengal*, 1946 I.T.R. 408

Page 586

Charge —The liability of the land to be distrained or sold in the event of certain defaults will not in itself make a payment or the interest on a payment a charge on the land *Metro Theatre, Bombay, Ltd v Commissioner of Income tax*, 1946 I T R 638

Page 583

Section 10 Balance of profits —In the case of a Company dealing in mineral rights and concessions and turning them to account, no profit can arise until a balance is struck between the cost of acquisition and the proceeds of sale and the fact that the Company may retain some rights, e.g., possible reverter or shares in new companies will not deprive it of the right to deduct the cost of acquisition when computing profits. But the Company cannot claim to postpone the emergence of profit until all its outlay has been recouped, though it may be convenient for the Income-tax authorities to agree to such a course *British South Africa Co v Commissioner of Income tax, Rhodesia*, 1946 I T R 17 (Supp.) (P C)

Page 539

Section 10 (2) (iii) —Interest does not include discount or 'Contango or backwardation' *Torrens v CIR*, 18 Tax Cases 262, these items would be integral parts of the buying or selling price and be subject to the same incidents

Where a cinema concern pays in respect of leasehold land on which its theatre stands a rent including in it interest on outstanding premium, the interest is neither interest on capital borrowed for the borrower's business nor an expense admissible under Section 10 (2) (xv), not being spent for the purpose of the business. The mere purchase of a capital asset involving payment of interest on the outstanding balance of the cost from time to time does not amount to the borrowing of capital for the business *Metro Theatre v Commissioner of Income tax, Bombay* 1946 I T R 638

Page 590

Tax free Securities —As regards interest on capital borrowed and invested in tax free securities, see also *C P & Berar Provincial Co-operative Bank v Commissioner of Income tax*, 1946 I T R 479 referred to under Section 8

Page 604

Section 10 (2) (vi) Depreciation —There can be no question of any allowance for depreciation in the case of a Company which merely deals in mining rights, for such rights, being its stock in trade have to be valued, like all such stock, on consistent and reasonable principles of valuation, involving adjustments it may be, in either direction not necessarily progressively downward as in the case of depreciation *British South Africa Co v Commissioner of Income tax Rhodesia* 1946 I T R 17 (Supp.) (P C)

Page 606

Where there is a charge over in an electric supply and distribution system from Direct current to Alternating Current and the distributor

changes at his cost consumer's lines and fittings it is open to the distributor to claim depreciation only in respect of his own plant and machinery and not in respect of the consumer's lines and fittings, for the latter do not belong to him *Poona Electric Co. etc., v. Commissioner of Income tax* 1946 I T R 618

Page 604

Actual cost—This has to be determined independently of whether any one other than the assessee contributed partly to the cost *Commissioner of Income tax v. Poona Electric Co., etc.*, 1946 I T R 620 The underlying idea is that the outside contribution if any, is of the nature of a capital receipt and therefore to be kept out of the picture

Page 618

Taxes—In *Stewart and M'Donald v. Clyde Trust* (a recent case see 'Taxation') the Scottish Court appears to have held that in awarding damages for loss of wages income tax should be deducted from potential earnings while the English Court in *Jordon v. Lummer and Trinidad Lake Asphalt Co.* (another recent case took a Company view. To a large extent it would seem the point depends on whether the damages when awarded will be taxable in the hands of the recipient

Page 619

Bonuses—The 'such sum' referred to in clause (x) of sub-section (2) of Section 10 is the same as the any sum paid as bonus or commission referred to earlier in the clause, and the reference is only to the quantum and not to the character of the payment. Therefore if the other conditions of the clause are satisfied the commission or bonus paid to a shareholder employee in a private company cannot be disallowed merely on the ground that a part of the money could have been paid to him as dividend otherwise especially where the payment of bonus or commission has no relation to the share capital of the payee but only to his work as employee *Loyal Motor Service v. Commissioner of Income tax, Bombay* 1946 I T R 647

Page 623

Bad debts—In *Bristow v. William Dickinson & Co.* 1945 (K B D) 6 Tax Rep 295, Macgibbon J., reversed the decision of the General Commissioners and allowed the Crown to tax as trading profits in the year of recovery, trading debts that had been written off as irrecoverable in an earlier year. The Court of Appeal—1946 I T R 38 (Sup)—confirmed this decision. The assessee's claim was that the item had been brought into account in the earlier year as a debt in respect of goods sold on credit and that therefore the item could not be taxed again in a later year when received. The Court considered that, on the facts, the item could not be treated as having been finally brought to account in an earlier year. It was taken at full value in year 1 reduced in value in years 2 and 3, and recovered in year 4, it was therefore not like an ordinary trading debt at all and it could not be held that it had been brought to account finally as a debt. The facts of the case were peculiar and related to sales in Spain under abnormal conditions. The general question, however, still remains

unsettled as will be seen from the following remarks of the Master of the Rolls ' if in year 1 there had been a debt which for some reason had been omitted, and then in year 4 the amount of the debt was paid, the proper course according to the ordinary practice would be not to treat that as a trading receipt of year 4 but as a trading receipt of year 1, when it ought to have appeared in the accounts in its then form of a debt the proper remedy in that case, is to re-open by proper procedure, the accounts of year 1. But that is not this case at all

Page 629

Scientific Research expenditure —Under Note 17 to the form of Return of Income (Rule 19), is a special case such expenditure incurred in the previous year of the assessment year 1945-46 will be allowed in the next previous year

Page 643

Section 10 (2) (x) *Capital expenditure* —The consideration for the lease of forests containing *harra* nut & *he* though paid in instalments during the currency of the lease has been held to be capital expenditure *Appellate Tribunal v Haji Sabu Miyan Haji Sirajuddin* 1946 I T R. 447 (Bom.) In such a case what is acquired is not the raw materials but a source of raw materials

In the case however of a Company dealing in mining rights, etc., the cost of acquiring such assets is not capital expenditure since it relates, not to the Company's fixed capital but to its circulating capital which it turns over in order to secure profit from it *British South Africa Co. v. Commissioner of Income tax, Rhodesia* 1946 I T R (Sup.) 17 (P.C.)

Page 647

The House of Lords confirmed the decision of the Court of Appeal in *Doncaster Amalgamated Collieries v. Bean*

Page 644

Goodwill —A share of net profits paid by a firm to an individual who is expressly declared not to be a partner and freed from liability for losses, for the use of a name the goodwill of which continues to belong to the individual is revenue expenditure of the firm for it acquires no Capital asset thereby. The case is different from acquiring goodwill and paying for it in instalments, even if expressed as a share of profits

Not is such a case one of joint adventure (as in the *Indian Radio and Cable Case* 1937 I T R 270) nor one of sharing ultimate net profits as in the *Pondicherry Case*, 5 I T C 353 but one of sharing *ad hoc* intermediate profits as in the *British Sugar Manufacturers' Case* 1937 I T R 202 for a right and opportunity to do business rather than to earn the profits of the business obviously, goodwill attracts customers and thus increases profits *Vithaldas Thackerdas & Co v Commissioner of Income tax Bombay* 1944 I T R 822

Page 704

Section 10 (6) Trade Associations—Fees for specific services —The fee levied by a stock brokers' association to admit authorised clerks into the

Exchange is remuneration definitely related to specific services rendered by the association for its members. The services were specific because they provided an identifiable scheme laid down with sufficient clarity and it was immaterial that all members did not employ authorised clerks and, therefore, did not avail themselves of the services, *Native Share and Stock Brokers' Association v Commissioner of Income tax, Bombay* 1946 I T R 628

Page 709

Section 10 (7) Insurance business —The main questions dealt with in *General Family Pension Fund v Commissioner of Income tax Bengal* 1946 I T R 488 relate to the pre-1939 law and will not arise under the present law

Page 710

Rule 3 (a) —A Life Insurance Company pays income tax and super tax to discharge its own liability and not that of its policy holders therefore tax is not paid or reserved for or expended on behalf of policy holders within the meaning of Rule 3 (a). The fact that a percentage of the life fund is reserved for policy holders is immaterial. The part of the valuation surplus which is carried forward into the future valuation as at the credit of policy holders is reserved for them and therefore deductible *New India Assurance Co v Commissioner of Income tax Bombay* 1946 I T R 809

Page 374 Page 694

Accountancy expenses —While *Allen v Iorguharson* 17 Tax Cases 59 applies to income tax and super tax cases legal and accountancy expenses on appeal (and *a fortiori* on the initial assessments) in the case of Excess Profits Tax including appeals to Boards of Referees can be deducted from taxable income for until Excess Profits Tax has been correctly determined assessment to income-tax cannot be made at will *Rusden Heel Co v Inland Revenue* 1946 (K B) 2 All E R 141. The ground for deduction is even stronger in the case of appeals under the Excess Profits Tax Act against disallowance of remuneration of employees for it may be necessary for the assessee to retain the services and goodwill of his employees *Smith's Potato etc v Inland Revenue* 1946 (K B) 2 All E R 284

Page 674 Page 719

Section 12 —The expenditure incurred by a director of a bank in defending a suit seeking to invalidate his election is not capital expenditure it does not create a new source of income but merely preserves an existing one and it is incurred for the purpose of earning income as a director *Commissioner of Income tax Bombay v Sri Purushottomdas Tlukurdas* 1946 I T R 305

As to whether a case falls under Section 7 or under Section 12 see also notes under Section 7

Page 727

Section 13 Basis of accounting —Merely withdrawals by partners can not be the basis of keeping accounts and the fact that an assessee had been

assessed in the past on the basis of actual withdrawals cannot make it a method of accounting regularly employed. *In re Motichand and Devidas*, 1946 I T R 534 (Bom.)

Page 731

The fact that it is not convenient or easy to allocate receipts or expenses as against various items of assets is no reason for holding that profits emerge only after the expenditure on the assets has first been recouped, the allocation of expenditure and income must somehow be made on a reasonable basis. But there is nothing to prevent the Crown from agreeing to the more convenient alternative of not taxing any profit until the expenditure on the assets has been completely recouped. *British South Africa Co v Commissioner of Income tax Rhodesia* 1946 I T R (Supp.) 17 (P C)

Page 741

Where a prospecting Company sells a concession to a public Company promoted by it and takes shares in the public Company in payment for the concession the shares are the price for part of the prospecting Company's trading stock and the shares should be valued on some reasonable basis, even if they cannot be sold in the usual manner through the Stock Exchange. If the new Company transfers the concession to a third Company receiving in exchange shares of the third Company which it distributes in specie to its shareholders the first Company in fact realises part of its investments and the new shares should be valued in order to ascertain the profit or loss on the transaction. *Gold Coast Selection Trust v Inland Revenue*, 1946 (C A.)

Page 728

The House of Lords confirmed the judgment of the Court of Appeal in *Craddock v Zero Investments*. The Revenue have no supervisory jurisdiction as to the reasonableness of contracts or transactions (apart of course from the transactions being colourable or fictitious) and cannot therefore seek to displace the actual cost of purchase by alleged true market value to be ascertained otherwise.

Page 731

Compensation under a statute for the prevention of 'ribbon development can be said to be due only on the date of agreement if the compensation is settled by agreement or on the date of award if settled by arbitration or by a tribunal. *Johnson v Try Ltd* 1946 (C A.)

Page 771

Section 15 Life insurance premium—A life insurance policy will not cease to be such even though under the terms the assessee in any eventuality would have to pay more than he received. *Babulal Kanji v Commissioner of Income-tax, Bombay*, 1946 I T R 662

Page 770

If under the terms of the policy, the assured must take a loan (at interest) of a part of the premium the policy becoming void in the event of his not taking a loan the assured does not, within the meaning of

Section 15, 'pay the part of the premium represented by the loan and he can get rebate of tax only in respect of the part of the premium not covered by the loan (*ibid*)

Page 776

Section 16 (1) (c) —In order to enable the trustor to claim a deduction from his own income, there should be actual transfer of income either to the beneficiaries or trustees or to others at their behest, and it is not merely sufficient that of his own accord the trustor pays for the benefit of the beneficiaries and then claims that he has discharged his obligations to the trustees. The governing consideration is, not what the trustor could have done, but what in fact he did. *Inland Revenue v Compton* 1946 K B D

Page 778

For the third proviso to operate it is not necessary that there should be a transfer of assets it is enough if the income of assets remaining the property of the disponent has been transferred

In the case of a settlement by a husband for the exclusive and independent maintenance of his wife, it cannot be said that the husband benefits indirectly (with reference to the third proviso), because he is under a legal obligation to maintain his wife. *Shahapure, D R v Commissioner of Income tax, Bombay*, 1946 I T R 78

Page 780

Section 16 (3) —Income received by a wife from rent of property gifted to her by her husband before 1937 can be added on to the husband's income. *Sheikh Mohammad Nagi v Commissioner of Income tax, Punjab*, 1945 I T R 452

Page 817

Section 22 General notice —It is not open to an assessee who has filed a return of income in response to a specific notice under Section 22 (1) to object to the assessment on the ground that the general notice under Section 22 (1) had been issued irregularly. *Kamakshya Narain Singh v Commissioner of Income tax, Bihar and Orissa* 1946 I T R 672 *Chatturam and others v Commissioner of Income tax Bihar and Orissa* 1946 I T R 695

Page 833

Section 23 Benami —It is open to the income tax authorities to find that a transaction was *benami*, but there should be materials for such a conclusion and the onus rests on the authorities to show that the ostensible owner or beneficiary is not the true owner or beneficiary, the more especially in Muslim families where an individual holds property for himself and not for the family he represents. *Shekh Muhamad Nagi v Commissioner of Income tax Punjab*, 1945 I T R 452

Page 863

Section 23 A Onus of proof —It is for the Company concerned to prove that the 'public' are 'substantially interested' in it within the mean

ing of the explanation to sub-section (2), if the Company wishes to escape from the operation of this section

The question whether the shares of a Company were the subject of dealings in a Stock Exchange in British India during a given period is a question of fact and the Court will interfere only if there are no materials for a finding *Huthee Singh & Sons v Commissioner of Income-tax, Bombay, 1946 I T R 653*

Page 862

Beneficial interests —Section 23 A has no reference to equities or beneficial ownership and where a husband and wife are jointly registered as the holder of certain shares they have to be assessed as a shareholder with the status of an "association of persons" The section is a procedural one and not a charging section It creates an artificial notional income which does not exist in the pocket of any shareholder Provisions in the articles of association of companies to the effect that the first named among registered joint holders of shares shall exercise certain rights constitute mere administrative machinery for the purpose of the Companies Act and have no bearing on section 23 A of the Income-tax Act *Cambatta v. Commissioner of Income tax, Bombay 1946 I T R 748*

Page 873

Section 24 Identity of business —This is a question of fact The test for deciding whether two businesses are separate or not is the existence or otherwise of an interconnection an interlacing an interdependence between and a unity embracing the two The mere fact of speculation by itself is not a necessary nexus between two or more separate speculative businesses integrating them into a single business of speculation on the other hand for a business to be single speculation need not be of the same kind or in the same commodity every year *Gowindram Brothers v Commissioner of Income tax Bombay 1946 I T R 764*

Page 879

United Kingdom Law —The United Kingdom Finance Act No. 2 of 1946 has liberalised the conditions of set off and carry forward of losses e.g., by extending the period of carry forward for losses during war years set off of losses against interest or dividends connected with trade etc

Page 992

Section 41 Debts maintained under private religious trusts can be treated as juridical persons and where the shares are precise and specific under the trusts the debts should be charged separately to tax and not in lump at the maximum rate *Sri Jyotshakari Kalinata etc v Commissioner of Income tax Bihar and Orissa 1946 I T R 703*

Page 988

Section 40 —The payment received by a divorced wife from the husband for the maintenance of children of the dissolved marriage is income of the mother and taxable as such *Spencer v Robson, 1946 K B D*

If such maintenance payments are given free of tax the gross amount for the purpose of taxation, should evidently be worked out on the basis

of the ruling of the House of Lords in *Inland Revenue v Cook*, 23 Tax. Cases 218, the Revenue authorities are not concerned with how a repaid sum is applied

Page 1012

Section 42 Business connection — 'Freelance' brokers in British India sent offers of purchase on their own contract forms or letterheads to a non resident manufacturer, the brokers having no other connection with the non resident, and the latter decided in each case whether to accept or reject the offer, the accepted form, bearing the stamp of the Indian state, being returned to British India for the signature of the purchaser. The contracts were all F O R in the state, and the consignments were addressed to the non resident to 'self' at the place of destination in British India, the railway receipts being sent to the purchaser either through the brokers or through banks and the purchaser receiving the railway receipt from the broker or banker on payment for the goods. It was held that there was no business connection. *Hira Mills v Income tax Officer, Cawnpore* 1946 I T R 417. The expression 'business connection' does not admit of precise definition, but there should be some business in British India and the non resident should have some connection with it, though there need not be a definite organisation, establishment or entity in the nature of an operating business, branch or agent. In the *Hira Mills* case the sales were to customers who merely happened to be in British India.

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Section 44-D — This section does not cover the case of a transfer of assets to a Company resident in British India which subsequently becomes non resident. The definition of 'associated operations' is confined to operations in assets representing the transferred assets or income there from, and cannot be extended to cover the case of subsequent change of residence by the transferee. Cf *Congreve v Inland Revenue* 1946 K B D.

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Section 46 — A 'legal proceeding' is not necessarily a proceeding in an ordinary Court of law, and a proceeding under Section 46 (2) of the Income tax Act is a 'legal proceeding' within the meaning of Section 171 of the Companies Act, and in accordance with the latter provision, an Income-tax Officer, before sending a certificate to the Collector under Section 46 (2) of the Income-tax Act in respect of tax due from a Company in liquidation should apply for leave of the winding up Court. *Governor General in Council v Shiromani Sugar Mills*, 1946 I T R 248 (T C).

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Priority — All the previous rulings were reviewed by the Federal Court in the above case and it was held that except to the extent specifically provided in the Companies Act, particularly Sections 230 and 232, the Crown in India is not entitled to any priority, prerogative or preferential treatment in respect of debts due to it.

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Section 53 Composition of offences—It is not necessary, in the case of most of the offences created by the Income tax Act, that a formal assessment should have been made before prosecution can be started, it is therefore, open to the Inspecting Assistant Commissioner to compound such offences at any stage of the proceedings relating to the assessment. The law in the United Kingdom also is similar. See for example, *Cockrell v Inland Revenue*, 16 Tax Cases 1.

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Section 54 (3) (m)—The expression 'appropriate authority' is wide and will include also a Civil Court when it is called upon to determine judicially whether a person has or has not been assessed to income tax in a particular period, e.g., to decide in connection with alleged disqualification for relief under an Agriculturists Relief Act. Such a Court can call for the relevant information from the Income tax Department. *Venkata Seshataram and others v Chapalamadugu Venkata Rangayya and others* 1946 I T R 722.

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Section 66—The High Court is neither bound nor entitled whether at the instance of either party or of its own accord to propound a question of law not raised by either party before the Appellate Tribunal, either as an additional or as an alternative point of law to that referred by the Tribunal. The Court's function is only advisory and confined to the points referred to it. *Hira Mills v Commissioner of Income-tax, U P*, 1946 I T R 417 (All). *Nawab Nawazish Ali Khan v Commissioner of Income tax (Oudh)* 1946 I T R 356. *Appellate Tribunal v Radha Madur Trust*, 1946 I T R 472 (Nag.)

Page 1160.

It would be in conformity with Section 66 and also conduce to convenience if all the relevant facts were referred to in the statement of case instead of having to be sought for in the judgments of the Income-tax authorities. *Hira Mills v Commissioner of Income tax, U P*, 1946 I T R 417 (All), *In re Badar Shoe Stores*, 1946 I T R 431 (All). The High Court has no jurisdiction to go behind or to question statements of fact made by the Appellate Tribunal in stating a case, all that the Court can do is to return the case for further findings of fact, if the facts in the case are insufficient to enable the Court to decide the questions of law referred to it. *Commissioner of Income tax, U P v Dwarke Dhesi Temple* 1946 I T R 440 (All).

This however, does not mean that the High Court is bound to accept findings of fact, even if there are no materials to support the findings.

When a statement of case is submitted to the High Court by the Tribunal, if either party desires further facts to be stated or other questions of law to be raised it can make an application by way of motion and this would be heard along with the statement of case and it would be for the Court then to decide whether the statement is complete and also whether on the facts the Tribunal has raised the appropriate questions of law.

Ahanda ala & Co v Commissioner of Income tax Bombay 1946 I T R 635 Whether the requirements of a statute have been met by the facts is a question of law. The findings of fact themselves are questions of fact, except when there is no evidence for the findings not merely insufficient evidence for them and in the latter case the findings of fact also would raise a question of law. *Brihan Maharashtra Syndicate v Commissioner of Income tax Bombay* 1946 I T R 611

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Section 67 —While an Income tax Officer has power under the Income-tax Act not only to assess a person but to find for the purpose what property he has and his conclusions whether right or wrong can be challenged only in accordance with the provisions of the Income tax Act and not by a Civil Court and similarly the action of a Collector in realising the demand of income tax as an arrear of land revenue cannot be questioned in a Civil suit there is no jurisdiction in the Income tax Act or the U P Revenue Act to bind third parties. Therefore if the Income-tax Officer finds some property to belong to an assessee which in truth belongs to a stranger the latter has a cause of action against the Income tax Officer. It should be noted however that there is conflict of authority as to the interpretation of the relevant parts of the U P Revenue Act. *Secretary of State v Radha Swami Sat Sang* 1945 I T R 520 (All)

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Putting into operation the machinery of Section 46 in order to collect arrear of income-tax as arrear of land revenue is an act done in the collection of revenue within the meaning of Section 226 (2) of the Government of India Act. Also the jurisdiction conferred by Sections 2 and 3 of the Indian Companies Act is original jurisdiction within the meaning of Section 226 (1) of the Government of India Act. Therefore the High Court cannot restrain the Income tax authorities from proceeding without leave of the Court to recover arrears of income-tax under Section 46 (2) of the Income-tax Act. *Governor General in Council v Shromani Sugar Mills* 1946 I T R 248 (T C)

THE INDIAN FINANCE ACT 1947

Act No. XX of 1947

An Act to give effect to the financial proposals of the Central Government for the year beginning on the 1st day of April 1947

WHILEAS it is expedient to discontinue the duty on salt manufactured in or imported into British India to fix maximum rates of postage under the Indian Post Office Act 1898 to continue subject to certain modifications for a further period of one year the additional duties of customs imposed by section 6 of the Indian Finance Act 1942 to continue the temporary export duty on raw cotton and the enhanced rates of export duties on raw jute and jute manufactures to enhance the export duty on tea to fix rates of income tax and super tax and to make certain provisions relating to income-tax super tax and excess profits tax

It is hereby enacted as follows —

THE INCOME-TAX ACT.

- Short title and extent 1 (1) This Act may be called the Indian Finance Act 1947
- (2) It extends to the whole of British India
- 2 For the year beginning on the 1st day of April 1947, no duty shall be levied on salt manufactured in, or imported by sea or by land into, British India
- Discontinuance of salt duty
- 3 For the year beginning on the 1st day of April, 1947, the Schedule contained in the First Schedule to the Indian Finance Act 1947 shall again be inserted in the Indian Post Office Act, 1898 as the First Schedule
- Inland postage rates
- to that Act
- 4 The additional duties of customs on certain goods chargeable with a duty of customs under the First Schedule to the Indian Tariff Act 1934 or under the said Schedule read with any notification of the Central Government for the time being in force imposed up to the 31st day of March 1943 by section 6 of the Indian Finance Act 1942 and continued up to the 31st day of March, 1947, by section 5 of the Indian Finance Act 1946 shall continue to be levied and collected as provided in the said section 6 and subject to the aforesaid modifications up to the 31st day of March 1948
- Continuance of additional duties of customs imposed by section 6 of Act XI of 1942
- subject to certain modifications
- 5 (1) For the Second Schedule to the Indian Tariff Act 1934 the following shall be substituted, namely —
- Proviso regarding certain temporary duties of customs and enhanced rates of duties of customs

THE SECOND SCHEDULE

Export Tariff

Item No	Name of article	Rate of duty
1	RAW JUTE (other than Bimlipatam jute)— (1) Cuttings (2) All other descriptions	Rs 4.8 per bale of 400 lbs Rs 15 per bale of 400 lbs.
2	JUTE MANUFACTURES (other than of Bimlipatam jute) when not in actual use as coverings receptacles or bindings for other goods— (1) Sacking (cloth bags twist, yarn, rope and twine) (2) Hessians and all other descriptions of jute manufactures not otherwise specified	Rs 50 per ton
3	RAW COTTON	Rs 80 per ton At such rate not exceeding Rs 75 per bale of 400 lbs as the Central Government by notification in the official Gazette may from time to time determine
4	RICE, with or without husk, including rice flour but excluding rice bran and rice dust, which are free	
5	TEA	Two annas and three pies per standard maund Four annas per lb "

(2) The following Ordinances are hereby repealed namely —

- (a) The Indian Tariff Act (Amendment) Ordinance, 1946,
- (b) The Indian Tariff Act (Second Amendment) Ordinance 1946,
- (c) The Indian Tariff (Amendment) Ordinance, 1947

Income tax and super tax 6 (1) Subject to the provisions of sub-sections (3), (4), (5) and (6), for the year beginning on the 1st day of April 1947—

(a) income-tax shall be charged at the rates specified in Part I of the Schedule, and

(i) rates of super tax shall for the purposes of section 55 of the Indian Income tax Act, 1922, be those specified in Part II of the Schedule

(2) In making any assessment for the year ending on the 31st day of March, 1948 there shall be deducted from the total income of an assessee, in accordance with the provisions of section 15-A of the Indian Income tax Act 1922, an amount equal to one-fifth of the earned income, if any, included in his total income but not exceeding in any case four thousand rupees

(3) In making any assessment for the year ending on the 31st day of March 1948—

(a) where the total income of an assessee not being a company includes any income chargeable under the head 'Salaries' as reduced by the deduction for earned income appropriate thereto, or any income chargeable under the head 'Interest on securities', or any income from dividends in respect of which he is deemed under section 19-B of the Indian Income tax Act, 1922 to have paid income-tax imposed in British India, the income-tax payable by the assessee on that part of his total income which consists of such inclusions shall be an amount bearing to the total amount of income-tax payable according to the rates applicable under the operation of the Indian Finance Act, 1946 on his total income the same proportion as the amount of such inclusions bears to his total income

(b) where the total income of an assessee, not being a company, includes any income chargeable under the head 'Salaries' on which super tax has been or might have been deducted under the provisions of sub-section (2) of section 18 of the Indian Income-tax Act 1922, the super tax payable by the assessee on that portion of his total income which consists of such inclusion shall be an amount bearing to the total amount of super tax payable according to the rates applicable under the operation of the Indian Finance Act, 1946 on his total income the same proportion as the amount of such inclusion bears to his total income

(4) In making any assessment for the year ending on the 31st day of March 1948 where the total income of an assessee consists partly of earned income and partly of unearned income, the super tax payable thereon shall be—

- (i) on that part of the earned income chargeable under the head 'Salaries' to which clause (1) of sub-section (1) applies the amount of super tax computed in accordance with the provisions of that sub-section plus

(ii) on the remainder of the earned income the amount which bears to the total amount of super tax which would have been payable on his total income had it consisted wholly of earned income the same proportion as such remainder bears to his total income *plus*

(iii) on the unearned income the amount which bears to the total amount of super tax which would have been payable on his total income had it consisted wholly of unearned income the same proportion as the unearned income bears to his total income

(5) In making any assessment for the year ending on the 31st day of March 1948—

(a) where the total income of a company includes any profits and gains from life insurance business the super tax payable by the company shall be reduced by an amount computed at the rate of two annas in the rupee on that part of its total income which consists of such inclusion

(b) where the total income of an assessee not being a company, includes any profits and gains from life insurance business the income tax and super tax payable by the assessee on that part of his total income which consists of such inclusion shall be an amount bearing to the total amount of such taxes payable according to the rates applicable under the operation of the Indian Finance Act 1942 on his total income the same proportion as the amount of such inclusion bears to his total income so however that the aggregate of the taxes so computed in respect of such inclusion shall not in any case exceed the amount of tax payable on such inclusion at the rate of five annas in the rupee

(6) In cases to which section 17 of the Indian Income tax Act, 1922 applies the tax chargeable shall be determined as provided in that section but with reference to the rates imposed by sub-section (1), and in accordance where applicable with the provisions of sub-sections (3) (4) and (5) of this section

(7) For the purposes of making any deduction of income tax in the year beginning on the 1st day of April 1947 under sub-section (2) or sub-section (2-B) of section 18 of the Indian Income tax Act 1922 from any earned income chargeable under the head Salaries the estimated total income of the assessee under this head shall in computing the income tax to be deducted be reduced by an amount equal to one fifth of such earned income but not exceeding in any case four thousand rupees

(8) For the purposes of this section and of the rates of tax imposed thereby the expression "total income" means total income as determined for the purposes of income tax or super tax as the case may be in accordance with the provisions of the Indian Income-tax Act 1922 and the expression earned income has the meaning assigned to it in clause (6-AA) of section 2 of that Act

Amendment of section
10 Act XII of 1942

7 To sub-section (2) of section 10 of the Indian Finance Act 1947 the following proviso shall be added namely—

' Provided that if it is subsequently found that the sum so repaid was excessive, the excess repayment shall be recoverable and the provisions of law referred to in sub section (4) of section 2 of the Excess Profits Tax Ordinance 1943 shall apply to the payment and recovery of the amount of the excess repayment as if that amount were a deposit required to be made under that section but notwithstanding the provisions of sub-section (7) of section 46 of the Indian Income tax Act 1922 as applied by the said sub section (4), such recovery may be made at any time

THE SCHEDULE

(See section 6)

PART I

Rates of Income tax

A —In the case of every individual Hindu undivided family unregistered firm and other association of persons not being a case to which paragraph B of this Part applies—

	Rate
1 On the first Rs 1 500 of total income	<i>Nil</i>
2 On the next Rs 3 500 of total income	One anna in the rupee
3 On the next Rs 5 000 of total income	Two annas in the rupee
4 On the next Rs 5 000 of total income	Three and a half annas in the rupee
5 On the balance of total income	Five annas in the rupee

Provided that—

(i) no income-tax shall be payable on a total income which before deduction of the allowance if any for earned income does not exceed Rs 2 500,

(ii) the income tax payable shall in no case exceed half the amount by which the total income (before deduction of the said allowance if any, for earned income) exceeds Rs 2 500

(iii) the income-tax payable on the total income as reduced by the allowance for earned income shall not exceed either—

(a) a sum bearing to half the amount by which the total income (before deduction of the allowance for earned income) exceeds Rs 2 500 the same proportion as such reduced total income bears to the unreduced total income or

(b) the income-tax payable on the income so reduced at the rates herein specified—

whichever is less

B —In the case of every company and local authority, and in every case in which under the provisions of the Indian Income tax Act, 1922 income-tax is to be charged at the maximum rate—

Rate.

On the whole of total income

Five annas in the rupee

PART II

Rates of Super tax

A—In the case of every individual Hindu undivided family, unregistered firm and other association of persons not being a case to which any other paragraph of this Part applies—

		Rate if income wholly earned	Rate if income wholly unearned
1	On the first Rs 25 000 of total income.	<i>Nil</i>	<i>Nil</i>
2	On the next Rs 5 000 of total income	Two annas in the rupee	Three annas in the rupee
3	On the next Rs 5 000 of total income	Two and a half annas in the rupee	Three and a half annas in the rupee
4	On the next Rs 10 000 of total income	Three annas in the rupee	Four annas in the rupee
5	On the next Rs 10 000 of total income	Four annas in the rupee	Five annas in the rupee
6	On the next Rs 10 000 of total income	Five annas in the rupee	Six annas in the rupee
7	On the next Rs 10 000 of total income	Six annas in the rupee	Seven annas in the rupee
8	On the next Rs 15 000 of total income	Seven annas in the rupee	Eight annas in the rupee
9	On the next Rs 15 000 of total income	Eight annas in the rupee	Nine annas in the rupee
10	On the next Rs 15 000 of total income	Nine annas in the rupee	Ten annas in the rupee
11	On the next Rs 30 000 of total income	Ten annas in the rupee	Ten and a half annas in the rupee
12	On the balance of total income	Ten and a half annas in the rupee	Ten and a half annas in the rupee

B—In the case of every local authority—

	Rate
On the whole of total income	Two annas in the rupee

C—In the case of an association of persons being a co-operative society other than the Sanikatta Saltowners Society in the Bombay Presidency for the time being registered under the Co-operative Societies Act 1912 or under an Act of a Provincial Legislature governing the registration of co-operative societies—

	Rate
(1) On the first Rs 25 000 of total income	<i>Nil</i>
(2) On the balance of total income	Two annas in the rupee

D—In the case of every company—

On the whole of total income Two annas in the rupee
and in addition in respect of that part of the total income (as reduced by the amount of dividends payable at a fixed rate) which does not exceed the amount of dividends not being dividend payable at a fixed rate declared in British India in respect of the whole or part of the previous year for the assessment for the year ending on the 31st day of March 1948 on the amount by which such part—

Rate

- | | |
|---|--------------------------|
| (a) exceeds 30 per cent but does not exceed 40 per cent of the total income as so reduced | Three annas in the rupee |
| (b) exceeds 40 per cent but does not exceed 50 per cent of the total income as so reduced | Five annas in the rupee |
| (c) exceed 50 per cent, of the total income as so reduced | Seven annas in the rupee |

Provided that—

(i) no additional super tax shall be payable where such part is less than or equal to five per cent on the capital of the company

(ii) where such part is more than five per cent on the capital of the company the additional super tax payable shall be reduced by the amount of additional super tax which would but for the provisions of clause (i) of this proviso have been payable had such part been equal to five per cent, on the capital of the company

(iii) the additional super tax shall be payable only by a company in which the public are substantially interested within the meaning of the *Explanation* to sub section (1) of section 23 A of the Indian Income tax Act 1922 or a subsidiary company of such a company where the whole of the share capital of such subsidiary company is held by the parent company or by the nominees thereof

Explanation —For the purposes of this paragraph—

(a) the expression capital of the company shall be deemed to mean the paid up share capital at the beginning of the previous year for the assessment for the year ending on the 31st day of March 1948 (other than capital entitled to a dividend at a fixed rate) plus any reserves other than depreciation reserves and reserves for bad or doubtful debts at the same date as diminished by the amount on deposit on the same date with the Central Government under section 10 of the Indian Finance Act 1942 or section 2 of the Excess Profits Tax Ordinance 1943

(b) the expression dividend shall be deemed to include any distribution included in that expression as defined in clause (6 A) of section 2 of the Indian Income-tax Act 1922 and any such distribution made during the year ending on the 31st day of March 1948 shall be deemed to have been made in respect of the whole or part of the previous year

(c) where any portion of the profits and gains of a company is not included in its total income by reason of such portion being exempt from tax under any provision of the Indian Income tax Act 1922 the capital of the company the total amount of dividends and the amount of dividends payable at a fixed rate shall each be deemed to be the proportion thereof that the total income of the company bears to its total profits and gains

THE INCOME TAX ACT

THE BUSINESS PROFITS TAX ACT, 1947

ACT No. XVI of 1947

An Act to impose a special tax on a certain class of income.

WHEREAS it is expedient to impose a special tax on income arising from business,

It is hereby enacted as follows —

Short title, extent and commencement

1 (1) This Act may be called the Business Profits Tax Act, 1947

(2) It extends to the whole of British India

(3) It shall come into force on such date as the Central Government may, by notification in the official Gazette, appoint

Interpretation

2 In this Act unless there is anything repugnant in the subject or context,—

(1) "abatement means, in respect of any chargeable accounting period, a sum which bears to a sum equal to—

(a) in the case of a company, not being a company deemed for the purposes of section 9 to be a firm six per cent, of the capital of the company on the first day of the said period computed in accordance with Schedule II or one lakh of rupees, whichever is greater, or

(b) in the case of a firm having—

(i) not more than two working partners, one lakh of rupees, or

(ii) three working partners, one and a half lakhs of rupees, or

(iii) four or more working partners, two lakhs of rupees, or

(c) in the case of a Hindu undivided family two lakhs of rupees, or

(d) in any other case one lakh of rupees—the same proportion as the said period bears to the period of one year

(2) "accounting period" in relation to any business means any period which is or has been determined as the previous year for that business for the purposes of the Indian Income-tax Act 1922

(3) "business" includes any trade, commerce or manufacture, or any adventure in the nature of trade, commerce or manufacture, or any profession or vocation the profits of which are chargeable according to the provisions of section 10 of the Indian Income tax Act 1922

Provided that where the functions of a company or of a society incorporated by or under any enactment consist wholly or mainly in the holding of investments or other property, the holding of the investments or property shall be deemed for the purpose of this definition to be a business carried on by such company or society

Provided further that all businesses to which this Act applies carried on by the same person shall be treated as one business for the purposes of this Act,

(4) chargeable accounting period means—

- (a) any accounting period falling wholly within the term beginning on the first day of April, 1946 and ending on the thirty first day of March 1947,
- (b) where any accounting period falls partly within and partly without the said term, such part of that accounting period as falls within the said term,

(5) Company means a company as defined in the Indian Companies Act, 1913, or formed in pursuance of an Act of Parliament or of Royal Charter or Letters Patent, or of an Act of the Legislature of a British possession or of a law of an Indian State, and includes any foreign association whether incorporated or not which the Central Board of Revenue may, by general or special order, declare to be a company for the purposes of this Act,

(6) "control of a company" means control direct or indirect of more than one half of the voting power attached to the total issued paid up share capital of the company, or control vested by its Memorandum and Articles of Association otherwise than by reference to such voting power

Provided that the voting power attached to shares held by a nominee or trustee for any person shall be deemed for the purpose of this definition to be held by that person,

(7) 'deficiency of profits means—

- (i) where profits have been made in any chargeable accounting period the amount by which such profits fall short of the abatement in respect of that period,
- (ii) where a loss has been made in any chargeable accounting period the amount of the loss added to the abatement in respect of that period

(8) director includes any person occupying the position of a director by whatever name called and also includes any person who—

- (i) is a manager of the company or concerned in the management of the business, and
- (ii) is remunerated out of the funds of the business and
- (iii) is the beneficial owner of not less than twenty per cent, of the ordinary share capital of the company

(9) 'dividend' has the same meaning as in section 2 of the Indian Income tax Act, 1922

(10) 'firm' 'partner' and 'partnership' have the same meanings respectively as in the Indian Partnership Act, 1932,

(11) fixed rate in relation to dividends on share capital other than ordinary share capital, includes a rate fluctuating in accordance with the maximum rate of income-tax,

(12) 'loss' means a loss computed in the same manner as for the purposes of this Act profits are to be computed,

(13) "ordinary share capital in relation to a company means all the issued share capital (by whatever name called) of the company other than capital the holders whereof have a right to a dividend at a fixed rate but have no other right to share in the profits of the company

(14) person includes a Hindu undivided family

(15) 'prescribed' means prescribed by rules made under this Act,

(16) profits means profits as determined in accordance with Schedule I

(17) 'taxable profits' means the amount by which the profits during a chargeable accounting period exceed the abatement in respect of that period,

(18) working partner of a firm means a partner thereof who is required by the terms of the contract of partnership to devote substantially the whole of his time to the business of the firm

3 (1) Every Commissioner of Income-tax, Appellate Assistant Commissioner of Income-tax, Inspecting Assistant Commissioner of Income-tax and Income-tax Officer shall have the like powers under this Act and in relation to the same area and cases as he exercises under the Indian Income-tax Act 1922

(2) All officers and persons employed in the execution of this Act shall observe and follow the orders, instructions and directions of the Central Board of Revenue

Provided that no such orders, instructions or directions shall be given so as to interfere with the discretion of the Appellate Assistant Commissioner of Income-tax in the exercise of his appellate functions

4 Subject to the provisions of this Act there shall in respect of any business to which this Act applies be charged levied and paid on the amount of the taxable profits during any chargeable accounting period a tax (in this Act referred to as 'business profits tax') which shall be equal to sixteen and two-thirds per cent, of the taxable profits

Provided that—

(a) any profits which are under the provisions of sub-section (3) of section 4 of the Indian Income-tax Act 1922 exempt from income-tax

(b) all profits from any business of life insurance

(c) any sum paid to a business by or through the Central Government by way of bonus or subsidy —

shall be totally exempt from business profits tax under this Act

5 This Act shall apply to every business of which any part of the profits made during the chargeable accounting period is chargeable to income-tax by virtue of the provisions of sub-clause (1) or sub-clause (ii) of clause (b) of sub-section (1) of section 4 of the Indian Income-tax Act 1922 or of clause (c) of that sub-section

Provided that this Act shall not apply to any business the whole of the profits of which accrue or arise without British India where such business is carried on by or on behalf of a person who is resident but not ordinarily resident in British India unless the business is controlled in India

Provided further that this Act shall not apply to any income, profits or gains of business accruing or arising within an Indian State unless such income, profits or gains are received or deemed under the provisions of the aforesaid Act to be received in or are brought into British India in any chargeable accounting period, or are assessable under section 42 of that Act

6 Where a deficiency of profits occurs in any chargeable accounting period in any business, the taxable profits of the business shall be deemed to be reduced and relief shall be granted in accordance with the following provisions —

Relief on occurrence of deficiency of profits

(a) the aggregate amount of the taxable profits for the previous chargeable accounting periods shall be deemed to be reduced by the amount of the deficiency of profits and the amount of business profits tax payable in respect thereof shall be deemed to be reduced accordingly, and the relief necessary to give effect to the reduction shall be given by repayment or otherwise,

(b) where the amount of the deficiency of profits exceeds the aggregate amount of the taxable profits for the previous chargeable accounting periods or where there is no previous chargeable accounting period, the balance of the deficiency of profits or the whole of the deficiency, as the case may be shall be applied in reducing any taxable profits for the next subsequent chargeable accounting period, and if and so far as it exceeds the amount of those profits, any taxable profits for the next subsequent chargeable accounting period and so on

7 As from the date of any change in the persons carrying on a business, the business shall be deemed for all the purposes of this Act to have been discontinued and a new business to have been commenced

Change in persons carrying on business

Provided that where a change takes place in the persons carrying on a business and where except for such change relief would be allowable under section 6, the Central Board of Revenue may, if it thinks fit, allow such relief under that section as it considers just, having regard to the extent to which the persons directly or indirectly interested in the business before the change remain interested therein after the change

8 (1) Where any interest annuity, or other annual payment or any royalty or rent is payable by one company to another company, and one of those companies is a subsidiary of the other, or both are subsidiaries of a third company, and the recipient company is resident outside British India no allowance shall be made in respect of such payment in computing the profits or losses of the paying company

Interconnected companies

(2) Where—

(a) a company (hereinafter referred to as "the principal") is resident in British India and is not a subsidiary of any other company resident in British India, and

- (b) during the whole or any part of any chargeable accounting period of the principal another company resident or carrying on business within British India (hereinafter referred to as the subsidiary) is a subsidiary of the principal,

the capital or profits or losses of the subsidiary for such chargeable accounting period or part thereof shall be treated for the purposes of this Act as if they were the capital of or as the case may be profits or losses arising from the business of the principal

Provided that the profits of the subsidiary so treated shall not be exempted from business profits tax in the hands of the principal by reason of any exemption applicable to the principal under the proviso to section 4

(3) Where the chargeable accounting periods of the principal and subsidiary are not co-terminous such division and apportionment of the profits or losses of the subsidiary for any chargeable accounting period shall be made as will allocate the due proportion thereof to the relative chargeable accounting period or periods of the principal, and such division and apportionment shall be by reference to the proportion that the number of days of the chargeable accounting period of the subsidiary falling within the relative chargeable accounting period or periods of the principal bears to the total number of days in the chargeable accounting period of the subsidiary

(4) For the purposes of this section a company shall be deemed to be a subsidiary of another company if and so long as not less than four fifths of its ordinary share capital is beneficially owned by that other company, whether directly or through another company or other companies, or partly directly and partly through another company or other companies

(5) The business profits tax payable by virtue of this section by the principal shall for the purposes of section 10 be allocated by the Income-tax Officer to the respective companies concerned in such proportion as in his opinion is just

Provided that the principal shall have the same rights of appeal against an order of allocation made under this sub-section as it has under this Act against the amount of its business profits tax assessment

- 9 Where an individual is entitled to profits arising from more than one business of which at least one is carried on by

Aggregation of profits
in certain cases

a firm in which he is a partner, the Income-tax Officer may with the prior sanction of the Inspecting Assistant Commissioner of Income tax aggregate the shares of such individual in the profits or losses of all of such businesses and treat the sum of such aggregation as the profits of a business carried on by such individual and assess him accordingly

Provided that if the accounting periods of such businesses are not co-terminous the Income tax Officer shall determine in respect of such individual his chargeable accounting period and shall make such divisions, apportionments and aggregation of the shares of such individual in the profits or losses of the several businesses as may be necessary to determine for such chargeable accounting period the total profits and gains of such individual therefrom

Provided further that for the purposes of this section a company, which is neither one in which the public are substantially interested, as defined in the *Explanation* to sub-section (1) of section 23 A of the Indian Income-tax Act, 1922 nor a subsidiary company as defined in sub-section (4) of section 8 of this Act shall be deemed to be a firm in which the persons having an interest in the company are partners or, in the case of a sole-shareholder, a business carried on by that sole-shareholder and the profits of such company shall be computed accordingly

Provided further that any profits or losses so aggregated for assessment upon an individual shall be excluded from the profits or losses of the respective businesses for the purposes of this Act and no assessment under this Act shall be made in respect of any such business save in the names of the other partners therein

10 The amount of the business profits tax payable by any person for any chargeable accounting period shall, in computing total income for the purposes of the relevant income tax or super tax assessment be allowed as a deduction

Allowance of business profits tax in computing income for income-tax purposes

Provided that where, under the provisions of this Act relating to deficiencies of profits relief is given by way of repayment from business profits tax chargeable for any chargeable accounting period previous to that in which the deficiency occurs, the amount of the deduction allowed shall not be altered but the amount repayable shall be taken into account in computing the profits and gains of the business for the purposes of income-tax as if it were a profit of the business accruing in the previous year (as determined for that business for the purposes of the Indian Income tax Act, 1922) in which the deficiency of profits occurs

11 (1) The Income-tax Officer may, for the purposes of this Act, require any person whom he believes to be engaged in any business to which this Act applies or to have been so engaged during any chargeable accounting period, or to be otherwise liable to pay business profits tax, to furnish within such period not being less than forty five days from the date of the service of the notice as may be specified in the notice, a return in the prescribed form and verified in the prescribed manner setting forth (along with such other particulars as may be provided for in the notice) with respect to any chargeable accounting period specified in the notice the profits of the business or the amount of deficiency, if any, available for relief under section 6

Issue of notice for assessment

Provided that the Income-tax Officer may, in his discretion extend the date for the delivery of the return

(2) The Income tax Officer may serve on any person upon whom a notice has been served under sub-section (1) a notice requiring him on a date to be therein specified to produce, or cause to be produced such accounts or documents as the Income tax Officer may require, and may from time to time serve further notices in like manner requiring the production of such further accounts or documents or other evidence as he may require

THE INCOME-TAX ACT

- 12 (1) The Income-tax Officer shall, by an order in writing after considering such evidence, if any, as he has required under section 11, assess to the best of his judgment the profits liable to business profits tax and the

Assessments

amount of business profits tax payable on the basis of such assessment, or if there is a deficiency of profits, the amount of that deficiency and the amount of business profits tax, if any repayable, and shall furnish a copy of such order to the person on whom the assessment has been made

(2) Business profits tax payable in respect of any chargeable accounting period shall be payable by the person carrying on, or treated as carrying on, the business in that period

(3) Where two or more persons were carrying on the business jointly in the chargeable accounting period, the assessment shall be made upon them jointly and in the case of a partnership may be made in the partnership name

(4) Where by virtue of the foregoing provisions an assessment could, but for his death, have been made on any person either solely or jointly with any other person or persons the assessment may be made on his legal representative either solely or jointly with that other person or persons, as the case may be

- 13 (1) The Income tax Officer, before proceeding to make an assessment (in this section referred to as the regular assessment) under section 12, may at any time after the expiry of the period specified in the notice issued under sub-section (1) of section 11 as that within which the return therein referred to is to be

Power to make provisional assessments

furnished and whether the return has or has not been furnished proceed to make in summary manner a provisional assessment of the taxable profits and the amount of business profits tax payable thereon

(2) Before making such provisional assessment the Income tax Officer shall give notice in the prescribed form to the person on whom assessment is to be made of his intention to do so, and shall with the notice forward a statement of the amount of the proposed assessment, and the said person shall be entitled to deliver to the Income-tax Officer at any time within fourteen days of receipt of the said notice a statement of his objections if any, to the amount of the proposed assessment

(3) On expiry of one month from the date of service of the notice referred to in sub-section (2), or earlier if the assessee agrees to the proposed assessment the Income tax Officer may, after taking into account the objections, if any, made under sub-section (2), make a provisional assessment, and shall furnish a copy of the order of assessment to the assessee

Provided that assent to the amount of the assessment, or failure to make objection to it, shall in no way prejudice the assessee in relation to the regular assessment

(4) In making any such provisional assessment the Income tax Officer shall make allowance for any deficiencies of profits for previous chargeable accounting periods which are under the provisions of section 6 to be set off against the taxable profits of the chargeable accounting period in respect of which the assessment is being made

Provided that where such deficiencies of profits have not been determined under sub-section (1) of section 12 the income-tax Officer shall estimate the amount thereof to the best of his judgment

(5) There shall be no right of appeal against a provisional assessment made under this section and it shall until a regular assessment is made in due course under section 12 determine the amount of business profits tax due from the assessee

(6) If when a regular assessment is made in due course under section 12 the amount of business profits tax payable thereunder is found to exceed that determined as payable by the provisional assessment it shall be reduced by the amount determined as payable by the provisional assessment

(7) If when a regular assessment is made in due course under section 12 the amount of business profits tax payable thereunder is found to be less than that determined as payable by the provisional assessment any excess of tax paid as a result of the provisional assessment shall be refunded to the assessee together with interest at two per cent *per annum* calculated from the date of payment of such excess tax to the date of the order of refund both days inclusive

14 If in consequence of definite information which has come into his possession the Income-tax Officer discovers that profits of any chargeable accounting period chargeable to business profits tax have escaped assessment or have been underassessed or have been the subject of excessive relief he may at any time within four years of the end of the chargeable accounting period in question serve on the person liable to such tax a notice containing all or any of the requirements which may be included in a notice under section 11 and may proceed to assess or reassess the amount of such profits liable to business profits tax and the provisions of this Act shall so far as may be apply as if the notice were a notice issued under that section

15 If the Income-tax Officer the Appellate Assistant Commissioner of Income-tax or the Commissioner of Income-tax in the course of any proceedings under this Act is satisfied that any person has without reasonable cause failed to furnish the return required under sub-section (1) of section 11 or to produce or cause to be produced the accounts or documents or other evidence required by the Income tax Officer under sub-section (2) of that section or has concealed particulars of the profits of the business or has deliberately furnished inaccurate particulars of such profits he may direct that such person shall pay by way of penalty in addition to the amount of any business profits tax payable a sum not exceeding—

(a) where the person has failed to furnish the return required under sub-section (1) of section 11 the amount of the business profits tax payable

(b) in any other case the amount of business profits tax which would have been avoided if the return made had been accepted as correct

Provided that the Income-tax Officer shall not impose any penalty under this section without the previous approval of the Inspecting Assistant Commissioner of Income tax

16 (1) Any person objecting to the amount of business profits tax for which he is liable as assessed by the Income-tax Officer or denying his liability to be assessed under this Act or objecting to any penalty imposed by the Income-tax Officer, or to the amount of any deficiency of profits as assessed by the Income tax Officer, or to the amount allowed by the Income-tax Officer by way of relief under any provision of this Act or to any refusal by the Income-tax Officer to grant relief, may appeal to the Appellate Assistant Commissioner of Income-tax

Appeals to Appellate
Assistant Commissioner
of Income tax

(2) An appeal shall ordinarily be presented within forty five days of receipt of the notice of demand relating to the assessment or penalty objected to or in the case of an appeal against the assessment of a deficiency of profits, within thirty days of the receipt of the copy of the order determining the deficiency, or in the case of an appeal against the amount of a relief granted or a refusal to grant relief, within forty five days of the receipt of the intimation of the order granting or refusing to grant the relief, but the Appellate Assistant Commissioner of Income tax may admit an appeal after the expiration of that period if he is satisfied that the appellant had sufficient cause for not presenting it within that period.

(3) An appeal shall be in the prescribed form and shall be verified in the prescribed manner

(4) The Appellate Assistant Commissioner of Income tax shall hear and determine the appeal and subject to the provisions of this Act shall pass such orders as he thinks fit, and such orders may include an order enhancing the assessment or a penalty

Provided that an order enhancing an assessment or penalty shall not be made unless the person affected thereby has been given a reasonable opportunity of showing cause against such enhancement

(5) The procedure to be adopted in the hearing and determination of appeals shall be in accordance with the rules made by the Central Board of Revenue in relation to income tax

17 Any Income tax Officer or any person in respect of whose business an order under section 12 has been passed and who objects to an order passed by an Appellate Assistant Commissioner of Income tax under section 15 or section 16 may, within the prescribed time and in the prescribed manner appeal against such order to the Appellate Tribunal constituted under the Indian Income tax Act 1922 and that Tribunal shall have all such powers in disposing of the appeal as it has in respect of appeals preferred to it under the said Act

18 The Commissioner of Income-tax may at any time within four years from the date of any order passed by any Appellate Assistant Commissioner of Income-tax or Income tax Officer under this Act rectify any mistake in any evidence recorded during assessment or appellate proceedings or any mistake apparent from the record and shall within the like period

Rectification of mistakes

rectify any mistake apparent from the record which has been brought to his notice by a person to whose business this Act applies

Provided that no such rectification shall be made having the effect of enhancing the liability of any person unless that person has been given a reasonable opportunity of being heard

19. The sections of the Indian Income tax Act 1922 as applied to excess profits tax by virtue of section 21 of the Excess Profits Tax Act 1940 shall in so far as they are not repugnant to the provisions of this Act, apply to business profits tax as they apply to excess profits tax

20 (1) Notwithstanding anything contained in the Indian Income tax Act 1922 all information contained in any statement or return made or furnished under the provisions of that Act or obtained or collected for the purposes of that Act may be used for the purposes of this Act

(2) All information contained in any statement or return made or furnished under the provisions of this Act or obtained or collected for the purposes of this Act may be used for the purposes of the Indian Income tax Act 1922

21 If any person fails without reasonable cause or excuse to furnish in due time any return or statement, or to produce, or cause to be produced any accounts or documents required to be produced under section 11 he shall be punishable with fine which may extend to five hundred rupees and with a further fine which may extend to fifty rupees for every day during which the default continues

22 If a person makes in any return required under section 11 any statement which is false and which he either knows or believes to be false or does not believe to be true he shall be punishable with simple imprisonment which may extend to six months or with fine which may extend to one thousand rupees or with both

23 (1) A person shall not be proceeded against for an offence under section 21 or section 22 except at the instance of the Inspecting Assistant Commissioner of Income-tax

(2) No prosecution for an offence punishable under section 21 or section 22 or under the Indian Penal Code shall be instituted in respect of the same facts as those in respect of which a penalty has been imposed under this Act

(3) The Inspecting Assistant Commissioner of Income tax may, either before or after the institution of proceedings compound any offence punishable under section 21 or section 22

24 (1) The Central Board of Revenue may, subject to the control of the Central Government, make rules for carrying out the purposes of this Act.

(2) Without prejudice to the generality of the foregoing power such rules may—

- (a) prescribe the procedure to be followed on appeals, applications for rectification of mistakes and applications for refunds
- (b) provide for any matter which by or under this Act is to be prescribed

(3) The power to make rules conferred by this section shall be exercised in like manner as the power to make rules under section 59 of the Indian Income tax Act 1922

SCHEDULE I

[See SECTION 2 (16)]

Rules for the computation of profits for purposes of Business Profits Tax

1 The profits of a business during any chargeable accounting period shall be separately computed and shall subject to the provisions of this Schedule be computed in accordance with the provisions of section 10 of the Indian Income tax Act 1922

Provided that any sums other than any interest paid by a firm to a partner of the firm excluded under the proviso to clause (iii) of sub-section (2) or clause (a) of sub-section (4) of that section from the allowances made in computing the profits of the business for the purposes of income tax shall if paid be included in those allowances when computing the profits of the business for the purposes of business profits tax

Provided further—

- (a) that any sums received or credited in a chargeable accounting period which by virtue of rule 9 of Schedule I to the Excess Profits Tax Act 1940 have been treated as business receipts for the purpose of assessment to excess profits tax and
- (b) any expenditure or loss incurred in any chargeable accounting period allowance in respect of which has been made for excess profits tax purposes—

shall be disregarded in computing the profits or losses of the chargeable accounting period

Provided further that where a chargeable accounting period is not an accounting period the profits or losses of the business during the accounting periods wholly or partly included within the chargeable accounting period shall be so computed as aforesaid and such division and apportionment to specific periods of those profits or losses and such aggregation of those profits and losses or any apportioned part thereof shall be made as appears necessary to arrive at the profit during the chargeable accounting period and any such apportionment shall be made in proportion to the number of days in the respective periods.

2. (1) The principle of adding the allowance for depreciation for any one period to the allowance for depreciation for any subsequent period and deeming it to be part of the allowance for such subsequent period shall not be followed

(2) Nothing in this Act shall be construed as permitting the application, in computing profits for the purposes of business profits tax, of the provisions of sub-section (2) of section 24 of the Indian Income-tax Act, 1922

3. Income received from investments or other property shall be included in the profits only as provided in this rule, that is to say,—

(a) in the case of the business of a building society, or a banking business, insurance business or business consisting wholly or mainly in the dealing in or holding of investments or other property, the profits shall include all income received from investments or other property, or

(b) in the case of a business part of which consists in banking, insurance or dealing in investments or other property, not being a business to which clause (a) applies, the profits shall include all income received from investments or other property held for the purposes of that part of that business

Provided that—

(i) income received directly or indirectly by way of dividend or distribution of profits from a body corporate carrying on business as defined in this Act, and

(ii) income to which the persons carrying on the business are not beneficially entitled

shall in no case be included.

4 (1) In the case of a business carried on in any accounting period which constitutes or includes a chargeable accounting period, by a company, the directors whereof have throughout that accounting period a controlling interest therein, no deduction shall be made in respect of directors' remuneration in computing the profits for that accounting period

(2) Where, in the case of a business carried on by a company in any accounting period which constitutes or includes a chargeable accounting period, the directors of the company have during any part of that accounting period a controlling interest therein, and the case is not one to which sub-rule (1) applies, the profits of the accounting period shall be computed as if the directors of the company had no controlling interest therein, and to the part thereof appropriate to the chargeable accounting period ascertained in accordance with the third proviso to rule 1 shall be added the directors' remuneration for that part of the chargeable accounting period during which the directors of the company had a controlling interest therein

(3) In this rule the expression 'directors' remuneration' does not include—

(a) the remuneration of any director who is required to devote substantially the whole of his time to the service of the company in a managerial or technical capacity and is not the

beneficial owner of or able, either directly or through the medium of other companies or by any other indirect means, to control more than five per cent of the ordinary share capital of the company or

- (b) the remuneration of any managing agent where such remuneration is included in the profits of the managing agent's business for the purposes of the business profits tax

5 (1) In computing the profits of any chargeable accounting period no deduction shall be allowed in respect of expenses in excess of the amount which the Income-tax Officer considers reasonable and necessary having regard to the requirements of the business and in the case of directors' fees or other payment for services to the actual services rendered by the person concerned

Provided that no disallowance under this rule shall be made by the Income-tax Officer unless he has obtained the prior authority of the Inspecting Assistant Commissioner of Income-tax

(2) Any person who is dissatisfied with the decision of the Income-tax Officer under this rule may appeal in the prescribed time and manner to the Appellate Tribunal referred to in section 17

SCHEDULE II

[See SECTION 2 (1)]

Rules for computing the capital of a company for purposes of Business Profits Tax

1 For the purposes of ascertaining the abatement under this Act in respect of any chargeable accounting period, the capital of a company shall be computed in accordance with the following rules

2 (1) Where the company is one to which clause (a) of rule 3 of Schedule I applies its capital shall be the sum of the amounts of its paid-up share capital and of its reserves in so far as they have not been allowed in computing the profits of the company for the purposes of the Indian Income-tax Act 1922

(2) Where the company is one to which clause (b) of rule 3 of Schedule I applies its capital ascertained in accordance with sub-rule (1) of this rule shall be diminished by the cost to it of its investments or other property the income from which is not includible in the profits so far as that cost exceeds any debt for money borrowed by it

(3) In all other cases the capital shall be the sum ascertained in accordance with the said sub-rule diminished by the cost to the company of its investments so far as that cost exceeds any debt for money borrowed by it

3 So much of the premium realized by a company from the issue of any of its shares as is retained in the business shall be regarded as forming part of its paid up capital for the purposes of rule 2

4 Any deposits with the Central Government under section 10 of the Indian Finance Act 1942 or section 2 of the Excess Profits Tax Ordinance, 1943 shall not be regarded as investment or other property for the purposes of this Schedule

THE INCOME-TAX AND EXCESS PROFITS TAX (AMENDMENT) ACT, 1947.

An Act further to amend the Indian Income-tax Act, 1922, and the Excess Profits Tax Act, 1940.

WHEREAS it is expedient further to amend the Indian Income-tax Act, 1922, and the Excess Profits Tax Act, 1940, for the purposes hereinafter appearing;

It is hereby enacted as follows.—

CHAPTER I.

Preliminary.

Short title and com-
mentement 1 (1) This Act may be called the Income-tax and Excess Profits Tax (Amendment) Act, 1947.

(2) It shall be deemed to have come into force on the 31st day of March, 1947.

CHAPTER II.

Amendments of Act XI of 1922.

Amendment of section 2,
Act XI of 1922. 2. In section 2 of the Indian Income-tax Act, 1922 (hereafter in this Chapter referred to as the said Act),—

(a) clause (4-A) shall be renumbered as clause (4-B), and after clause (4) the following clause shall be inserted, namely:—

“(4-A), “capital asset” means property of any kind (other than agricultural land) held by an assessee, whether or not connected with his business, profession or vocation, but does not include—

(i) any stock-in-trade, consumable stores or raw materials held for the purposes of his business, profession or vocation;

(ii) personal effects, that is to say, movable property (including wearing apparel, jewellery and furniture) held for personal use by the assessee or any member of his family dependent on him.”

(b) for the *Explanation* to clause (6-A) the following shall be substituted, namely:—

“Provided further that the expression “accumulated profits”, wherever it occurs in this clause, shall not include capital gains of any previous year prior to the previous year for the assessment for the year ending on the 31st day of March, 1948;

(c) in clause (6-C), after the word and figures “section 10”, the words, figures and letter “and any capital gain chargeable according to the provisions of section 12-B” shall be inserted;

(d) in clause (15), for the words “does not apply; and” the words “does not apply and except any capital gain which is not includible in the total income of an assessee;” shall be substituted.

Amendment of section 4
Act XI of 1922

3 In sub-section (3) of section 4 of the said Act —

(a) to clause (iv) the words 'and any capital gains of the Fund arising from the sale exchange or transfer of such securities' shall be added

(b) in clause (vi) after the words 'Any receipts' the words 'figures and letter 'not being capital gains chargeable according to the provisions of section 12 B and' shall be inserted

Amendment of section
4 A Act XI of 1922

4 To clause (c) of section 4 A of the said Act the words 'account not being taken in either case of income chargeable under the head Capital gain' shall be added

Amendment of section
6 Act XI of 1922

5 To section 6 of the said Act the following clause shall be added namely —

(a) Capital gains

Insertion of new sect on
12 B in Act XI of 1922

6 After section 12 A of the said Act the following section shall be inserted namely —

12 B (1) The tax shall be payable by an assessee under the head 'Capital gains' in respect of any profits or gains arising from the sale exchange or transfer of a capital asset effected after the 31st day of March 1946 and such profits and gains shall be deemed to be income of the previous year in which the sale exchange or transfer took place

Capital gains

Provided that where the amount of capital gains in the previous year does not exceed fifteen thousand rupees the tax shall not be payable by the assessee and such amount shall not be included in his total income

Provided further that the tax shall not be payable by an assessee in respect of any profits or gains arising from the sale exchange or transfer of a capital asset being property the income of which is chargeable under section 9 and which has been possessed by the assessee or a parent of his for not less than seven years before the date on which the sale exchange or transfer took place and the amount of such profits or gains shall not be included in his total income

Provided further that any transfer of capital assets by reason of the compulsory acquisition thereof under any law for the time being in force relating to the compulsory acquisition of property for public purposes or any distribution of capital assets on the total or partial partition of a Hindu undivided family or on the dissolution of a firm or other association of persons or on the liquidation of a company or under a deed of gift bequest will or transfer on irrevocable trust shall not for the purposes of this section be treated as sale exchange or transfer of the capital assets

Provided further that the transfer of a capital asset by a company to a subsidiary company the whole of the share capital of which is held by the parent company or by the nominees thereof shall not be treated as a sale exchange or transfer within the meaning of this section where the subsidiary company is resident in British India and is registered under the Indian Companies Act 1913 so however that for the purposes of clause (vi) or clause (vii) of sub-section (2) of section 10 the cost or the written

down value, as the case may be, of the transferred capital asset shall be taken to be the same as it would have been if the parent company had continued to hold the capital as set for the purposes of its business

(2) The amount of a capital gain shall be computed after making the following deductions from the full value of the consideration for which the sale, exchange or transfer of the capital asset is made, namely —

- (i) expenditure incurred solely in connection with such sale, exchange or transfer,
- (ii) the actual cost to the assessee of the capital asset including any expenditure of a capital nature incurred and borne by him in making any additions or alterations thereto, but excluding any expenditure in respect of which any allowance is admissible under any provision of sections 8, 9, 10 and 12

Provided that where a person who acquires a capital asset from the assessee, whether by sale, exchange or transfer, is a person with whom the assessee is directly or indirectly connected and the Income-tax Officer has reason to believe that the sale, exchange or transfer was effected with the object of avoidance or reduction of the liability of the assessee under this section the full value of the consideration for which the sale, exchange or transfer is made shall with the prior approval of the Inspecting Assistant Commissioner of Income-tax, be taken to be the fair market value of the capital asset on the date on which the sale, exchange or transfer took place

Provided further that where the capital asset is an asset in respect of which the assessee has obtained depreciation allowance in any year, the actual cost of the asset to the assessee shall be its written down value, as defined in section 10 increased or diminished as the case may be by any adjustment made under clause (vi) of sub-section (2) of that section

Provided further that where the capital asset became the property of the assessee before the 1st day of January, 1939, he may on proof of the fair market value thereof on the said date to the satisfaction of the Income-tax Officer, substitute for the actual cost such fair market value which shall be deemed to be the actual cost to him of the asset and which shall be reduced by the amount of depreciation if any, allowed to the assessee after the said date and increased or diminished, as the case may be, by any adjustment made under clause (vi) of sub-section (2) of section 10

Provided further that where the capital asset was on any previous occasion the subject of negotiations for its sale, exchange or transfer, any option or other money received and retained by the assessee in respect of such negotiations shall be deducted in computing the actual cost to him of such asset

(3) Where any capital asset became the property of the assessee under any of the circumstances referred to in the third proviso to sub-section (1) its actual cost allowable to him for the purposes of this section shall be its actual cost to the previous owner thereof, and the provisions of sub-section (2) shall apply accordingly, and where the actual cost to the previous owner cannot be ascertained, the fair market value at the date on which the capital asset became the property of the previous owner shall be deemed to be the actual cost thereof

(4) Notwithstanding anything contained in sub-section (1), where a capital gain arises from the sale exchange or transfer of a capital asset which immediately before the date on which the sale exchange or transfer took place was being used by the assessee for the purposes of his business, profession or vocation or which in the two years immediately preceding that date was being used by him or a parent of his mainly for the purposes of his own or the parents own residence and the assessee has within a period of one year before or after that date purchased a new capital asset for the same purposes of his business profession or vocation or as the case may be for the purposes of his own residence then instead of the capital gain being charged to tax as income of the previous year in which the sale exchange or transfer took place it shall if the assessee so elects in writing before the assessment is made be dealt with in accordance with the following provisions of this sub-section that is to say —

(a) if the amount of the capital gain is greater than the cost of the new asset —

(i) the difference between the amount of the capital gain and the cost of the new asset shall be charged under this section as income of the previous year and

(ii) for the purposes of computing in respect of the new asset any allowance under clause (vi) or clause (vii) of sub-section (2) of section 10 or the amount of any capital gain arising from its sale exchange or transfer the cost or the written down value as the case may be shall be nil or

(b) if the amount of the capital gain is equal to or less than the cost of the new asset —

(i) the capital gain shall not be charged under this section and

(ii) for the purposes of computing in respect of the new asset any allowance under the said clause (vi) or any allowance or adjustment under the said clause (vii) or the amount of any capital gain arising from its sale exchange or transfer the cost or the written down value as the case may be shall be reduced by the amount of the capital gain

Provided that where in respect of the purchase of a new capital asset consisting of plant or machinery the assessee satisfies the Income-tax Officer that despite the exercise of due diligence it has not been possible to make the purchase within the period specified in this sub-section the Income-tax Officer may with the prior approval of the Inspecting Assistant Commissioner of Income-tax extend the said period to such date as he considers reasonable

Amendment of section 14, Act XI of 1922 7 In clause (c) of sub-section (2) of section 14 of the said Act after the words 'assessable under the words figures and letter 'section 12 B or' shall be inserted

Amendment of section 17, Act XI of 1922 8 To section 17 of the said Act the following sub-sections shall be added namely —

'(6) Where the total income of an assessee not being a company, includes any income chargeable under the head 'Capital gains' the tax including super tax payable by him on his total income shall be—

- (i) income tax and super tax payable on his total income as reduced by the amount of such inclusion, had such reduced income been his total income, *plus*
- (ii) income-tax on the whole amount of such inclusion at the following rates, namely —

Rate

where such amount—

exceeds Rs 15,000 but does not exceed Rs 50 000	One anna in the rupee,
exceeds Rs 50 000 but does not exceed Rs 2,00,000	Two annas in the rupee
exceeds Rs 2 00,000 but does not exceed Rs 5 00 000	Three annas in the rupee,
exceeds Rs 5 00 000 but does not exceed Rs 10 00 000	Four annas in the rupee
exceeds Rs 10 00 000	Five annas in the rupee

Provided that where owing to the fact that the amount of such inclusion has exceeded a certain limit, income tax thereon is payable or is payable at a higher rate, the amount of income-tax so payable shall be reduced so as not to exceed—

- (a) the amount which would have been payable if the amount of such inclusion had not exceeded that limit, *plus*,
- (b) one-half of the amount by which the amount of such inclusion exceeds that limit

(7) Where the total income of a company includes any income chargeable under the head "Capital gains", the super tax payable by the company in any year shall be reduced by an amount computed on that part of its total income which consists of such inclusion at the rate of super tax (excluding the rate of additional super tax, if any) specified in the case of a company by the annual Act of the Central Legislature fixing the rate or rates of tax for that year.

Amendment of section 18-A, Act XI of 1922 9 To section 18 A of the said Act the following sub-section shall be added, namely —

'(12) Any income chargeable under the head 'Capital gains' shall not be taken into account for any of the purposes of this section.'

Amendment of section 24, Act XI of 1922 10 In section 24 of the said Act, after sub-section (2) the following sub sections shall be inserted namely —

'(2 A) Notwithstanding anything contained in sub-section (1), where the loss sustained is a loss falling under the head "Capital gains" such loss shall not be set off except, against any profits and gains falling under that head

(2 B) Where an assessee sustains a loss such as is referred to in sub-section (2 A) and the loss cannot be wholly set off in accordance with the provisions of that sub-section, the portion not so set off shall be carried forward to the following year and set off against capital gains for that year, and if it cannot be so set off, the amount thereof not so set off shall be carried forward to the following year and so on, so however that no such loss shall be so carried forward for more than six years

Provided that where the loss sustained in any previous year does not exceed fifteen thousand rupees it shall not be carried forward'

Amendment of sect on 11 To section 38 of the said Act the follow
38, Act XI of 1922 ing clause shall be added namely —

(4) require any dealer broker or agent or any person concerned in the management of a stock or commodity Exchange to furnish a statement of the names and addresses of all persons to whom he or the Exchange has paid any sum in connection with the sale exchange or transfer of a capital asset or on whose behalf or from whom he or the Exchange has received any such sum together with particulars of all such payments and receipts

Amendment of section 12 In section 42 of the said Act —
42 Act XI of 1922

(a) for the marginal heading the following shall be substituted namely —

Income deemed to accrue or arise within British India

(b) in sub-section (1) after the words in cash or in kind the words or through or from the sale exchange or transfer of a capital asset in British India shall be inserted

Amendment of section 13 To section 43 of the said Act the follow
43 Act XI of 1922 ing Explanation shall be added namely —

Explanation —A person whether residing in or out of British India who acquires after the 28th day of February 1947 whether by sale exchange or transfer capital asset in British India from a person residing out of British India shall for the purposes of charging to tax the capital gain arising from such sale exchange or transfer be deemed to have a business connection within the meaning of this section with such person residing out of British India

14 In clause (d) of sub-section (1) of section 58-C of the said Act, after the words securities purchased therewith the words and of any capital gains arising from the sale exchange or transfer of capital assets of the fund shall be inserted

Amendment of sect on
58-C, Act XI of 1922

15 In section 58-R of the said Act after the words 'deposits of an approved superannuation fund the words and any capital gains arising from the sale exchange or transfer of capital assets of such fund shall be inserted

Amendment of section
58-R Act XI of 1922

CHAPTER III

Amendments of Act XV of 1940

16 In section 15 of the Excess Profits Tax Act (hereafter in this Chapter referred to as the said Act) the words within five years of the end of the chargeable accounting period in question shall be omitted and shall be deemed always to have been omitted

Amendment of section
15 Act XV of 1940

In ertion of new section
26-A in Act XV of 1940

17 After section 26 of the said Act the following section shall be inserted namely —

'26 A (1) If on an application made to it through the Excess Profits Tax Officer the Central Board of Revenue is satisfied that a person who in a chargeable accounting period ending on the 31st day of March 1946 carried on a business the profits of which for any chargeable accounting period are charged with excess profits tax —

Further powers of Central Board of Revenue to grant certain relief

(i) incurred during the period commencing on the 1st day of April 1946 and ending on the 31st day of December, 1947, in connection with that business —

(a) expenditure on the removal of works constructed for protection against enemy attack

(b) where under the orders of a competent authority the business was wholly or partly removed during the war expenditure or again removing the business or part thereof

(c) where any physical assets held for the purposes of the business were altered to adapt them to war conditions expenditure on re-adapting them to normal requirements

(d) expenditure in consequence of the termination of any contract for the supply of goods materials or services or the lease of buildings or machinery to him where that contract is terminated by reason of the termination of a contract for the provision by him of goods, materials or services for the purposes of the war or

(ii) incurred during the period commencing on the 1st day of April 1946 and ending on the 31st day of December 1947 a loss on the sale of trading stock held on the 31st day of March 1946 for the purposes of the business or

(iii) incurred in any accounting period ending on or before the 31st day of March, 1946 in connection with that business any expenditure referred to in the sub-clauses of clause (i) which except under the provisions of this sub-section is not allowable, either wholly or partly in computing the profits of such accounting period —

the Central Board of Revenue may direct that such allowance as it thinks just shall be made in computing the profits of the business during the chargeable accounting period ending on the 31st day of March 1946 and effect shall be given to such direction by repayment or otherwise as the case may require

Provided that in giving any such direction the Central Board of Revenue may impose such conditions as it considers appropriate

Provided further that where the applicant satisfies the Central Board of Revenue that it was not possible to complete any work referred to in sub-clauses (a), (b) and (c) of clause (i) within the period specified in that clause, the Central Board of Revenue may extend the said period to such date as it considers reasonable

Provided further that where any change has taken place in the persons carrying on the business the persons carrying it on after the change

shall have the same right to make an application under this sub-section in respect of any expenditure referred to in sub-clauses (b) and (c) of clause (1) as the persons previously carrying on the business would have had if there had been no such change

(2) Where an accounting period included, but did not end on, the 31st day of March 1946, all expenditure referred to in the sub-clauses of clause (1) of sub-section (1) which would, apart from the provisions of this sub-section and rule 11 of Schedule I, be allowable as a deduction in computing the profits of the said accounting period, shall be treated for the purposes of sub-section (1) as if it were incurred after that day, and if an application is made under this section, no deduction from or in computing, the profits of any accounting period or chargeable accounting period shall be allowed in respect of such expenditure otherwise than under sub-section (1)

(3) Where a change takes place in the persons carrying on a business, or a person carrying on a business being a body corporate, becomes or ceases to be a subsidiary company or principal company within the meaning of sub-section (6) of section 9, and where except for the happening of that event relief would be allowable under this section, the Central Board of Revenue may, if it thinks fit, allow such relief under this section as it considers just, having regard to the extent to which the persons directly or indirectly interested in the business or body corporate, as the case may be, before the change remain interested therein after the change

Amendment of Schedule I, Act XV of 1949

18 To the first paragraph of rule 11 of Schedule I to the said Act the following proviso shall be added namely —

"Provided that where any loss or expenditure incurred during the period commencing on the 1st day of April, 1946 and ending on the 31st day of December, 1947 is reasonably and properly attributable, wholly or partly, to any chargeable accounting period or standard period, such deduction as appears to the Excess Profits Tax Officer to be reasonable shall be allowed in computing the profits of such chargeable accounting period or standard period, and any relief accruing from such deduction shall be given by repayment or otherwise, as the case may require "

STATEMENT OF OBJECTS AND REASONS

The main object of this Bill is to include in the Indian Income Tax Act, 1922 provisions enabling income-tax to be levied on a profit or gain arising from the sale, exchange or transfer of a capital asset. For this purpose several amendments to the Income-tax Act are necessary. In addition the Bill seeks to amend the Excess Profits Tax Act mainly by making provision for terminal losses occurring after the excess profits tax has ceased but which are properly attributable to the excess profits tax period. The main provisions of the Bill are explained in the Notes on Clauses below

NEW DELHI,

LIAQUAT ALI KHAN

The 27th February, 1947

NOTES ON CLAUSES

CHAPTER II

Clause 2—Sub clause (a) defines "capital asset" as meaning any property (other than agricultural land) or any actionable claim in respect of such property held by an assessee, but it does not include such items as stock in trade which would properly be taken into account in determining his profits and gains chargeable under section 10 of the Act

Sub-clause (b)—The effect of this amendment is to make accumulated capital profits now exempt taxable but not if they are capital gains of any previous year prior to the previous year for the assessment year 1947-48

Sub-clause (c) enlarges the definition of 'income' so as to include capital gains chargeable under the new section 12 B

Sub-clause (d) secures that in the case of a non resident 'capital gains' arising outside British India are not included in his total world income

Clauses 3 (a), 14 and 15—make only consequential changes to exempt capital gains in the case of Provident and Superannuation Funds which may consist *inter alia* of such gains

Clause 3 (b)—is intended to withdraw exemption from tax in the case of a capital gain falling under section 12 B even though it may be of a casual or non-recurring nature

Clause 4—amends section 4-A (c) so as to exclude capital gains for the purposes of determining the residence of a company on the basis of more than half the income arising in British India

Clause 5—adds to section 6 another head of income namely, "Capital gains"

Clause 6—adds a new section 12 B to the Act Under sub-clause (1) capital gains are deemed to be income and income of the previous year in which the sale, exchange or transfer takes place According to the first proviso if the amount of capital gains in the previous year does not exceed five thousand rupees, it will be ignored and not included in the assessee's total income This will exclude assessment of small gains made in the disposal of personal effects or otherwise The second proviso lays down that any distribution of assets on the partition of a Hindu undivided family, or on the dissolution of a firm or other association of persons or on the liquidation of a company or under a deed of gift, bequest, will or transfer on trust is not treated as sale, exchange or transfer

Sub-clause (2) provides the method of computing the amount of a capital gain From the full value of the consideration is to be deducted any expenditure incurred in the sale exchange or transfer of the capital asset and its actual cost to the assessee including any capital expenditure incurred by him in making additions or alterations thereto The cost is however, to be reduced by any option or other money received in connection with any previous negotiation for sale, exchange or transfer Where the capital asset is one in respect of which the assessee has obtained depreciation allowance, the cost is to be reduced to the written-down value of the asset subject to an increase or decrease to be made by the amount assessed or an allowance made under section 10 (2) (vi) of the Act

THE INCOME TAX ACT

In the case of assets acquired prior to the 1st January, 1939, as it is not sought to assess any appreciation occurring prior to that date, the assessee has been given the option to substitute for the cost the fair market value of the asset on that date

Clause 7—amends section 14 (2) (c) so as to provide that the exemption conferred therein on profits arising in an Indian State does not apply to capital gains

Clause 8—adds another subsection to section 17 of the Act to secure that in the case of assets held by the assessee for more than two years the tax payable on capital gains arising therefrom will not exceed the income-tax on such capital gains at the maximum rate

Clause 9—amends section 18-A Capital gains will not be taken into account for any of the purposes of this section

Clause 10—A loss sustained in the sale exchange or transfer of a capital asset in any year will be set off against a capital gain made in that year. As in the case of profits a loss which does not exceed five thousand rupees will be ignored

Carry forward of such losses will be allowed for six years but a set off will be permissible only against capital gains

Clause 11—amends section 38 to enable the Income-tax Officer to require any dealer broker agent or any person concerned in the management of a commodity Exchange to furnish particulars of any payments or receipts connected with the sale exchange or transfer of a capital asset

Clause 12—amends section 42 so that gains arising from the sale exchange or transfer of a capital asset in British India will be deemed to be income accruing or arising in British India

Clause 13—amends section 43 so that a person to whom a non resident sells his assets in British India can be treated as his agent. If he is treated as agent he will be liable to pay the tax on the capital gains made by the non resident principal and the tax can be recovered from the agent's assets in British India including the assets sold or transferred to him by the non resident principal

CHAPTER III

Clause 16—It is well known that during the period of the war many persons not previously carrying on business or carrying on business on only a small scale have made very considerable profits. The responsibilities laid upon Income-tax Officers who have to function also as Excess Profits Tax Officers have been so heavy that it has been practically impossible for them to discover every such case. The clause seeks to extend the period during which action may be taken by Excess Profits Tax Officers to secure for the Revenue its just dues in such cases

Clause 17—This clause seeks to implement the promise given to provide for allowance against the profits of the final E.P.T. chargeable accounting period of losses and expenditure arising in the period of transition from war time to peace time conditions

Clause 18 —Rule 11 of the First Schedule to the Act may be interpreted as giving the power to relate back to Excess Profits Tax chargeable accounting periods expenditure incurred after the termination of the tax. This clause seeks to limit the period the expenditure during which may be so related back.

TAXATION ON INCOME (INVESTIGATION COMMISSION) ACT 1947.

*An Act to provide for an investigation into matters relating to
taxation on income*

WHEREAS it is expedient, for the purpose of ascertaining whether the actual incidence of taxation on income is and has been in recent years, in accordance with the provisions of law and the extent to which the existing law and procedure for the assessment and recovery of such taxation is adequate to prevent the evasion thereof, to make provision for an investigation to be made into such matters

It is hereby enacted as follows —

Short title, extent and commencement	1 (1) This Act may be called the Taxation on Income (Investigation Commission) Act, 1947
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(2) It extends to the whole of British India

(3) It shall come into force on such date as the Central Government may, by notification in the Official Gazette, appoint

2	In this Act	taxation on income means any tax chargeable under the Indian Income-tax Act 1922 (XI of 1922) or the Excess Profits Tax Act 1940 (XV of 1940)
Interpretation		

3	The Central Government may constitute a Commission to be called the Income-tax Investigation Commission (hereinafter referred to as the Commission) whose duties it shall be—
Constitution and functions of Commission	

(a) to investigate and report to the Central Government on all matters relating to taxation on income with particular reference to the extent to which the existing law relating to and procedure for, the assessment and collection of such taxation is adequate to prevent the evasion thereof,

(b) to investigate in accordance with the provisions of this Act any case referred to it under section 5 and report thereon to the Central Government

4	(1) The Commission shall consist of a Chairman (being a person who is or has been a Judge of a High Court) and two other Commissioners, appointed by the Central Government
Composition of Commission	

(2) On the occurrence from any cause of a vacancy among the Commissioners the Central Government may, if it thinks fit, appoint a person to fill the vacancy

5 (1) The Central Government may, at any time before the 31st day of December 1947, refer to the Commission for investigation and report any case in which the Central Government has *prima facie* reasons for believing that a person has to a substantial extent evaded payment of taxation on income together with such material as may be available in support of such belief

(2) If in the course of investigation into a case referred to it under sub-section (1) the Commission has reason to believe that some person other than the person whose case is being investigated has himself evaded payment of taxation on income it may make a report to the Central Government stating its reasons for such belief and on receipt of such report the Central Government may at any time refer the case of such other person to the Commission for investigation and report

6 (1) The Commission shall have power to administer oaths and shall have all the powers of a Civil Court under the Code of Civil Procedure, 1908 (V of 1908) for the purposes of taking evidence on oath enforcing the attendance of witnesses and of persons whose cases are being investigated compelling the production of documents and issuing commissions for the examination of witnesses and shall be deemed to be a Civil Court for all the purposes of section 195 and Chapter XXXV of the Code of Criminal Procedure 1898 (V of 1898) and any reference in the said Chapter to the presiding officer of a Court shall be deemed to include a reference to the Chairman of the Commission

(2) If in the course of any investigation under this Act it appears to the Commission to be necessary to examine any accounts or documents which it cannot itself conveniently examine the Commission may authorise any person qualified in its opinion to make such examination to examine the accounts or documents and interrogate for that purpose any person having charge or custody thereof and make a report thereon to the Commission and any person having charge or custody of such accounts or documents shall be bound to produce them to the person so authorised and to give to such person any information in respect thereof which the person so authorised may require

(3) The Commissioners and all persons authorised by the Commission under this section shall be deemed to be public servants within the meaning of section 21 of the Indian Penal Code (XLV of 1860)

7 (1) The Commission shall subject to the provisions of this Act have power to regulate its own procedure (including the fixing of places and times of its sittings and deciding whether to sit in public or in private) and may act notwithstanding a vacancy in the number of the Commissioners

(2) In making an investigation under clause (b) of section 3 the Commission shall act in accordance with the principles of natural justice, shall follow as far as practicable the principles of the Indian Evidence Act, 1872 (I of 1872), and shall give the person whose case is being investigated a reasonable opportunity of rebutting any evidence adduced against him

(3) Any person whose case is being investigated the Commission may be represented by a pleader duly authorised to act on his behalf

(4) Except with the previous sanction of the Central Government —

(a) no suit, prosecution or other legal proceeding shall be instituted against any person in any civil or criminal court for any evidence given by him in any proceedings before the Commission, and

(b) no evidence so given shall be admissible in evidence against such person in any suit prosecution or other proceeding before such Court

(5) No document shall be inadmissible in evidence in any proceedings before the Commission on the ground that it is not duly stamped or registered

(6) Nothing in section 54 of the Indian Income tax Act 1922 (XI of 1922) or in that section as applied to excess profits tax by section 21 of the Excess Profits Tax Act 1940 (XV of 1940) shall apply to the disclosure of any of the particulars referred to therein in any proceeding before the Commission or in any report made by the Commission to the Central Government or in any report made to the Commission by a person authorised under sub-section (2) of section 6

8 (1) After considering any report made to it under clause (b) of section 3 the Central Government may by order in writing direct that proceedings to assess in respect of the income of any period commencing after the 31st day of December 1938 the person to whose case the report relates to income-tax super tax or excess profits tax shall be taken or reopened, and upon such a direction being made such assessment proceedings may be taken and completed under the appropriate law notwithstanding anything contained in section 34 of the Indian Income-tax Act 1922 (XI of 1922) or section 15 of the Excess Profits Tax Act 1940 (XV of 1940), or any other law and notwithstanding any lapse of time

(2) On a direction being made under sub-section (1) a copy of the report of the Commission so far as it relates to the case of the person concerned shall be furnished to him

(3) Notwithstanding anything to the contrary contained in any other law in any proceedings directed to be taken under sub-section (1) any evidence in the case adduced before the Commission or a person authorised by it under sub-section (2) of section 6 shall be admissible in evidence

9 No act or proceeding of the Commission or any person authorised by it under sub-section (2) of section 6 shall be called in question in any manner by any Court and no suit, prosecution or other legal proceeding shall lie against the Crown or any Commissioner or any other person for anything in good faith done or intended to be done under this Act

10 The Central Government may by notification in the official Gazette make rules for carrying out the purposes of this Act

STATEMENT OF OBJECTS AND REASONS

It is notorious that recently businesses and properties have changed hands for very large sums of money. Government are anxious to know how in spite of very high rates of taxation—*income-tax* *super tax* and *Excess Profits Tax*—the large fortunes which the transactions imply have been accumulated. The Bill therefore proposes to appoint and empower a special Commission to investigate both the actual incidence of taxation with particular reference to individual cases and the extent to which the existing law is adequate to prevent evasion. The main provisions of the Bill are explained in the notes on clauses below.

HAQULAT ALI KHAN

NEW DELHI

The 27th February 1947

NOTES ON CLAUSES

Clause 3—The contemplated functions of the Commission are two fold to make a general report on the effectiveness or otherwise of the existing law and procedure to prevent tax evasion and to make special investigations into particular cases. In these cases it is necessary for the success of the investigation that the Commission should have power to investigate the financial affairs of other connected persons.

Clause 5—This is a normal provision when *ad hoc* tribunals such as this Commission are set up. It vests the Commission with powers of a Civil Court to compel the production of evidence both oral and documentary before it and gives it the same powers as a Court possesses in regard to offence committed before it.

Clause 6—It will not be possible for the Commission itself to make all the detailed investigation that will be required and this clause enables the Commission to appoint expert accountants or assessment officers to aid the Commission in its task. Such persons must be vested with like powers to compel the production of evidence before them.

Clause 7—Sub-clause (1) gives the Commission general power to regulate its own procedure and the final sub-clause is a normal provision giving the Commission and its investigating staff the status of public servant. Contempts of their authority are thus brought within the mischief of Chapter X of the Indian Penal Code. The intervening sub-clauses in effect relax the ordinary law of evidence in proceedings before the Commission and investigating officers these special provisions are regarded as essential to the success of the Commission's investigations. A witness who duly answers questions put to him will be entitled to a certificate of *indemnity* protecting him from liability in civil or criminal courts in respect of statements made by him in proceedings under this Bill though an exception may be made against a person whose affairs are being investigated if the Commission holds the opinion that it would be against the public interest to grant such an indemnity.

Clause 8—Should it be found in any case that there has been evasion of tax Government is given power by this clause to order reassessment proceedings for which may be taken up notwithstanding any bar against the reopening of assessment proceedings in the relevant law. And any facts elicited by the Commission may be used in proceedings under this clause.

Clause 9—This is the usual indemnity provision.

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INTRODUCTION

INCOME AND CAPITAL

Income tax as its name implies is a tax on Income. But what is Income? The law does not define it though it sets out certain provisions as to particular kinds of receipts that should be excluded or included and as to the methods of computing income. See sections 2 (6-C) and 8 to 12 of the Indian Income tax Act. As to the nature of income we have to seek guidance from judicial pronouncements which again are based largely on commercial usage. Commercial usage unfortunately is not altogether a reliable guide, and in practice there is no more baffling problem that faces a Commercial Accountant than the allocation of items as between Capital and Revenue. The concepts of Capital and Income have been the subject of close analysis by successive generations of economic thinkers and, as the following extracts from the classic book of Professor Fisher's¹ will show the concepts have been elusive and have defied analysis.

'Capital is a fund and income a flow
is wealth and income is the service of wealth
of wealth existing at an instant of time is called Capital. A flow of services through a period of time is called income. From the time of Adam Smith it has been asserted by economists though not usually by businessmen that only particular kinds of wealth could be capital and the burning question has been what kinds? But the failure to agree on any dividing line between wealth which is and wealth which is not capital after a century and a half of discussion certainly suggests the suspicion that no such line exists. What Senior wrote seven decades ago is true to day. Capital has been so variously defined, that it may be doubtful whether it has any generally received meaning. In consequence 'almost every year there appears some new attempt to settle the disputed conception but unfortunately no authoritative result has as yet followed these attempts. On the contrary many of them only served to put more combatants in the field and furnish more matter to the dispute.' Many authors express dissatisfaction with their own treatment of capital and even recast it in successive editions.

Adam Smith's concept of capital is wealth which yields revenue. He would therefore exclude a dwelling occupied by the owner. Hermann on the other hand, includes dwellings on the ground that they are durable goods. But a fruiterer's stock in trade which is capital according to Smith because it is used for profit, according to Hermann does not seem to be capital because it is perishable. Knies calls capital any wealth whether durable or not so long as it is reserved for future use. Walras attempts to settle the question of durability or futurity by counting the uses. Any wealth which serves more than one use is capital. A can of preserved fruits is therefore capital to

(1) 'The Nature of Capital and Income' by Professor Irving Fisher
MacMillan & Co. A study of this book is strongly recommended.

Knies, if stored away for the future, but is not capital to Walras, because it will perish by a single use. To Kleinwichter, capital consists only of "tools" of production, such as railways. He excludes food, for instance, as passive. Jevons, on the contrary, makes food the most typical capital of all, and excludes railways except as representing the food and sustenance of the labourers who built them.

While most authors make the distinction between capital and non capital depend on the kind of wealth objectively considered, Mill makes it depend on the intention in the mind of the capitalist as to how he shall use his wealth. Marx makes it depend on the effect of the wealth on the labourer, and Tuttle, upon the amount of wealth possessed. Again, while most authors confine the concept of capital to material goods, MacLeod extends it to all immaterial goods which produce profit including workmen's labour, credit, and what he styles, "incorporeal estates" such as the Law, the Church Literature, Art, Education an author's Mind. Clark takes what he styles 'pure' capital out of the material realm entirely, making it consist, not of things, but of their utility. Most authors leave no place in their concept of capital, for the value of goods as distinct from the concrete goods themselves whereas Fetter, in his definition leaves place for nothing else. Some definitions are framed with especial reference to particular problems of capital man. For instance, have reference to the problem of capital and labour, but they fail to agree as to the relation of capital to that problem. MacCulloch regards it as a means of supporting labourers by a wage fund. Marx as a means of humiliating and exploiting them, Ricardo, as a labour saver. MacLeod as including labour itself as a special form of capital.

Many definitions have reference to the problem of production, but in no less discordant ways. According to Senior, Mill and many others capital must be itself a product. Walras, MacLeod and others admit land and all natural agents under capital. Bohm Bawerk, while agreeing that it must be a product, insists that it must not apply to a finished product. Marx denies that capital is productive. Bohm Bawerk admits that it is not "independently" productive, but denies the Marxian corollary that it should not receive interest. Other writers make it co-ordinate with land and labour as a productive element.

As to what it is that capital produces, there is further disagreement. Adam Smith affirms that capital produces "revenue," Senior, that it produces "wealth." Others vaguely imply that it produces value, services, or utility.

Most of the definitions involve some reference to time but in many different ways. Hermann has in mind the time the wealth will last, Clark the permanency of the fund capital as contrasted with the transitoriness of its elements, "capital goods", Knies, the futurity of satisfactions, Jevons and Landry, specifically the time between the "investment" of the capital and its return.

It is idle to attempt any reconciliation between concepts of capital so conflicting, and yet there are elements of truth in all. Though generally wrongly and narrowly interpreted there are certain recurrent ideas which are entirely correct. The definitions concur in striving to express the important facts that capital is productive, that is, is antithetical to income, that it is a provision for the future, or that it is a reserve. But they assume that only a part of all wealth can conform to these conditions. To the authors of the definitions quoted, it would seem absurd to include all wealth as capital, as there would be nothing left with which to contrast it and by which to define

it. And yet, as Professor Marshall says, when one attempts to draw a hard and-fast line between wealth which is capital and wealth which is not capital, he finds himself "on an inclined plane," constantly tending, by being more liberal in his interpretation of terms, to include more and more in the term capital, until there is little or nothing left outside of it. We are told for instance, that capital is wealth for future use. But 'future' is an elastic term. As was shown in Chapter II, all wealth is, strictly speaking for future use. It is impossible to push back its use into the past, neither is it possible to confine it to the present. The present is but an instant of time and all use of wealth requires some duration of time. A plateful of food, however hurriedly it is being eaten, is still for future use, though the future is but the next few seconds, and if by "future" we mean to exclude the immediate future," where is the line to be drawn? Are we to say, for instance, that capital is that wealth whose use extends beyond seventeen days?

And as all wealth is for future use it is also, by the same token, all a 'reserve.' To call capital a reserve does not, therefore, in strictness, delimit it from other wealth. Even a beggar's crust in his pocket will tide him over a few hours.

Equally futile is any attempt definitely to mark off capital as that wealth which is "productive." We have seen that all wealth is productive in the sense that it yields services. There was a time when the question was hotly debated what labour was productive and what unproductive. The distinction was barren and came to be so recognized. No one now objects to calling all labour productive. And if this productivity is common to all labour, it is equally common to all wealth. If we admit that a private coachman is a productive worker, how can we deny that the horse and carriage are also productive, especially as the three merely co-operate in rendering the very same service, transportation?

Finally, we cannot distinguish capital as that wealth which bears income. All wealth bears income, for income consists simply of the services of wealth. But the idea, that some wealth bears income and some not, has been persistent from the time of Adam Smith, who meaning by income only money income, conceived capital as the wealth, which produces income in this sense, as distinguished from the wealth such as dwellings, equipages, clothing, and food, which dissipates that income. A home, according to him, is not a source of income, but of expense, and therefore cannot be capital.

In these and other ways have economists introduced, in place of the fundamental distinctions between fund and flow, and between wealth and services, the merely relative distinction between one kind of wealth and another. As a consequence, their studies of the problems of capital have been full of confusion. Among the many confusions which have come from overlooking the time distinction between a stock and a flow was the famous "wage fund" theory, that the rate of wages varies inversely with the amount of capital in the supposed "wage fund."

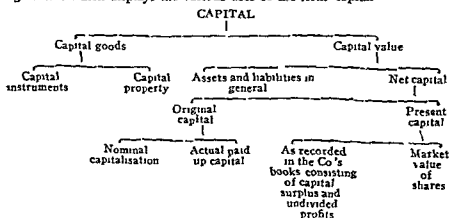
A little attention to business book keeping would have saved economists from such errors, for the keeping of records in business involves a practical if unconscious, recognition of the time principle here propounded. The 'capital account' of a railway, for instance, gives the condition of the railway at a particular instant of time, and the "income account" gives its operation through a period of time.

As to popular and business usage, it may be said that a careful study of this usage as reflected by lexicographers, who have sought from time to time to record it, reveals the fact that before the time of Adam Smith capital was not regarded as a part of the stock of wealth, but as synonymous with that stock.

In business manuals and articles on practical accounting we find that capital is employed in the sense of the net value of a man's wealth.

As one business man expressed it Capital is simply a book keeping term. Consequently the business man naturally associates the term with his shop and not his home for he keeps a balance sheet in the former and not in the latter but once given a balance sheet it does not matter what purpose is behind it. A social club, an art gallery, or a hospital may have a capital. In one year a joint stock company with capital stock was proposed for the purpose of building the yacht for defending the American Cup. If a private family should call itself a joint stock company and draw up a balance sheet entering all its property, house, furniture, provisions etc. on one side with the debts on the other, no business man we imagine would hesitate to call the balance of assets over liabilities which is the total wealth value of the family, by the name capital. As a business man said to the writer Capital is not a part of wealth but all a man has got including his automobile. Is that cigar in your mouth capital? he was asked. No, he said hesitatingly but this opinion he quickly reversed as inconsistent with his former statement and admitted that a box of cigars and each cigar in it or out of it for that matter were a part of his stock or reserve.

We see, then, that the capital of a person or firm has four separate meanings—the nominal capitalisation, the actual original paid-in-capital, the present accumulated capital or capital, surplus and undivided profits as given by the book keeper, and the market estimate of the same, *i.e.*, the value of the shares. These and the other senses of capital are given in the following scheme which displays the various uses of the term capital.



Were it not for an instinctive feeling that there exists a definite 'income' concept the repeated failure to formulate it might lead one to conclude that it is not susceptible of any exact and rigorous definition and that the best course is to abandon its search as futile.

Income (or outgo) always implies (1) capital as the source and (2) an owner of capital as the beneficiary. It will be observed that the

cost of reconstructing the house was entered in the accounts in exactly the same way as repairs or other 'current' costs. There may seem to be objection to such a proceeding in the thought that reconstruction appears to be not a part of 'running expense' but a 'capital' cost and belongs not to income accounts but to capital accounts. It is true that the *value* of the new house must be entered on the capital balance sheet but the *cost of producing it* belongs properly to income accounts. The former represents a *capital* the latter represents *disbursements*. The former relates to an *instant* of time (which may be any instant from the time it is begun till the time when it ceases to exist) the latter relates to a *period* of time (which may be all or any part of the time during which the labour and other sacrifices occasioned by the house occur). A house is quite distinct from the series of sacrifices by which it was fashioned. And yet it is undoubtedly true that we instinctively object to entering the cost of building the house in its income and outgo account, and we express the objection by calling this last a capital cost rather than a part of running expenses. By so classing it we mean that it does not recur or at any rate only at long intervals.

And this procedure (of taxing realised income) is very common in practice. It amounts to taxing not the *income* actually flowing from capital but its 'earnings' or the interest upon the capital. It is familiar in the general property tax in the United States. To some extent also the British income tax is an instance of the same fallacy. The general principle connecting realised and earned income is that they differ by the appreciation or depreciation of capital.

However logical some of these theories and distinctions might be and Professor Fisher's own theory is undoubtedly logical they do not easily solve the practical difficulty of distinguishing whether particular items in a concrete case constitute 'Capital' or 'Income'. Judicial decisions on the other hand have had to solve this problem and necessarily rest on a less logical footing. Business usage and company law the nature of the business distinctions between 'fixed' and 'circulating' capital the motives of persons the degree of control a person has over the receipt and similar considerations have been taken into account by the law courts as will be seen from the decisions set out in the body of the book. The position is very obscure and it is almost impossible satisfactorily to lay down any general principles as to what constitutes the distinction between Capital and Income and the extent to which the question is one of law or one of fact.

The various rulings on the subject are set out under section 2 (4)—Business, section 2 (6 C)—Income, section 3—Income and Capital section 4 (3) (iii)—Casual profits, and section 10 (2) (xi)—Capital expenditure.

HISTORY OF INCOME-TAX LAW IN INDIA

It would be scarcely relevant to the purpose of this book to detail the history of direct taxation in India in pre-British days. It hardly seems necessary therefore to refer to Manu or to Sânti Parva or to Kautilya nor even to less distant periods like those of Akbar or Sher Shah.

Direct taxation is not a novelty in India introduced by the British, as too commonly supposed, but a most ancient and well known institution. Indian Governments have, from time immemorial made the non agricultural classes contribute their share of the expenses of the State. To the Indian

mind in general, this appeared only just fitting, and to be contentedly borne. Between cultivators and traders, poor and rich no sense of unequal treatment could subsist under the system which the predecessors of the British in the Empire for centuries pursued. But when the British superseded them they gradually abolished the structure of direct taxation which their predecessors had laboriously raised. In the elder Provinces, that is, those that came under British rule first this change was consummated by about the year 1844 in the newer ones it took place later but the only survivals of the Indian system now are the Capital tax and the Thathameda in Burma. The last of them to be abolished was the Pindhari tax in the Central Provinces (The Capital tax and the Thethameda have also been abolished since). Where Indian States continued the taxation they retained their old method of direct taxation till recently when the force of circumstances has compelled them to copy British methods.

The British Government which had gradually abandoned direct taxation was obliged by financial necessities to revert to direct taxation in 1860. But instead of an indigenous model softened and adapted to local circumstances the Government unfortunately set up that of the income-tax as in force in England. To get direct taxation into good working order even after a suitable model would have been a work of time and care in the absence of the long standing record of the names and resources of house-holders which had been done away with in earlier days. But what except failure could attend a sudden call on relatively ignorant and unlettered millions, at short notice to assess themselves, or prove right of exemption to send in elaborate returns and calculations and to understand and watch their own interests under the system of notices surcharges claims abatements instalments penalties and what not consequent thereon? Necessarily, there followed a long train of evils. An army of tax assessors and collectors temporarily engaged could not be pure. They were aided by an army of informers, actuated by direct gain or private animosity. Frauds in assessment and collection went hand in hand with extortion in return for real or supposed exemption. Inquisition into private affairs fabrication of false accounts where true ones did not exist or were inconvenient acceptance of false returns rejection of honest ones unequal treatment of the similarly circumstanced all these more or less prevailed. The tax reached numbers not really liable for zamundars illegally recovered it from tenants and masters from servants while underlings enriched themselves by the threat of a summons. Acts XXI of 1861 and XVI of 1862 while affording relief in some respects practically stereotyped many inequalities and heart burnings. In later years the system of assessment by broad classes was an improvement on the earlier complications but the advance of local officers towards equitable assessment was perpetually being cancelled by the alterations in rate and liability.

Renewed direct taxation in British India thus made a false start from which it did not easily recover. Possibly with time and care a great improvement might have been effected if the law had remained unaltered. But unluckily, with its too English form, came the idea that the tax was to be as in England a convenient means of rectifying Budget inequalities and a great reserve in every financial or national emergency. In consequence of this idea incomes between Rs 200 and 500 which had been taxed at 2 per cent. in 1860 were exempted in 1862, the 4 per cent rate was reduced to 3 per cent in 1863 and the whole tax was dropped in 1865. In 1867 it

re appeared in the modified form of a licence tax, at the rate of only 2 per cent at most, but reaching down again to incomes of Rs 200. In 1868 it became a certificate-tax, at rates a fifth lower, and again commencing with a Rs 500 limit. In 1869 it became once more a full blown income-tax, at 1 per cent on all incomes and profits of Rs 500 and upwards. In the middle of the same year it was suddenly nearly doubled. In 1870 a further rise to fully $3\frac{1}{8}$ per cent occurred, but with better times the rate fell in 1871 to $1\frac{1}{24}$ per cent, with a limit of Rs 750 and in 1872 the limit was further relaxed to Rs 1,000 and upwards. In 1873 came a second period of total abolition, to be succeeded from 1877-78 by a new series of Acts. Along with the changes in rate and incidence just described came changes in name, form, classification and procedure. With one object or another twenty three Acts on the subject were passed between 1860 and 1886.

Owing to the perpetual changes, the people never certain who was liable or what was the sum due, were an easy prey for fraud and extortion while the superior officials, time after time found their labours thrown away, and a fresh battle with guesswork and deception to be begun. That both officials and people should in 1872 have united to condemn an impost hitherto associated only with such evils is not to be wondered at. Our abandonment of the machinery of direct taxation inherited from our predecessors was one of the things in us which the mass of the people disliked without being able to understand. Our new fangled and European attempts to retrace this policy seemed to them tyrannical compared with the rude expedients familiar to their fathers. All things considered the abolition of the income-tax in 1873 was probably the best thing that could then be done.

But direct taxation could not long be dispensed with. A new start was made in 1877. This start was, I think, decidedly well intentioned, made in considerable appreciation of past defects and desire to avoid them. It was wise to begin with trades and classifications, but it seems to me that too much was made of supposed local differences, and too much importance attached to local action. Bengal, Madras and Bombay passed Acts of their own. Northern India was dealt with by the Imperial legislature. As a necessary consequence, further legislation was soon needed to remedy inequalities. Some good was thereby effected, more would have resulted but for the, as I think, unfortunate abandonment of the Bill introduced in November, 1879.

Act VI of 1880, with the local Acts it amended was in force till 1886. Their continuance for five years unaltered, did a great deal to remove such evils as arose from frequent changes before. But there was still an unjust system of maximum everywhere, while the amount of maximum varied, and the classification essentially differed in different parts of India. The incidence differed with every class and the poor paid more in proportion than the rich, and the richer a man was, above a certain point, the less he had to pay. The measure was open to grave objections of principle and detail and the legislation of 1886 was therefore welcome."

The details of the provisions in the Acts that preceded the Act of 1886 are of little interest now as they do not throw much light either on the 1886 Act or its successors. The legislation of 1886 and again that of 1918 having made more or less a 'clean cut' with the past on each occasion.

The general structure of the 1886 Act was as below. Income was divided into four classes—(1) Salaries, (2) Interest on Securities, (3) Profits of Joint Stock Companies, (4) Other income, which included income from house property. All income was taxed, except agricultural income and most of the incomes now exempted under section 4 (3), *e.g.*, income of charities, were exempt either by the Act or by notifications. No tax was levied on the shareholder in respect of profits of companies which had already paid tax; nor was tax levied on the share received by a member of a Hindu undivided family. The rate of tax was 5 pies in the rupee on incomes over Rs. 2,000; salaries between Rs. 500 and Rs. 2,000 per annum and interest on securities were taxed at 4 pies per rupee. Income from other sources was taxed at fixed rates varying with the income (but roughly corresponding to 4 to 5 pies in the rupee). In 1903 the taxable minimum was raised to Rs. 1,000.

The machinery of the Act was simple. Except in very big cities, like Calcutta, Bombay and Madras, there were hardly any whole-time Income-tax Officers. The work was done by the Land Revenue Officers as a subsidiary activity. There was no obligation on individuals to furnish returns of income, nor, consequently, any penalty for not doing so. Tax on salaries of public servants and interest on securities was collected at source without much difficulty. Nor was there much trouble about Joint Stock Companies, which, however, were compelled to send returns of profits. But the law did not lay down any rules as to how profits were to be calculated. These details were regulated by rules or by executive orders. In respect of (4)—“Other Income”—which was by far the most important class, the Collector was allowed to assess summarily incomes below Rs. 2,000, and all that he had to do was to publish a list of such persons in his office, all of whom unless they objected within 60 days, became finally liable to the tax. In other cases, the Collector merely notified each assessee what amount had been assessed as tax. There was also provision for the Collector's calling for, but not compelling the submission of returns of income. Any assessee could petition the Collector against the assessment, and assessee's having to pay a tax of Rs. 250 or over and Companies had a right to apply to the Divisional Commissioner (or the Board of Revenue in Madras) for revision, and the Commissioner had discretion to entertain such applications even if the amount of tax was less. Both the Collector and the Commissioner had power to call for evidence, etc., but only at the instance of the petitioners or to verify facts alleged by them. The Collector had power to compound the assessment with an assessee—whether an individual or a Company—for a number of years.

It is unnecessary to detail the various minor amendments that were made to this Act from time to time. This simple machinery provided by this Act worked smoothly enough so long as the rate of tax was low. The rates fixed in 1886 were fixed with close reference to the cesses on land that had been imposed in the seventies of that century. So long as these low rates were in force, slight inequalities in assessment did not very much matter—either to the taxpayers or to the Government. In 1916, the War necessitated increased taxation and income-tax had to make up its share. The graduation was made steeper and the rates increased substantially.

The increase in the rates coupled with the steeper graduation called for a radical change in the whole system of assessment. The first change made was to provide for the refund of income-tax to shareholders of Companies (small incomes relief). This was in 1916. Pending a general revision of

the Act, the necessity for which was felt the law was amended in 1917 so as to compel in the case of assessees with an income of over Rs 2000 the production of returns on pain of a penalty both for false returns and for non-compliance. An assessee who failed to submit a return was also deprived of the right of appeal. These changes, however, were scarcely adequate and far more drastic changes were required.

In the first place it was necessary to abandon the old system of assessing a person's income in separate compartments without reference to his income from the other compartments, and to assess him with reference to his income from all sources together. In the second place, higher rates of taxation required a greater degree of precision in arriving at taxable profits etc. and it was therefore necessary to frame clear rules as to the calculation of profits, what expenses may be deducted from profits and what not. In the third place the machinery of assessment also required tightening up. These defects were remedied by the 1918 Act under which the Collector was empowered to call for returns of income in all cases and for evidence in support of it, and if necessary to enforce the attendance of persons (including the assessees) who could give useful information in connection with the assessments. Compounding taxes for a series of years was given up and new assessments could be made only for each year at a time based on the income of that year. The assessee was assessed provisionally on the income of the previous year and the assessment was finally adjusted at the end of the year with reference to the income of the year, the necessary refund or supplementary demand being made. The Commissioner of Income tax was vested with discretion to refer doubtful cases to the High Court *suo motu* or at the instance of the assessee if any question arose with reference to the interpretation of any of the provisions of the Act or the rules made under it. Provision was also made to tax non residents through their agents when the non resident principals and their income could not be got at directly. This Act of 1918 was much nearer to the present Act in its general features than to the Act of 1886 which it superseded. An attempt was also made by Government—though without success—to provide for the taxation of income of married women jointly with the income of their husbands and also to take agricultural income into account in determining the rate of tax payable by an assessee on his non agricultural income.

Within a few years even the new Act showed that it required substantial revision. This, however, was not unexpected. The Government of India appointed Committees in each Province composed of both officials and non-officials to examine the questions that arose and make the necessary recommendations. When these Committees had reported an All India Committee was appointed in 1921 and the recommendations of this Committee formed the basis of the Act of 1922 which is in force now, though it has been materially amended in many respects by over twenty-five amending Acts since 1922 and notably, on an extensive scale in 1939 apart from the formal amendments made by the Adaptation of Indian Laws Order in Council 1937. The amendments made in 1939 were largely based on the recommendations of a Special Inquiry Committee composed of two experts from England and one from India which made an investigation in 1935 and 1936. The law has been further amended several times since 1939.

Super tax.—A Super tax was first levied in India in 1917. The tax was levied on incomes over Rs 50,000 the tax being graduated on a 'slab' basis. The same rates were levied on Companies as on individuals and

Hindu undivided families but in the case of Companies only the undistributed profits were taxed the distributed profits being taxed in the hands of the shareholders, if they were liable to Super tax as part of their income. This arrangement discouraged the accumulation of undistributed profits and encouraged the distribution of profits beyond the limits of prudence and safety. The Act was accordingly recast in 1920 and the tax on Companies was levied on the entire profits less Rs. 50,000 at a flat rate of one anna in the rupee instead of on a graduated basis. The shareholder was not credited with the tax paid by the Company and the Super tax on Companies became, all but in name, a Corporation Profits Tax. But unlike the Corporation Profits Tax elsewhere it was not allowed to be deducted from taxable income for Income tax purposes. In other respects the general framework of the 1917 Act remained practically unaltered. Both the 1917 and the 1920 Acts were small Acts of a few sections each which had to be read in conjunction with the Income tax Acts of 1886 and 1918 which were referred to as the 'principal Acts'. When the Income tax Act of 1918 was amended in 1922 the Super tax Act also was incorporated therein and the present Act VI of 1922 as amended from time to time deals both with Super tax and with Income tax the rates being fixed every year by the Finance Act. From 1939-40 companies pay Super tax on the whole of their income without a free slab.

Excess Profits Taxation.—An Excess Profits Duty was levied in India for one year viz. 1919-20—see Act V of 1919. This duty was levied on the abnormal profits made by certain businesses in consequence of the then War.

An Excess Profits Tax was again levied in 1940—Act XV of 1940—taxing all excess profits made on or after the 1st September 1939. This Act has been since amended several times. The law follows generally, the corresponding legislation in the United Kingdom though differing in fairly important details.

SUMMARY OF PRESENT LAW

The body of the Law is contained in Act VI of 1922 (as amended). The amendments in 1939 in particular have so much elaborated the provisions that it is difficult to summarise them without omitting many details in themselves of considerable importance.

The Act relates to both Income tax and Super tax. Section 58 sub-section (1) mentions the sections that do not apply to Super-tax. The rates of Income-tax and Super tax are prescribed by the annual Finance Act.

The tax is levied not only on income as ordinarily understood but on certain capital receipts which have been included in a special definition of 'income, such as certain bonus shares and debentures and accumulated receipts from employer's contribution to provident funds [section 2 (6-C)]. Earned income, specially defined and broadly speaking representing income from personal exertion is entitled to an allowance and is also not included, to a limited extent in total income. (Section 15 A).

The tax is levied for each financial year (i.e. for the liability to the Exchequer for that year) on the income of the previous year' as defined in section 2, sub-section (11) of the Act that is briefly the previous financial year or a year ending on a date in the previous financial year up to which the assessee has made up his accounts. Thus the tax is levied in arrear on an ascertained income, except in special cases such as when a person is about to leave British India (section 24-A). An assessee cannot alter his

accounting year, except with the consent of the Income tax Officer. The financial year of Government ends on March 31st. The income of the previous year is both the basis and the measure of taxation. It is not as though the taxation was in respect of the income of the year in which the assessment was made and that the income of the previous year was deemed by a statutory convention to be the measure of the income of the year of assessment. (In this respect the basis of the Excess Profits Tax is entirely different). Hence no assessment is made in the first year in which a business is started but the first assessment is made after the close of the assessee's first accounting period on the profits of that period.

Similarly subject to certain provisions in sub-section (3) of section 25 relating to businesses that were taxed under the previous Income tax Act Act VII of 1918, and necessitated by the fact that under the Act of 1918 the assessment was on the income of the year of assessment and tax was provisionally levied on the income of the previous year subject to adjustment subsequently with reference to the ascertained income of the year of assessment an assessment is made on a business after it has finally closed down on the profits of its last working account year. [Sub-section (1) of section 25.]

The principal charging sections are sections 3 and 4 in regard to Income tax, and section 55 in regard to Super tax. (The Privy Council have considered section 6 to be the real charging section but that was in a different connection). Since 1st April 1939 both the taxes are levied on the 'slab system' prior to that date Super tax was levied on the 'slab system' and Income-tax on the 'step system' coupled with marginal relief at the stages where the rates increased. Further as from 1st April 1939 companies do not get a free first slab in respect of Super tax.

The rate of tax increases with the successive slices or slabs of the total income of the assessee computed according to the provisions of section 16 i.e., including income taxed at source and certain kinds of income not taxed. The total income and the taxable income (a term that is not to be found in the Act), that is the income to which the rate is to be applied in order to determine the actual amount of tax payable, may therefore vary considerably.

An 'assessee' is defined in section 2 sub-section (2) as a person by whom Income-tax is payable. The Act recognises the following classes of assesseees—Individuals, Hindu undivided families, firms (registered or unregistered), companies and other associations of persons i.e. both individuals and associations. (Section 3). The word person is used in the Act with reference to all classes of assesseees. It is specially declared to apply to a Hindu undivided family and to a local authority by section 2 sub-section (9). ~~Firm has the same meaning as in the Partnership Act~~ but registration for Income tax purposes has no reference to registration under the Partnership Act. A 'registered firm' under the Income-tax Act is merely a 'firm' constituted under an instrument of partnership specifying the individual shares of the partners of which the prescribed particulars have been registered by the Income tax Officer in the prescribed manner under the provisions of section 26-A and under statutory rules made under it. [Section 2 sub-section (14)]. An 'unregistered firm' means any other firm. [Section 2 sub-section (16)]. Prescribed means prescribed by rules made under section 59 of the Act by the Central Board of Revenue subject to the control of the Central Government. Rules 2 to 6-B of the Rules framed under the Act relate to the 'registration of firms'.

An unregistered firm is to a large extent treated as an individual. It pays both Income-tax and Super tax at the graduated rates, on successive slices of its income in excess of the free limit. A partner in an unregistered firm is not liable to Income tax or Super tax individually on his share in the profits of the firm if the firm has paid Income tax and Super tax thereon [Proviso to section 55 and section 14 (2)]. But his share of the profits is included in his total income to regulate the rate of tax on his other income under section 17 (2). [See section 16 (1)]

As from 1st April, 1939 a registered firm is not taxed as such. Under section 23 (5) its total income (or loss) is determined and apportioned between its partners &c. included in their respective total incomes tax being levied directly on them except in respect of tax not recoverable from non-resident partners. At the option of the Income tax Officer an unregistered firm may be dealt with like a registered firm.

The partner in a registered firm thus pays Income tax and Super tax on his share of the profits of the firm at the rates applicable to his total income including his share of the profits of the firm. The partner in an unregistered firm, on the other hand suffers tax on his share of the profits of the firm at the rates applicable to the profits of the firm which may be higher or lower than the rates applicable to his own total income. On the rest of his income, he suffers tax on the basis of section 17 (2), roughly speaking, on a *pro rata* basis.

In assessing a member of a Hindu undivided family to Income-tax or Super tax, his share of the income of the family is not taken into account at all. It is not even included in his 'total income' for the purpose of determining his personal rate of tax. [Section 14 (1) and section 16 (1)]

The Act applies to five 'heads' of income, profits and gains—(1) Salaries, (2) Interest on Securities (3) Income from Property, *i.e.*, 'buildings or lands appurtenant thereto' of which the assessee is the 'owner' and which he does not occupy for purposes of his business, profession or vocation [section 9 sub-section (1)], (4) profits and gains from Business, Profession or Vocation and (5) Income from other sources (Section 6). All 'income, profits or gains' derived under any of these five heads is liable to the tax in accordance with the complicated provisions of sections 4-A and 4-B *i.e.*, depending on where it accrues or arises or is received or deemed to accrue, etc. and to whom it accrues etc. *i.e.*, whether he is resident or not, and ordinarily resident or not. Roughly speaking, a non-resident is taxed on income accruing arising or received in British India and a resident, on his world income, if ordinarily resident in British India otherwise only on his British India income plus remittances from abroad unless his foreign income is from a business controlled in India (not British India) or a profession or vocation set up there in which case, the whole income would be liable. An important exception in the case of residents deals with income in Indian States (sections 14 and 17). Such income is included in 'total income', *i.e.*, for rate purposes, but not taxed, except in certain cases, until it is brought into British India. 'Residence' and 'ordinary residence' are specially defined by rather complicated formulae (sections 4-A and 4-B). Where foreign income is frozen, collection of tax on such income, if taxable, is postponed till the income is available (section 45).

'Salaries' include salaries paid by private as well as public employers. They also include fees commissions and perquisites of all kinds, including

the value of free quarters even though the quarters are not capable of conversion into money. They may be taxed on an accrued basis' [Section 7 (1)] 'Business' includes any trade, commerce or manufacture or any adventure or concern in the nature of trade, commerce or manufacture [Section 2 (4)] There is no definition of a 'profession' and for this we must seek guidance from rulings of courts.

There is no definition of what constitutes 'accruing or arising'. The views of courts have in the past oscillated between the idea of *receivability* in British India on the one hand and the *location of the source or origin of income* in British India on the other [see notes under sections 4 (1) and 42 (1)] and the position has become even more obscure as a consequence of the amendments in 1939 to sections 4 and 42.

Sections 7 to 13 describe how income shall be computed under each head. Salaries are income of the year in which they are received or due as the case may be. The only deductions permissible are subscriptions to Provident Funds constituted by Government or recognised under Chapter IX A, and insurance premia, the aggregate deductions being limited to 16th of the total income of the assessee. These deductions however, cannot be claimed for Super-tax. (Sections 7, 15, 16 and 58.) Section 8 deals with interest on securities and section 9 deals with property which is taxed on a notional income, i.e., on the 'annual value' which is defined as the sum for which the property might reasonably be expected to be let from year to year. Deductions are allowed for repairs, insurance premia, charges on the property, interest, land revenue, collection charges and vacancies. Also if the house is not let but occupied by the owner the annual value is limited to 10 per cent of the total income of the owner. Section 10 deals with business, profession or vocation carried on by the assessee. Subject to various restrictions, particularly with reference to payments to partners and to interest and salaries payable abroad, it allows for the following deductions: viz, rent paid for business premises and repairs thereto, interest on borrowed capital, insurance premia, repairs of plant, machinery, etc., depreciation and discarding of plant, machinery, etc., land revenue and local rates, etc. on the premises and all expenditure (other than capital expenditure) incurred solely for the purpose of the business, profession or vocation. Section 12 which deals with income from 'other sources' similarly allows for the deduction of all expenditure (other than capital or personal expenditure) incurred solely for earning the profits or gains, subject, however, to certain exceptions similar to those in section 10. Over and above the deductions referred to above, an allowance is admissible, since 1945, in respect of 'earned income' for the purpose of income-tax (but not for super tax), and a part of the 'earned income' is also not included in total income.

Section 13 deals with the method of accounting under sections 10 and 12. Under sections 7 to 9 the problem of the method of accounting does not ordinarily arise. Under section 9, it is a notional receipt and not the actual receipt that is taxed. It is only in respect of sections 10 and 12 therefore that the question of method of accounting has to be considered. Under section 13 the income should be computed in accordance with the method of accounting regularly employed by the assessee, but if no method has been regularly employed or if the method employed obscures the real profits the Income-tax Officer has absolute discretion to compute the income as he thinks best.

An assessee may set off the profits under one source against losses under another. Partners of registered firms including such unregistered firms as

are taxed like registered firms under section 23 (5), but not partners of other unregistered firms are allowed to set off their shares or net loss of the firm (after it has had set off) against their other profits.

An assessee is allowed to carry forward his losses (including the apportioned losses of a registered firm) and set them off against profits from the same business profession or vocation up to a limit of six years (the limit being one year in respect of loss of 1939-40, two years in respect of that of 1940-41 and so on till the limit of six years is reached).

Both Income tax and Super tax are deducted at the time of payment by every person paying salaries. On Interest on Securities normally only Income-tax is collected at source and at the maximum rate but in special cases Super tax also is collected at appropriate rates as also in respect of dividends to non residents in certain circumstances. Tax deducted at source is collected in advance on behalf of the assessee who will be assessed the next year and meantime the deductions at source are held to his credit. (Section 18) 'Securities' means securities of the Government of India or a Local Government and debentures or other securities for money issued by or on behalf of a local authority or a company. (Section 8) It should be noted that interest on debentures issued by a company is allowed as a deduction from the taxable profits of the company except in respect of certain foreign debentures in respect of which tax has not been deducted at source. Income tax on interest or securities is deducted at the maximum rate but certificates are issued by Income tax Officers authorizing the collection of tax at lower rates if the probable total income of the assessee justifies it [Proviso to section 18 (3)]. Owners of securities and persons in receipt of salaries are entitled to a refund if eligible with reference to their total income in the year. (Section 48) Non resident aliens are not eligible for refunds at all other non residents are allowed refunds on the basis of their world income. (Section 17) The tax on dividends is recovered as follows. Every company is liable to Income-tax on its profits, at the prescribed maximum rate and the tax paid by the company is deemed to have been paid on behalf of the shareholder [Section 18 (5)]. Every shareholder is entitled if he is not liable to pay tax at the maximum rate, on his personal total income including the dividends to a refund calculated on his dividends received from any company whose profits are liable to Indian Income tax at the difference between the rate applicable to his personal total income and the maximum rate borne by the company. [Sections 18 (5) and 48] Under the Finance Act Super tax is levied on the entire profits of every company at a flat rate. This Company Super tax is regarded as a Corporation Profits tax and is not regarded as in any sense paid by the company on behalf of the shareholder. Consequently a shareholder cannot get any refund in respect of the Company Super tax that he has indirectly suffered on his dividends. Further if his income including his dividends exceeds the free limit he is liable to pay Super tax irrespective of whether the company has paid the Company Super tax on its profits or not. A company that holds shares in another company is liable to the Company Super tax on its profits (including dividends received from the held company) irrespective of whether the held company has paid the Company Super tax or not but by special notification under section 60 in vestment companies which have been specially defined for the purpose are exempt from such multiple taxation.

The principal officer of a company may, in certain circumstances be required to deduct Super tax from dividends payable to a non resident share

holder. So also in certain circumstances as already stated a person paying Interest. In the case also of a subscriber to a recognised Provident Fund, receiving the non-exempt part of his accumulations Super tax is collected by deduction at source (Section 18)

In 1944, section 18 A was added, under which an assessee has to pay provisionally during the year of income—or rather the financial year preceding the financial year in which the regular assessment falls due—in four or less instalments—the estimated tax due on his income from sources to which section 18 is not applicable, this provisional payment being automatically adjusted when the regular assessment is made. This section was introduced as an anti inflationary measure and will therefore be presumably removed when conditions change after the war and indicate the need for reflationary measures

Assessments are made by Income tax Officers. From 1st April, 1939 persons with taxable income are bound to furnish returns of income *suo motu*, in response to a general notice published by the local Income tax Officer. The latter also has power to require persons, whom he considers to have derived a taxable income, to make a return of their total income in the prescribed form [Section 22, sub-section (2)]. Failure to make a return renders the defaulter liable to prosecution [Section 51 (c)] or to penalties under section 28. The Income tax Officer can also call on an assessee to produce accounts or other evidence [Sections 22 (4), 23 (2), 23 (3) and 37]. To enforce the production of evidence by third parties and also to compel the personal attendance of the assessee if necessary the Income tax Officer has been given the powers of a Court (Section 37) and false evidence given before him is perjury under the Indian Penal Code (section 52). The law also provides for the making of supplementary assessment in respect of escaped income within four years (or eight in cases of concealment) (Section 34) and for the rectification of apparent mistakes within four years (Section 35). Against the Income tax Officer's assessment, an appeal lies to the Appellate Assistant Commissioner. It is also open to the assessee to move the Income tax Officer to re-open 'default' assessments if he can show that his default was due to 'sufficient cause', and a right of appeal lies to the Appellate Assistant Commissioner against the order of the Income tax Officer refusing to re-open such assessment (Sections 27 and 30). Both the assessee and the Department can appeal against the orders of the Appellate Assistant Commissioner to the Appellate Tribunal (Section 32). The Commissioner has also power to revise, either *suo motu* or at the instance of the assessee, any order passed by any of his subordinates, but in no circumstances to the prejudice of the assessee, always provided (broadly) that the assessee waives or has lost his rights of appeal (Section 33). In any case in which there is a right of appeal under section 32 and it has been exercised the assessee or the Commissioner may require the Appellate Tribunal to refer any question of law arising out of the appellate order to the High Court [Section 66, sub-section (1)]. When the Tribunal rejects a petition for reference on the ground of time bar, a preliminary reference on that point lies to the High Court. If the Tribunal refuses to make a reference the assessee may move the High Court direct to order the Tribunal to make a reference

[For five years from 1931, when the minimum taxable limit of income was lowered from Rs. 2,000 to Rs. 1,000, the successive Finance Acts provided for a procedure of summary assessment of incomes below Rs. 2,000]

Roughly stated it was open to the Income tax Officer to assess such a person without calling for a return of income and it was open to the assessee who so received a notice of demand to file a return of income and have his case dealt with under the ordinary procedure]

Again from 1942 to 1945 inclusive the Finance Acts provide for a summary procedure for the depositing with a Government of certain fixed sums in lieu of taxation in the case of incomes below Rs. 2000 per annum, and also for the refund to assesseees with incomes not exceeding Rs. 6000 per annum of a fraction of the tax.

The functions of the Civil Courts are strictly limited to the disposal by the High Courts of references on points of law (Section 67). An appeal lies to the Privy Council from the decision of the High Court if the High Court certifies that the case is a fit one for appeal (Section 66-A.)

Income tax Officers, Assistant Commissioners both Appellate and Inspecting and Commissioners of Income tax and members of the Appellate Tribunal are all Government officials (Sections 3 and 5 A.)

Assistant Commissioners may be either Inspecting or Appellate, and the statute requires the Income tax Officer in certain specific cases to act with the previous approval of the Inspecting Assistant Commissioner. No directions may be given by higher authority to appellate Assistant Commissioners in the discharge of their appellate functions.

Tax is recovered either by the Income tax Officer himself [Sections 45 and 46 (1)] or by the Collector of the District as an arrear of land revenue [Section 46 (2)] or as an arrear of Municipal tax or other local rate [Section 46 (3)]. Except in certain special cases no proceedings may be started for the recovery of any arrears after one year [Section 46 (7)].

For the taxation of Hindu undivided families in the first year after partition see section 25 A.

There are special provisions for the taxation of tramp ships (sections 44 A to 44 C), the taxation of certain classes of persons under disability *cestui que trusts* and non residents (sections 40 to 43), and for the taxation of transferred and discontinued business (sections 25 and 26) and also for the taxation of persons about to leave British India and of executors of deceased persons (sections 24 A and 24 B).

There are special sets of provisions to deal with cases in which tax is evaded, e.g., section 16 (1) (c) and (3)—transfer of income by trusts or to wife and minor children and partnership with wife or minor children, section 23 (5)—option to assess a firm either as registered or as unregistered section 23 A—treating certain companies as having distributed all their profits section 44 D—transfer of assets abroad and sections 44 E and 44 F—bondwashing.

Any notice or requisition under the Act can be served by registered post or as a summons under the Civil Procedure Code (Section 63). An assessee may appear in all Income tax proceedings either in person or by a duly authorised representative who should be a lawyer or an accountant or an Income tax practitioner or an employee or a relative (Section 61). Every person deducting or paying tax in accordance with the Act on income belonging to another person is indemnified (Section 65).

All documents accounts etc. which officers of the Income tax Department receive in connection with assessments, appeals etc., are confidential,

and the disclosure of any of these, except for the purposes of the Act, and certain other specified purposes, is an offence punishable with imprisonment for six months and also a fine. No such prosecution may be made except at the instance of the Commissioner (Section 54)

The law exempts the following kinds of income from taxation [section 4 (3)]—Income of charitable and religious trusts including voluntary contributions received by such institutions, income of local authorities, but not income from business outside their jurisdiction, interest on securities held by certain Provident funds, casual and non recurring receipts not arising from the exercise of a business, profession or vocation, agricultural income and special allowances given to meet expenditure incurred in connection with the performance of duties. Power is also given to the Central Government under section 60 to exempt, or modify the tax in favour of any class of persons or any class of income and to give relief in individual cases to persons receiving in a single year heavy arrears of salary relating to earlier years but the former power can be used after 1st April, 1939, only to restrict relief already granted and not to extend such relief or grant relief in new cases.

The exemption of contributions to, and of the income from investments of, Provident Funds to which the Provident Funds Act, 1925, does not apply is regulated by an elaborate code of provisions—chiefly Chapter IX-A, section 4 (3) (ix) and section 15 (3), so also, in respect of Superannuation Funds Chapter IX B.

The law also provides for the refund of a part of the Income tax paid on income which has been taxed both in India and in the United Kingdom (section 49) and permits the Government to make similar arrangements, by notification with Indian States and other parts of the British Empire (Section 49 A). There are special arrangements by Orders in Council with certain parts of the British Empire.

The law provides for the levy of penalties by the Income-tax Officer, for the following offences—for not giving notice of discontinuance of business (section 25), for concealment of income (section 28) for not furnishing returns (*ibid*) and for delay in paying tax [section 46 (1)]. It also provides for the prosecution before a Magistrate of persons who fail to perform the duties with which they are charged under the Act *e.g.*, failure to submit returns or accounts, failure to collect or pay the tax deducted at source, refusal to allow books to be seen. Such prosecutions can be made only at the instance of the Inspecting Assistant Commissioner who can also compound the offence. Sections 51 to 53.)

CONSTRUCTION—RULES OF

As regards the rules of construction of Statutes, the reader is referred to any standard text book on the Interpretation of Statutes. The general rules, however, are summarised below, and a few authorities have been cited, more especially those relating to Revenue cases.

Words—Construction of—The rules about construction of words are as below

If a special definition of a word or words is given in the Act, it should be adopted if not repugnant to the context, *Reg v. Goind and others*, 16 Bom 283, failing this, the definition if any, in the General Clauses Act of the same legislature, *Woomesh Chunder Bose v Soorjee Kanto Roy Choudhry*, 5 Cal 713, and failing this the meaning should be ascertained

by ordinary rules. It is unsafe to refer to definition clauses in other statutes even of the same legislature, *Adamson v Melbourne and Metropolitan Board of Works*, 1929 A.C. 142. If there are interpretation clauses in the statute referring to other Acts [e.g., "Public servants" in section 2 (13) or "judicial proceeding" in section 37 of the Income tax Act] it should not be assumed that the thing defined has annexed to it every incident attached to it in the other Act by the legislature. *Uma Churn Bag v Ajadunnissa Bibee*, 12 Cal. 430.

The first ordinary rule of interpretation of words is, that words import a popular meaning when employed in a statute ought to be construed in the popular sense unless the legislature has defined the words in any other sense. *Reg v Inam Ali etc.*, 10 All. 150. *Yorkshire etc.*, *Co v Clayton*, 1 Tax Cases, 479, 485. 'What we ought to do in this case it not being free from difficulty, is to choose that which I should say, is the natural meaning of a word used in a statute not specially relating at all to the technicalities of real property law or to conveying in particular but relating to a matter of business for this is a Finance Act and therefore using language which is to be read from a business point of view. —per Kennedy, J., in *Commissioners, Inland Revenue v Gribble*, (1913) 3 K.B. 212 followed by Sankey, J., in *Neville Reid & Co v Commissioners, Inland Revenue* 1 A.T.C. 237, 12 Tax Cases 545 see also *Commissioner of Income tax, Bombay v Ellis Reid*, 55 Bom. 312. But words of known legal import are to be considered to have been used in their technical sense or according to their strict acceptation unless there appears to be a manifest intention of using them in the popular sense, *Rhodeskrishna Ghose v Koylash Chunder Bose*, 4 B.L.R. 82, 91, *Collector of Trichinopoly v Lekamani*, 14 B.L.R. 115, *Special Commissioners v Pemsel*, 3 Tax Cases 53. Regard should therefore be given to any peculiar sense which words may have acquired in Indian law. On the other hand, particular words may have a different meaning in a taxing Act from what they would have in an Act of another kind. *Apthorpe v Peter Schoenhofen Brewery* 4 Tax Cas. 54. And in any case the words of a statute should be understood in the sense they bore when the statute was passed, *Yorkshire, etc.*, *Co v Clayton*, 1 Tax Cases 483, *Gurwar Singh v Thakur Narain Singh*, 14 Cal. 730. If, however, the context or the declared intention of the Act or provisions contained in other parts of the Act, e.g., the absence of machinery to carry into effect the wider, and possible meaning show that general words are not to be read in their understood sense they must receive a more limited meaning, *Shidlingapa v Karisbasapa*, 11 Bom. 599, *Reg v Ramchandra Narayan and another*, 22 Bom. 152, *Colquhoun v Brooks*, 2 Tax Cases 490. In *Colquhoun v Brooks*, 2 Tax Cases 490, in which the assessee resided in the United Kingdom and profits accrued or arose to him from business outside the United Kingdom, it was contended on behalf of the assessee that on the analogy of certain decisions under the Legacy and Succession Duty Acts which without the limitations imposed by the decisions, would have applied even if neither the testator nor the legatee nor the property was within or had some relation to the United Kingdom, the Income tax Act also should be limited in its application. The House of Lords held that the Acts were not analogous. In the Income tax Act, specific limits are laid down as to who is taxable and in respect of what part of his income, whereas the Legacy and Succession Duty Acts imposed no such definite limits. At the same time, 'I am far from denying that if it can be shown that a particular interpretation of a taxing statute would operate unreasonably in the case of a

foreigner sojourning in this country it would afford a reason for adopting some other interpretation if it were possible consistently with the ordinary canons of construction — *Per* Lord Herschell in *Colquhoun v Brooks*, (*supra* at p 504) Unless explicitly stated otherwise when a statute deals with things in general words it deals only with things over which the legislature has jurisdiction (*ibid*)

If general words are used it must be assumed that the Legislature is dealing only with persons and things or circumstances within its territory. Clear and precise words are necessary before an Act can be taken to apply to matter beyond such jurisdiction *Jeffreys v Boosey* (1854) 4 H.L. Cases 815 *Colquhoun v Heddon* (1890) 2 Tax Cases 621 *R v Jameson*, (1896) 2 Q.B. 421

in any case the Crown does not tax by analogy but by statute it is not for us to say nor do we know what the Legislature may or may not have meant apart from their words by which we are bound alike to what they say and in what they do not. Words which impose tax in general terms may still receive a particular limitation when the computation rules omit the directions appropriate and indispensable to levying the tax in a particular case *per Lord Sumner in Ormond Investment Co Ltd v Betts*, 13 Tax Cases 400, 1928 A.C. 143 at p 158

If the construction of words in a technical sense produces inequality and in a popular sense equality the latter may be chosen *Special Commissioners v Pemsel* 3 Tax Cases 53. There is no presumption in favour of the exemption of a few from the incidents of a general tax on the contrary the presumption is in favour of equality and against the partiality implied by exemptions. Equality and impartial justice in the incidence of taxation are of greater moment than the construction of taxing statutes in a liberal sense favourable to the subject *Commissioner of Income tax, Bihar and Orissa v Maharaja Visteesar Singh* 14 Pat 785 1935 I.T.R. 216

In an enumeration of different subjects general words following specific words may be construed with reference to the antecedent matters and the construction restricted by treating them as applying to things of the same kind as those previously mentioned *John Poulson & Co v Madhurudan Paul Choudhry* 1 B.L.R. Supp Vol 101 at p 105 *Trustees of Psalms and Hymns v Whitwell* 3 Tax Cases 7 *Stradysoda & Co v Board v Benstead*, 5 Tax Cases 230 unless of course there be something to show that a wider sense was intended (*Maxwell on Statutes* 6th edition pp 592-593). This is known as the doctrine of *eiusdem generis*. But this doctrine cannot apply when each of the words preceding the general word is generically distinct from the rest and is exhaustive of its own genus *In re Purra Clund & Co Ltd* 27 Cal 1023 or when only one specific word precedes the general word *Rix v Special Commissioners Ex parte Shaftesbury Homes & Co* 8 Tax Cases 367. There is no room for this doctrine in the absence of any mention of a genus and the mention of a single species by itself cannot constitute a genus. Thus where a company was liable for "water rates" but otherwise exempted from taxation it was unsuccessfully contended by the Crown that the Company was exempt only from taxation of the nature of water rates i.e. from local taxation only *Indo-Tenants Electric Co v Attorney General of Newfoundland* 18 A.T.C. 204 (P.C.) Language

is always used *secundum subjectam materiam* and it must therefore be understood in the sense which best harmonises with the subject matter, *Chartered, etc., Bank v Wilson*, 1 Tax Cases 192. When considering what is of ambiguous import the whole context ought to be regarded, *Reith v Westminster School*, 6 Tax Cases 486

A word which occurs more than once in the same Act should be construed uniformly unless a definition in the Act or the context shows that the word has been used in varying senses, (*Bajnath v Sital Singh*, 13 All 224, where the point is discussed at length, *Mahomed Akil v Assadunnessa Bibee*, B L R. Supp Vol 774), *Colquhoun v Heddon*, 2 Tax Cas 628

Unless there is anything repugnant in the subject or context, words importing the masculine gender include females, and words in the singular, the plural and *vice versa*. (Section 13 of the General Clauses Act)

The following words deserve special mention

Include—"Shall include" is a phrase of extension and not one of restrictive definition, it is not equivalent to 'shall mean' *R v Kershaw*, 6 E & B 1007, 26 L J M C 19, *R v Hermann*, 48 L J M C 106, 4 Q B D 284, 27 W R 475, 40 L T 263

"The word include is very generally used in Interpretation Clauses in order to enlarge the meaning of words or phrases occurring in the body of the statute and when it is so used, these words or phrases must be construed as comprehending not only such things as they signify according to their natural import but also those things which the interpretation clause declares that they shall include. But 'include' is susceptible of another construction which may become imperative, if the context of the Act is sufficient to show that it was not merely employed for the purpose of adding to the natural significance of the words or expressions defined. It may be equivalent to 'mean and include,' and in that case it may afford an exhaustive explanation of the meaning which, for the purposes of the Act, must invariably be attached to these words or expressions"—*Lord Watson in Dilworth v Commissioner of Stamps*, 1899 A.C. 99, 105, 106, 68 L J P C 4, see also *R v Goring and others*, 16 Bom 283, *Vyankaj v Sarjee Rao Appaji Rao*, 16 Bom 537

May—Though dicta of eminent Judges may be cited to the contrary, it seems plain conclusion that 'may,' 'it shall be lawful' 'it shall and may be lawful' 'empowered,' 'shall hereby have power,' 'shall think proper', and such like phrases, give, in their ordinary meaning, an enabling and discretionary power. "They are potential and never (in themselves) significant of any obligation,"—*Lord Selborne in Julius v Oxford*, (1880) 5 App Cas 214, 235. 'They confer a faculty or power, and they do not of themselves, do more than confer a faculty or power', and therefore, where the point in question is not covered by authority, "it lies upon those who contend that an obligation exists to exercise this power, to shew, in the circumstances of the case, something which according to the principles I have mentioned, creates this obligation,"—*Lord Cairns in Julius v Oxford*, (1880) 5 App Cas 214. On that case Cotton, L.J., observed "'May' never can mean 'must,' so long as the English language retains its meaning, but it gives a power, and then it may be a question in what cases where a Judge has a power given him by the word 'may,' it becomes his duty to exercise that power,"—*Re Baker Nichols v Baker*, 59 L J Ch. 661; 44 Ch D 262

Julius v Bishop of Oxford (Supra) may be regarded as the leading case on the principles therein referred to by Lord Cairns for construing as obligatory, phrases which in their ordinary meaning are merely enabling His Lordship, in that case gathers those principles into the following proposition —

"Where a power is deposited with a public officer for the purpose of being used for the benefit of persons (1) who are specifically pointed out, and (2) with regard to whom a definition is supplied by the Legislature of the conditions upon which they are entitled to call for its exercise that power ought to be exercised and the Court will require it to be exercised" *Julius v Oxford*, (1880) 5 App Cas 214 225

And the following supplemental proposition may be gathered from the judgment of Lord Blackburn in the same case —

Enabling words are construed as compulsory, whenever the object of the power is to effectuate a legal right, and if the object of the power is to enable the donee to effectuate a legal right, then it is the duty of the donee of the power to exercise the power, when those who have the right, call upon him to do so

'May', and such enabling words as those above referred to therefore, group themselves into two classes according as they impose or give —

I An Obligatory Duty,

II A Discretionary or Enabling Power

(Stroud's Jud Dictionary, Vol II pp 1173, 1174)

See *Alcock Ashdown & Co v Chief Revenue Authority*, 1 ITC 221 where the Privy Council applied the above principles in construing 'may' in section 51 of the Indian Income tax Act of 1918

Discretion — 'Where something is left to be done according to the discretion of the authority on whom the power of doing it is conferred, the discretion must be exercised honestly and in the spirit of the statute, other wise the act done would not fall within the statute 'According to his discretion,' means, it has been said, according to the rules of reason and justice, not private opinion, *Rooke's Case*, 5 Rep 100-A, *Keighley's Case*, 10 Rep 140 B, *Eastwick v City of London*, Style, 42-43, per Willes, J in *Lee v Bude Ry*, LR 6 CP 576, 40 LJ CP 288, according to law and not humour, it is to be not arbitrary, vague, and fanciful but legal and regular, per Lord Mansfield in *R v Wilkes*, 4 Bur 2839, to be exercised not capriciously, but on judicial grounds and for substantial reasons per Jessel, MR in *Re Taylor*, 4 Ch D 160, 46 LJ Ch 400, and per Lord Blackburn, in *Doherty v Allman*, (1878) 3 App Cas 728 And it must be exercised within the limits to which an honest man competent to the discharge of his office ought to confine himself, per Lord Kenyon, in *Wilson v Rastall*, 4 TR 757, that is, within the limits and for the objects intended by the legislature' (Maxwell, Interpretation of Statutes 7th Edn, pp 109, 110)

You cannot lay down a hard and fast rule as to the exercise of Judicial Discretion, for the moment you do that "the discretion of the Judge is fettered," per Brett, MR, in *re Friedeberg* 54 LJP D & A 75, (1885) 10 PD 112, Cf per Bowen, LJ, in *Jones v Curling*, 53 LJQB 373, 13 QBD 262 (Stroud's Jud Dictionary, p 542.) See also *SPK & AM Chettyor Firm v Commissioner of Income tax, Burma*, 4 ITC 182

Year — The word 'year' is used in varying senses in the Act But it will be seen from the notes under each section that the Act uses it normally

in possibly *ex majore cautela* in one section, does not affect the interpretation to be put on a subsequent section if the language of the latter in itself is clear, *Furtado v City of London Brewery*, 6 Tax Cases 382

As between two rival constructions, one of which, without adding any words to the statute, provides a perfectly reasonable and intelligible result, without depriving any subject of any benefit of alleviation of taxation, save only an obviously unintended and unexpected alleviation while the other not only involves the assumption of words ('if any') not in the statute, and on such assumption deprives for no apparent reason, the subject of a benefit enjoyed for many years the former is to be preferred *Union Cold Storage Co v Simpson Eng* (1939) 2 All Reports 94 (CA) Where more than one construction is possible the more reasonable and practical one should be followed, *Commissioner of Income-tax, Bengal v Mahaliram Ramjidas*, 1910 ITR 442 (PC)

In certain circumstances the principle of contemporary exposition," may be invoked *Emperor v Probhat Chandra Barua*, 1 ITC 284, 51 Cal 504 and *Maharajahdhiraj of Dharlhanga v Commissioner of Income tax*, 1 ITC 303, 3 Patna 470 It is seldom useful however, to try to interpret one statute by another *Garland v Archershee*, 15 Tax Cases 734

Also every attempt should be made to avoid inconsistency of meaning *Sugdin v Leeds Corporation*, 6 Tax Cases 211 *Colquhoun v Heddon*, 2 Tax Cases 621, *Governors of Sutton's Hospital v Elliott*, 8 Tax Cases 155, *Grant v Langston* 4 Tax Cases 217 but if this is impossible the latter passage in the Act must be held to override the earlier *Ajudhia Prasad v Balmukund*, 8 All 354, *Wood v Riley* (1867) LR 3 CP 26 A particular enactment should be construed strictly as against a general provision, *Churchill v Crease*, (1828) 5 Bing 177, *De Winton v Brecon Corporation*, (1859) 26 Beav 533

Proviso.—A proviso or saving clause or exception prevails over the substantive part which it follows *Attorney General v Chelsea Waterworks*, (1731) Fitzgibbon p 195 If a proviso is unnecessarily inserted, in order to except a case which does not fall within the enactment and only in order to remove misapprehension it cannot be inferred from this that cases otherwise outside the enactment would fall within it as they have not been specifically excepted *West Derby Union v Metropolitan Life Assurance Society*, (1897) AC 647 Though a proviso may be used as a guide in selecting one or other of two possible constructions of the enactment if that is ambiguous it cannot be used by mere implication to import into the enacting part, which is unambiguous words which are not there *West Derby Union v Metropolitan Life Assurance Society* (1897) AC 647

If a section specifically grants exemption to certain persons or bodies of persons it does not necessarily follow that every other person is brought within the scope of the impost, other persons not specifically referred to may also be exempt This is not a case to which the principle *expressio unius est exclusio alterius* can be applied as a matter of course *Special Commissioners of Income tax v Pemsel*, 3 Tax Cases 53 See also *Umar Baksh v Commissioner of Income tax, Punjab*, 5 ITC 402 and notes under section 4 (3) (i) and (ii)

Uniformity of Construction.—A universal law, like Income-tax, cannot receive different interpretations with reference to different localities, *Special Commissioners of Income tax v Pemsel* 3 Tax Cases 53, see also *Umar Baksh v Commissioner of Income tax, Punjab*, 5 ITC 402 and

notes under section 4 (3) (i) and (ii). It was held in the *Pemsel* case that if statutes apply to more than one country (e.g. England and Scotland), 'you must reason by analogy you must take the meaning of legal expressions from the law of the country to which they properly belong and in any case arising in the sister country you must apply the statute in an analogous and corresponding sense so as to make its operation and effect the same in both the countries'.

Retrospective effect—There is no vested right in procedure and alterations in procedure may be interpreted retrospectively but a right of appeal is a matter of substance and cannot be presumed retrospectively by an alteration in a statute in the absence of clear terms. *Colonial Sugar Refining Co v Irving* (1905) A.C. 369. *Dillu Cloth and General Mills v Commissioner of Income tax* 9 Lah 284 (P.C.). *Sheik Itar ur Rahman v Commissioner of Income tax Punjab* (1934) I.T.R. 339.

Where there has been a change in the law and the new law does not provide to the contrary, it is the making of the assessment and the date thereof that determines the applicability of the new law whether in respect of liability or of rate or of exemptions and reliefs even though the income earned in an earlier year is the material out of which the assessment is made. *Jattu Shah Nattu Shah v Commissioner of Income tax Punjab* A.I.R. 1932 Lah 575. *Commissioner of Income tax v Sind Hindu Permanent Funds* 1940 I.T.R. 467. *Commissioner of Income tax Madras v Maharaja of Pithapuram*, 1942 I.T.R. 1.

It is only when an amending section avoids transactions that express words are necessary to create retrospective effect. *Barerjee v Commissioner of Income tax P & O*, 1941 I.T.R. 137.

Consolidating Statutes—A codifying or consolidating measure should be construed as far as possible with reference to its natural meaning as it stands without reference to the previous state of the law otherwise the very object of the codification viz., the avoidance of reference to previous enactments would be defeated. But a reference to the previous law would be justified if the new measure was ambiguous. *Roger Pyat Shellac Co v Secretary of State*, 1 I.T.C. 363. *Administrator General v Prem Lal Mullick* 22 Cal 788 (P.C.) see *Bank of England v Vaughan Price*, (1891) A.C. 107 114. *Norendranath Sircar v Kamal Pasani Dan* 23 Cal 563 (P.C.). If the same words are used in a consolidating Act as in the original Act and if the words in the original Act have been judicially interpreted that interpretation should be followed in construing the consolidating Act also. *Stewart v Conservators of River Thames v Tax Cases* 297. Since that decision (*Cook v Knott* 2 T.C. 246) the rule has been re-enacted in the same terms and I should hesitate long before overruling a decision which has stood for 38 years and upon which subsequent legislation may have been based. per Cive L.C. in *Locketts v Colquhoun* 10 Tax Cases 118. Ordinarily a consolidating Act introduces no changes except of words and arrangement but if the change in words makes a change in the meaning on ordinary principles of construction it will be necessary to give effect to the change see per Lord Sumner in *Clare and Hey v Ha v Betts*, (1927) A.C. 443 11 Tax Cases 469.

As regards alterations in law or language the Legislature must be taken to intend any change beyond what it explicitly declares in express terms or by unmistakable implication. *Chief Commissioner of Income tax v Zaminidar of Singampattinam* 1 I.T.C. 181, 45 Mad 318. "If the language

used in the amending Act is reasonably capable of being construed so as to leave the procedure substantially as it was, we ought, in my opinion, so to construe it — *R v Bloomsbury Commissioners Ex parte Hooper*, (1915) 3 K.B. 768 769, 7 Tax Cases 69 But the presumption that a change of language necessarily indicates a change of intention ought not to have too great weight attached to it *Emperor v Probhat Chandra Barua* 1 ITC 284, 51 Cal 504 There are such things as attempts at a more graceful style and the elimination of superfluous words It should however be assumed that in re enacting a particular clause or section the Legislature was aware of the construction put by Courts on it *Stewart v Conservators of River Thames* 5 Tax Cases 279 and the amendments must be construed with reference to the state of the law that it was proposed to amend *Attorney General v London County Council*, 4 Tax Cases 265, *Corporation of Birmingham v Barnes*, 12 A.T.C. 358

Remedial sections—Construction of—A remedial enactment or section should be construed liberally *Chartered Mercantile Bank of India v Wilson* 1 Tax Cases 185 *Farmer v Cotton's Trustees* 6 Tax Cases 590 604, and a penal one strictly, *Perumal v Municipal Commissioners of Madras*, 23 Mad 164 In construing an exemption clause no word which would extend the exemption may be left out nor is generalisation permissible for the purpose of holding one word to be synonymous with another, if in fair construction it is capable of receiving an independent signification, *Muat v Stewart*, 2 Tax Cases 607 A privilege or exemption ought always to be taken into account whether assessment is made under one part of a tax Act or another part of the same Act *Hughes v Bank of New Zealand (CA)* 53 TLR 258 In *re North British and Mercantile Insurance Co, Ltd* (1937) I.T.R. 349 (Cal) The plain words of a remedial statute must not be restricted by interpretation to the removal of the particular mischief which led to the enactment *Corporation of Birmingham v Barnes*, 19 Tax Cases 216 An act by which the jurisdiction of the ordinary courts is taken away should be construed strictly, *Prosunno Coomar Paul Chowdhury v Koylash Chunder Paul Choudhry*, B.L.R. Supp Vol 759 Limitation should also be construed strictly i.e. in favour of the person whose right is the subject of limitation *Manekji v Rustomji* 14 Bom 269 Though appeals are the creation of statutory enactment and must be affirmatively given and not presumed *Reg v Vajiram* 16 Bom 414 *Colonial Sugar Refining Co v Irving* (1905) A.C. 369 *Rangoon Botataung Co v Collector of Rangoon* (1912) 39 I.A. 197, a party should not be deprived of the right of appeal, except by express words or necessary implication *Rance Shurno Mayee v Iachmeeput Doogur*, B.L.R. Supp Vol 694 and if the words of a section giving a right of appeal are ambiguous they ought to receive a liberal construction i.e., as far as possible, so as to give an appeal *Zain ul Abdin Khan v Ahmad Khan* 2 All 67 A statute must not be so construed as to take away benefits already conferred by previous legislation unless that intention is plainly expressed. It cannot be inferred from ambiguous language, *Union Cold Storage Co v Simpson*, (1939) 2 All Eng Rep 94 (C.A.) If a case can be brought under either of two provisions the assessee is entitled to be brought under the (to him) more favourable of the two, *Posotto Bros v Commissioner of Income tax, Madras*, 1940 I.T.R. 41

While a statute imposing a duty should be construed strictly this can only be in respect of the liability imposed, the principle cannot be extended

to mere matters of procedure devised as the best means in all ordinary circumstances to collect the impost. On the general principle of avoiding injustice and absurdity, any construction should be rejected if escape from it were possible, which enabled a person to defeat a statute or impair his obligations by his own act or otherwise profit by his own wrong *Coran v Wright*, (1887) 18 Q.B.D. 201, 204, *Gopalasami Chettiar v Secretary of State for India*, (1933) I.T.R. 289

Rules—The rules made in pursuance of a delegated authority must be consistent with the statute under which the rules are made. The authority is given to the end that the provisions of a statute may be the better carried into effect, and not with the view of neutralising or contradicting these provisions, *Rajam Chetti v Seshayya*, 18 Mad. 236, 245. When a power to make regulations is given by statute, no regulations made under it can abridge a right conferred by the statute itself, *Queen v Bird and others*. Ex parte *Needles*, (1898) 2 Q.B. 340. Delegated power may not be further delegated without express provision to that effect *Reg v Merriam Chetti*, 17 Mad. 118.

If there is a conflict between two rules or between a rule and a section of the Act, the position must be dealt with exactly as in the case of a conflict between two sections, and if no reconciliation is possible the rule would ordinarily be treated as the subordinate provision and made to give way to the section *Institute of Patent Agents v Lockwood*, (1894) A.C. 347, *Minister of Health v The King* (1931) A.C. 494, *In re North British and Mercantile Insurance Co., Ltd.*, (1937) I.T.R. 349 (Cal).

Where the statute is only permissible and allows alternatives, and a rule has been made of a mandatory nature giving no alternative, the Crown can not fall back on the Act and seek an alternative not allowed by the rule. *Lakshmi Insurance Co. v Commissioner of Income tax, Punjab*, 5 I.T.C. 24 (Lah).

In rules, forms and notifications issued under the Act words shall have the same meaning as in the Act unless there is something repugnant in the subject or context (Section 20 General Clauses Act).

The rules under the Income-tax Act are primarily rules for the guidance of fiscal officers, and not quite of the nature of rules of procedure of Civil Courts. They should therefore be interpreted according to their plain meaning and not stretched by judicial interpretation *Commissioner of Income-tax, Bombay v Ellis Reid*, 55 Bom. 312 per Barlee, J., at p. 321. See also per Kennedy J., in *Commissioners of Inland Revenue v Griddle*, (1913) 3 K.B. 212 and per Sankar, J., in *Verville Reid & Co. v Commissioners of Inland Revenue*, 12 Tax Cases 545.

Under section 21 of the General Clauses Act, the power to make rules includes the power to add to amend vary or rescind orders rules and notifications.

Machinery sections—In interpreting a section in a taxing Act relating to the machinery of assessment and not imposing a charge on the subject, that construction should be preferred which makes the machinery workable—*ut res valat potius quam pereat*, *Commissioner of Income tax, Bengal v Mahaliram Ramjadas*, 1940 I.T.R. 442 (P.C.).

Practice—Special importance is attached to practice—i.e., the interpretation placed by the Revenue authorities—in respect of fiscal law, *Stewart Commissioners v Pemsel*, 3 Tax Cases 53, *Commissioner of Income tax*

v Ramanathan Chetti, 43 Mad 75^h 1 ITC 37 *Madras Provincial Co-operative Bank v Commissioner of Income tax*, (1933) ITR 165 *Shrinathi Lakshmi Dair v Commissioner of Income tax, B and O*, 1944 ITR 309 but this is done usually when the practice is in favour of the subject. But there is no obligation to pay tax—not clearly and expressly imposed by the law—even though the tax may have been paid by mistake for a long time. *Pole Careu v Craddock* 7 Tax Cases 488. Nor is the practice of the Revenue authorities binding on the Courts one way or the other. *Killing Valley Tea Co v Secretary of State* 1 ITC 54 48 Cal 161 *Associated Newspapers v City of London Corporation* (1916) 2 AC 429 *Chunamal Saligrasi v Commissioner of Income tax Punjab* AIR 1931 Lah 320. Nor could a Court give effect to a practice not warranted by the provisions of the Statute. *Glenzay Co v Lethem* 6 Tax Cases 453. No weight will be given unless the practice is of long standing. *Bhikanpur Sugar Concern Case* 1 ITC 29.

Miscellaneous—Affirmative words without a negative expressed or implied do not take away an existing right. *Collector of Trichinopoly v Lekaman* 14 BLR 115 and an enactment conferring a narrow and limited right does not take away a larger right if it exists apart from the enactment but it has the effect if the apparent intention of the legislature is that the two rights should not exist together per Lord Cranworth, LC in *O Flaherty v M Dowell* (1857) 6 HLC 142=10 ER 1248. *Kanu Ram Das v Mozaffar Hosam Shaha* 14 Cal 809.

The following general principles also should be followed. General provisions do not derogate from special provisions but the latter derogate from the former. In the absence of express legislative directions the Courts should be guided by justice equity and good conscience. Every statute should be interpreted so as not to conflict with the comity of nations and accepted principles of International Law.

Besides these there are various well known maxims of interpretation e.g. *expressio unius est exclusio alterius stare decisis contemporanea expositio* etc. of varying degrees of importance in practical application and for an exposition of these principles the reader is referred to any treatise on the Interpretation of Statutes.

Question of law—The proper construction of a statute is a question of law. *Great Western Railway v Baler* 8 Tax Cases 244 (HL). Or to put it in another way judicial interpretation when of general application is a question of law. *Commissioners of Inland Revenue v Livingston and others* 11 Tax Cases 545.

TAXING ACT—CONSTRUCTION OF

The rules of construction of Taxing Acts are set out in the following leading cases—

If the person sought to be taxed comes within the letter of the law he must be taxed however great the hardship may appear to the judicial mind to be. On the other hand if the Crown seeking to recover the tax cannot bring the subject within the letter of the law the subject is free however apparently within the spirit of the case he might otherwise appear to be. In other words if there be admissible in any statute what is called an equitable construction certainly such a construction is not admissible in a taxing statute where you can simply adhere to the words of the statute per Lord Cairns in *Partington v Attorney General*, (1869) LR 4 E & I App HL 100 p 122.

“I quite agree we ought not to put a strained construction upon that section in order to make liable to taxation that which would not otherwise be liable but I think it is now settled that in construing these Revenue Acts as well as other Acts, we ought to give a fair and reasonable construction and not to lean in favour of one side or the other on the ground that it is a tax imposed upon the subject and therefore ought not to be forced unless it comes clearly within the word. That is the rule which has been laid down by the House of Lords in regard to the Succession Duty Acts and I think it is a correct rule per Cotton L. J., in *Gill v. Pearson v. Ferguson* (1881) 7 Q.B.D. 562 p. 572 1 Tax Cases 501

“No tax can be imposed on the subject without words in an Act of Parliament clearly showing an intention to lay a burden on him. But when that intention is sufficiently shown it is I think vain to speculate on what would be the fairest and most equitable mode of levying that tax. The object of those framing a Taxing Act is to grant to Her Majesty a revenue no doubt they would prefer if it were possible to raise that revenue equally from all and as that cannot be done to raise it from those on whom the tax falls with as little trouble and annoyance and as equally as can be contrived and when any enactments for the purpose can bear two interpretations it is reasonable to put that construction on them which will produce these effects. But the object is to grant a revenue at all events even though a possible nearer approximation to equality may be sacrificed in order more easily and certainly to raise that revenue and I think the only safe rule is to look at the words of the enactments and see what is the intention expressed by those words per Lord Blackburn in *Coltress Iron Co. v. Black* (1881) 6 App. Cases 315, p. 330 1 Tax Cases 287

“This is an Income tax Act, and what is intended to be taxed is income. And when I say ‘what is intended to be taxed’ I mean what is the intention of the Act as expressed in its provisions because in a Taxing Act it is impossible I believe to assume any intention any governing purpose in the Act, to do more than take such tax as the statute imposes. In various cases the principle of construction of a Taxing Act has been referred to in various forms but I believe that may be all reduced to this, that inasmuch as you have no right to assume that there is any governing object which a Taxing Act is intended to attain, other than that which it has expressed by making such and such objects the intended subject for taxation, you must see whether a tax is expressly imposed. Cases therefore, under the Taxing Acts always resolve themselves into a question whether or not the words of the Act have reached the alleged subject of taxation’ per Lord Wensleydale in *In re Micklethwait*, (1885) 11 I.C. 452 at p. 456

“It is a well established rule that the subject is not to be taxed without clear words for that purpose and also that every Act of Parliament must be read according to the natural construction of its words’ per Lord Wensleydale in 11 Ex. 456 quoted with approval by Lord Halsbury L.C. in *Tennant v. Smith* (1892) A.C. 150 at p. 154 3 Tax Cases 158

I am rather disposed to repudiate the notion of there being any artificial distinction between the rules to be applied to a taxing Act and the rules to be applied to any other Act. With regard to all Acts and

all documents you have to apply your best mind to it to look at the question all round, get all the light that you can throw on it and see what seems to be the meaning of the expressions used. It would not be satisfactory to say that, if this Act applies to anything else than taxation, you might require a less degree of certainty or an inferior exercise of the process of reasoning to attempt to arrive at its meaning, than you should apply in respect to a Tax Act' per Willis, J, in *Styles v Treasurer of Middle Temple*, 4 Tax Cases 123

"I see no reason why special canons of construction should be applied to any Act of Parliament and I know of no authority for saying that a taxing Act is to be construed differently from any other Act. The duty of the Court is, in my opinion, in all cases the same, whether the Act to be construed relates to taxation or any other subject, viz, to give effect to the intention of the Legislature, as the intention is to be gathered from the language employed having regard to the context in connection with which it is employed. The Court must no doubt ascertain the subject matter to which the particular tax is by the statute intended to be applied but when once this is ascertained it is not open to the Court to narrow or whittle down the operation of the Act by seeming considerations of hardship or of business convenience or the like. Courts have to give effect to what the Legislature has said. per Lord Russell, C.J, in *Attorney General v Carlton Bank*, (1899) 2 Q B 158, 164

"No tax can be imposed except by words which are clear, and the benefit of the doubt is the right of the subject," per Fitzgibbon, L.J, in *In re Finance Act, 1894 and Studdert*, (1900) 2 Ir R. p 400, see also *Commissioner of Income-tax, Burma v Phra Phraison Salarak*, 6 Rang 508, *In re Harkishandas* AIR 1931 All 401

'I know of no law which prevents a man from avoiding a duty which has not attached to the property. A man is perfectly entitled, if he can, to avoid the payment of duty by disposing of his property in any way not forbidden by the Act. The argument that his motive is to escape duty appears to me wholly irrelevant, because a man is perfectly justified in avoiding and escaping the duty which will arise in the future but which has not yet attached to any property which he possesses' per Farwell, L.J in *Attorney General v Richmond & Gordon*, (1908) 2 K B 729, 743

In taxation matters, one cannot go into the merits of the dispute but has to apply the relevant statutes to the facts of the case. *Kelly v Rogers*, 19 Tax Cases 699 without regard to considerations of equity or Lordship, see *Whimster & Co v Commissioner of Inland Revenue*, 12 Tax Cases 824, *Ormond Investment Co v Betts*, 13 Tax Cases 434, and *Kleiman v Winckworth*, 17 Tax Cases 572.

"The Crown however must make out its right to the duty, and if there be a means of evading the stamp duty, so much the better for those who can evade it. It is no fraud upon the Crown, it is a thing which they are perfectly entitled to do,' per Lord Esher, M.R, in *Commissioners, Inland Revenue v Angus*, 23 Q B 579, 593

Any one is entitled to conduct his affairs within the law so as to avoid incidence of taxation, *In re Central Talkies Circuit*, 1941 I.T.R. 44 (Bom)

"Arguments based upon the ground of injustice have but little weight in determining the true meaning of an Act of Parliament unless indeed

its provisions are so ambiguous that the hardship inflicted by one construction can be based to show that such a purpose could not be properly attributed to the Legislature' per Lord Buckmaster in *Wankie Colliery v Commissioners Inland Revenue* 1 A.T.C. 125

'I think however that considerations of justice and injustice have not much to do with modern direct taxation, they belong to a different order of ideas. Taxation is concerned with expediency or in expediency. It regularly results in one person being burdened for another's benefit in the sense that the subject who pays the tax may be the last person to benefit by the expenditure of it' per Lord Sumner in *ibid*

'Equity and Income tax are strangers' per Lord Sands in *Commissioners of Inland Revenue v Granite City Steamship Co* 6 A.T.C. 678

'I agree that this case was not contemplated, but when one gets cases under the taxing law which cannot be contemplated it does not do to make assumptions as to what they would have said had they contemplated the case. I think you have simply to look and see what they have said'—per Rowlatt, J. in *Commissioners of Inland Revenue v Ryde Pier Co*, 4 A.T.C. 513

Statutory language cannot be construed by asking which construction will most benefit the Revenue'—per Lord Sumner in *National Provident Institution v Brown* 8 Tax Cases 57

'But even in a Taxing Statute it is legitimate to consider which of two possible constructions is more in accordance with the spirit and intention of the Act'—per Lord Salvesen in *Scottish Shire Line v Lethem*, 6 Tax Cases 91

Substance is to be looked at in Revenue matters, not machinery and form. *St. Louis Breweries v Aphorpe*, 4 Tax Cases 111. See also the following cases *Oriental Bank Corporation v Wright*, (1880) 5 A.C. 842; *Cox v Rabbits*, (1878) 3 A.C. 473; *Lord Advocate v Fleming* (1897) A.C. 145; *Pryce v Monmouthshire, etc. Companies*, (1879) 4 A.C. 197; *Simms v Registrar of Probates*, (1900) A.C. 323; *Stockton Railway Co v Barrette*, (1844) 11 Cl. & Fin. 590

The above cases were reviewed in the *Duke of Westminster's Case* 19 Tax Cases 490 (H.L.). " it is said that in revenue cases there is a doctrine that the Court may ignore the legal position and regard what is called the substance of the matter. This supposed doctrine seems to rest for its support on a misunderstanding of the language used in some earlier cases. The sooner this misunderstanding is dispelled and the supposed doctrine given its quietus, the better it will be for all concerned for the doctrine seems to involve substituting 'the uncertain and crooked cord of discretion' for the golden and straight meted wand of the law" per Lord Tomlin *ibid*. Similar observations were made by the Privy Council in *Bank of Chettinad v Commissioner of Income Tax Madras*, 1940 I.T.R. 522. "The doctrine (of substance as against form) has in the past been invoked for the purpose of treating a transaction of one legal character as though it were a transaction of a different legal character, and in so far as that doctrine was enumerated, certain observations with regard to it are to be found in the speeches in the *Duke of Westminster's case*. But the method of approach to this problem, which appears to me to be the correct one, does not fall within any discredited portion of that, old doctrine but falls within its permissible limits because it does not involve putting upon a

transaction between parties a character which in law it does not possess. It involves discovering what is the true character in law of the transaction which was entered into per the Master of Rolls in *Commissioners of Inland Revenue v. Miallaby Deeley*, 17 A TC 503 (C.A.)

A strict interpretation may prohibit the importation of any extraneous matter into any statutory enactment but will not justify the elimination or subtraction of any material ingredients from it. If a plain word carries a plain sense in the English language however strict the law may interpret it it will not ignore the ordinary meanings which it carries. *Madan Mohanlal v. Commissioner of Income tax Punjab* (1935) ITR. 438

The technicalities of a taxing statute should be strained if at all in favour of the subject and not against him. *Commissioner of Income tax, UP v. Beharilal Ramchandra* (1937) ITR 417 (Oudh). In case of doubt a fiscal law should be interpreted in favour of the subject. *Beharilal Bhargava v. Commissioner of Income tax UP* (1941) ITR. 9 (All). See also *Stockton & Darlington Railway v. Barrett* (1844) 11 Cl & F 590 and *Pryce v. Monmouthshire Canal & Rail way Companies* (1878-79) 4 A.C. 197

See also the following cases in India. *Killing Valley Tea Co v. Secretary of State* 1 ITC 54 48 Cal 161. *Roe & Co v. Secretary of State* 1 ITC 16. *Imperial Tobacco Co v. Secretary of State* 1 ITC 169 49 Cal 721. *Sundardas v. Collector of Gujarat*, 1 ITC 189 3 Lah 349. *Commissioner of Income tax v. Kamanathan Chetti* 1 ITC 37 43 Mad 75. *Rajni Prasad Singh v. Commissioner of Income tax B & O* 9 Pat. 914. *In re Makund Sarup* 30 All 495. *In re Bai Sa Sakinabo* AIR 1932 Bom 116. *Commissioner of Income tax Punjab v. Jrvandas* 10 Lah. 657 and also *Commissioner of Income tax Bombay v. C B Mehta* (1935) 1 ITR. 376 following *Pollock C B in the Dock Company at Kingston upon Hull v. Browne*, 2 B & Ad 43

Where it is desired to impose a new burden by way of taxation, it is essential that this intention should be stated in plain terms. The Courts cannot assent to the view that if a section in a taxing statute is of doubtful and ambiguous meaning it is possible out of the ambiguity to extract a new and added obligation not formerly cast upon the taxpayer per Lord Buckmaster in *Smith and Co v. Greenwood & Tax Cases* 193 cited by Chatterjee J. in *Rogers Pyatt Shellack Company v. Secretary of State* 1 ITC. 363

In construing a fiscal statute the Court has no concern with disputable questions of distributive justice—this upon the plainest ground that by very strong presumption the Legislature has not intended that questions of equality or fairness in taxation should be left to any decision save its own per Rankin C.J., in *Emperor v. Probhat Chandra Baru* 1 ITC. 284 51 Cal 504 at page 508

Manifest mistakes—Although in construing fiscal enactments Courts should ordinarily insist upon the subject taxed being clearly within the words of the law and decline to extend its scope when there is any ambiguity, they cannot exclude from their consideration the fact that the context discloses a manifest inaccuracy. In such cases, the sound rule of construction is to eliminate the inaccuracy and to execute the true intention of the Legislature. *Jennings v. President Municipal Commission* 11 Mad 253

Double taxation—Presumption against—In the United Kingdom it is now a well recognised principle that the various taxing Acts do not autho

rize the Crown to take income-tax twice over in respect of the same source for the same period of time and that this can be done only under specific statutory authority. As Lord Sumner said in *Bradbury v English Sewing Cotton Co., Ltd.*, 8 Tax Cases 481. 'Though the Acts nowhere say so this principle has long been assumed. Whether the contention may ever be raised that the Crown is not bound by mere conventions of fair play, current from time to time, hitherto, at any rate, the binding force of this principle has not been questioned. A construction resulting in double taxation of the same income would require the support of very clear words to that effect, In re *John & Co.*, 43 All 139. See also *Manindra Chandra Nandi v Secretary of State*, 34 Cal 257, *Emperor v Probhat Chandra*, 1 ITC 284, 61 Cal 504 in both of which the issue was somewhat different, viz., whether the Indian Income-tax Act specifically authorized the levy of tax on incomes that may have already borne some other tax.

Precedents—Use of—As to the use of decided cases Halsbury L.C., said in *Quinn v Leatham*, (1901) Appeal Cases 495 (506) —

'There are two observations which I wish to make and one is that every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found. The other is that a case is an authority for what it actually decides. I entirely deny that it can be quoted for a proposition that may seem to follow logically from it."

At the same time precedents are not to be lightly departed from—

"We have not however, succeeded in laying down a rule which would be consistent with the existing legislation and decisions on the subject and would at the same time be capable of being satisfactorily worked and we are strongly impressed with the importance of not unsettling the law as established by past decisions when we cannot lay down a rule that is not open to exception'—Per Blackburn J. in (1863) 4 B & S 135 146 quoted with approval by Lord Macnaghten in *The General Accident, etc Corporation v McGowan* 5 Tax Cases 308 [1908] A.C. 207

'Statements, however contained in a judgment which go beyond the occasion and lay down a rule which is unnecessary for the purpose in hand have no binding authority." In re *Mahabram Ranjidas* (1938) ITR 265 (Cal)

English decisions—Applicability of—Though Income tax has been in force in India for quite a long time it is only in the last thirty years or so that the tax has been sufficiently heavy or administered with sufficient strictness to result in disputes. The case law on the subject has, however, been growing rapidly in recent years. In deciding many problems, Indian Courts have still sometimes to find guidance in precedents in the United Kingdom. Though in *North Anantapur Gold Mines v Chief Commissioner of Income-tax*, 1 ITC. 133 44 Mad 718 and in other cases High Courts considered that the Income-tax law in the United Kingdom may be usefully followed where the provisions are similar the precedents have had to be applied with great caution in view of the wide differences between the United Kingdom and the Indian law. This has been stressed by the Privy Council who 'would discard altogether the case law which has been so painfully evolved in the construction of the English Income tax Statutes

The Indian Act is not *in pari materia* it is less elaborate in many ways subject to fewer refinements and in arrangement and language it differs greatly from the provisions which the Courts (in the United Kingdom) have to deal under such conditions little can be gained by attempting to reason from one to the other, at all events (when) the solution of the problem lies very near the surface of the Act and depends mainly on general considerations *Commissioner of Income tax Bengal v Shaw Wallace & Co Ltd* 5 ITC 211

To the same effect were their observations in *Bejoy Singh Dudhuria v Commissioner of Income tax, Bengal*, 60 Cal 1029 *Pondicherry Railway Company Ltd v Commissioner of Income tax Madras*, 54 Mad 691, *Commissioner of Income tax Madras v Fletcher* (1937) ITR 428, *Gopal Saran v Commissioner of Income tax, Bihar and Orissa* (1935) ITR 237 and *Commissioner of Income tax Bombay v Mehta* (1938) ITR 521 See also *In re Indian Iron & Steel Co, Ltd* (1941) ITR 539 (Cal) In respect of certain general concepts however in regard to which the statute is silent in both countries *e.g.*, the distinction between income and capital the test of what constitutes a business or a profession the criterion of what constitutes expenditure necessary for earning the income ignoring the destination of the income etc the case law as evolved in the United Kingdom furnishes some useful guidance English judgments can therefore be utilised as aids in interpreting analogous provisions in the Indian law, though not as binding authorities on these matters where the language of the two Acts differs *In re Amritsar Produce Exchange Ltd* (1937) ITR 307 Though caution is necessary in applying decisions in a British Income-tax Act to the Indian Income tax Act reasoning in British rulings to the extent that it is of a general nature and is not affected by the specialities of the British Act can be applied to elucidate the Indian Act *Commissioner of Income tax, Bengal v Mahaliram Ramjidas* (1940) ITR 442 (P.C.) English decisions have no binding authority on the construction of the Indian Act, and though they may sometimes afford help or guidance cannot relieve the Indian Courts from their responsibility of applying the language of the Act to the particular circumstances that emerge under conditions of Indian life *All India Spinners' Association v Commissioner of Income tax, Bombay* (1944) ITR 482 (P.C.)

Even in respect of such general concepts *e.g.*, in regard to the relevancy of the locality where income accrues or arises as a basis of liability to tax there are substantial differences between the law in this country and in the United Kingdom It will be seen—to take an outstanding example—from the decision of the Madras High Court in the *Madras Export Company Case* 1 ITC 194 and from the decisions of the Calcutta High Court in the *Rogers Pyatt Shellac Case*, 1 ITC 363 and of the Rangoon High Court in *Steel Bros Case*, I.L.R. 3 Rang 614 that there is considerable difficulty in following United Kingdom precedents even in respect of seemingly similar provisions See also the observations of the Privy Council in *C B Mehta's Case* referred to above (1938) ITR 521

The Indian Income tax Act being in the English language the words used in it should according to the Madras High Court be given the same meaning as in similar statutes in the United Kingdom *Commissioner of Income tax, Madras v Jamal Muhammad*, (1941) ITR 375

The machinery of assessment and collection is also quite different in the United Kingdom and in India. In the United Kingdom the law attempts

to utilise non official agencies to a considerable extent in assessments but this is almost a formality in many respects as will be seen from the following extract from the Report of the Royal Commission on Income tax in 1920 —

"This smooth working of the machine has been rendered possible only by considerable deviations from the scheme originally conceived little by little (the) plan has been departed from and every change has been in the direction of making over to the Inspector of Taxes the exercise of powers that theoretically belong to the Local Commissioners and their officials. Many of the recommendations that we have to make are directed towards recognising and giving legal sanction to these developments

PREVIOUS STATUTE—EFFECT OF—EXEMPTIONS

The question how far the Indian Income-tax Act overrides exemptions from taxation conferred by previous statutes has arisen in respect of permanently settled estates. The revenue payable by these estates was settled permanently about the year 1800 in accordance with the policy that then prevailed. These estates are mostly in Bengal Bihar and parts of Assam, and the Northern Circars of Madras, and there are also some 'islands of permanently settled tracts—some of them fairly extensive—even in the ryotwari parts of Madras. Later on the policy of the East India Company changed and permanent settlements were not extended elsewhere. The question has often been raised how far the permanent settlement precluded the levy of further taxation. In some of the Income tax Acts that preceded the Act of 1886 permanently settled estates were taxed. All agricultural income was taxed and no distinction was made between permanently and temporarily settled estates. From 1877 however, agricultural income was not taxed and both classes of estates escaped taxation. But additional cesses and imposts for various purposes road cess, education cess embankment and drainage cess, cost of settlements between landlords and tenants etc. have since been levied on the permanently settled estates and though all these levies have evoked protests the legislature has never admitted that the permanent settlement gave absolute immunity from future taxation. In *Manindra Chandra Nandi v Secretary of State for India*, (1907) 34 Cal 257, it was contended before the High Court of Calcutta that income from royalties on coal in permanently settled lands should be exempted both from local cesses and from Income-tax. Curiously however, the objection then taken to the levy of the latter was not that it contravened the permanent settlement but that royalties were of the nature of capital receipts and that, in any case the same income should not be taxed twice over, once to local cesses and once to Income tax. The levy of Income-tax on the non agricultural income of permanently settled estates was not objected to as a breach of the terms of the permanent settlement.

In later years, however, the question was raised in several cases. In *Chief Commissioner of Income tax v Zamindar of Singampatti*, 1 ITC 181, a Full Bench of the Madras High Court (Ayling Coutts Trotter and Ramesam, JJ) decided that the non agricultural income of permanently settled estates was not taxable. In *Emperor v Probhat Chandra Barua* 1 ITC 284, a Divisional Bench of the Calcutta High Court (Rankin and Page JJ) decided that it was. There was a difference of opinion between the two judges and the view of the senior judge (Rankin J) prevailed. In *Maharajahdhray of Darbhanga v Commissioner of Income tax*, 1 ITC 303,

the Patna High Court (Dawson Miller, C.J. and Mullick, J.) held that the income was not taxable. Here again the judges differed and the view of the Chief Justice prevailed. In *Indu Bhushan Sarkar v Commissioner of Income tax*, 2 I.T.C. 221 a Divisional Bench of the Calcutta High Court (Cuming and Page JJ.) differed from the ruling in the *Barua* case and held that the income was not taxable. In *Inspector v. Prabha Chandra Barua* 54 Cal 863 a Full Bench of five judges of the Calcutta High Court considered the question and (by a majority of three judges Ghose, Buckland and Panton, JJ., to two Mukherjee and Suhrawardy JJ.) decided that the income was taxable. The question was finally set at rest in the same case (57 I.A. 228) by the Privy Council who held that while the permanent settlement regulations contained assurances against any claim to the increase of the *Jama* based on increase in Zemindari income they contained no promise that the Zemindar in respect of income derived from the Zemindari would be exempt from any liability in any future general scheme of property taxation or that the income of the Zemindar would not be subjected along with other incomes to any future general taxation of incomes 57 I.A. 228.

The question of applying the rule of construction laid down in *Steward v Vera Cruz* (1884) 10 App. Cas. 59 that general words in a later statute should not be held to repeal earlier legislation on a particular matter can arise only if both pieces of legislation deal with the same subject matter. Regulation 1 of 1793 relates to the *jama* of each estate while the Behar Agricultural Income tax Act deals with a tax on agricultural income. The question of derogation therefore does not arise. *Hulas Narain Singh v Behar*, (1942) I.T.R. 115 (F.C.)

There is no analogy, however, between the position of a proprietor of a permanently settled estate who has entered into a permanent agreement with Government and that of a conquered Raja who is deposed and reduced to the position of a tenure holder. *Radha Mohun v Commissioner of Income tax* 2 I.T.C. 453.

By a treaty of 1803 a landholder (Raja) undertook *inter alia* to pay a tribute to the Government who stated in return that no further demand however small shall be made on the said Raja or received from him as nazar, supplies or otherwise. The question arose whether Income tax could be levied on the non agricultural part of the Raja's income and was answered in the affirmative. The Income tax Act imposes a tax on all persons in British India without exception and must therefore be deemed by necessary implication to have repealed all earlier exemptions. If there be any earlier legislation or a treaty between the sovereign power and the subject for special exemption from future taxation followed by the introduction by the sovereign power at a later date of legislation which admittedly but for the claim to the earlier exemption applies to and includes the person originally exempted it follows that by necessary implication the later statute repeals the earlier statute or other Act under which the exemption is claimed. A repealing implication is effected when the provisions of a later enactment are so inconsistent with or repugnant to the provisions of an earlier one that the two cannot stand together. *Rajendra Narayan Bhanja Deo v Commissioner of Income tax B & O* (1937) I.T.R. 111.

United Kingdom Law—Section 213 of the United Kingdom Income-tax Act 1918 lays down that no letters patent granted by the Crown of any exemption from tax and no statute granting payments free of tax can exempt a person from tax but Parliament can by legislation subsequent to a

general taxing Act confer exemption from that Act, *Argyll (Duke of) v Commissioners of Inland Revenue*, 7 Tax Cases 225. Where a statute confers exemption from taxes, the exemption *prima facie* applies only to taxes in existence at the time of passing of the statute. *Associated Newspapers, Ltd v London Corporation*, (1916) 2 A.C. 429 but if the terms of exemption are wide enough it may apply also to future taxes including income-tax. *Pole Carew v Craddock*, (1920) 3 K.B. 109, 7 Tax Cases 488 (C.A.)

In the *Ancholme Drainage Act*, 1767, it was laid down that 'all taxes, tolls rates and duties to be raised by virtue of the Act shall at all times hereafter be exempted from the payment of any taxes, rates assessments or impositions whatsoever, any law or statute to the contrary notwithstanding'. It was held that the exemption applied to Income-tax also and was not confined to local taxes only. There was no reason to limit the generality of the words of the Act and there was nothing in the context to justify such a course. *Ancholme Drainage Commissioners v Weldhen* 20 Tax Cases 241 (1936) 1 All E.R. 759. In *Sinclair v Cadbury Bros* 18 T.C. 156, land which was exempt from all taxes by a Statute 1660 was used for business purposes and it was held that for the purposes of income tax the annual value of the land should be deducted from the profit of the trade in the usual course as otherwise the exemption would be nullified.

A statute must not be so construed as to take away benefits already conferred by previous legislation, unless the intention to do so is plainly expressed. Such intention cannot be inferred from ambiguous language. *Union Cold Storage Co v Simpson* (1939) 2 All Eng. Rep. 94 (C.A.)

In a colonial case, *United Towns Electric Co v Attorney General of Newfoundland*, 18 A.T.C. 294 (P.C.), the company was by an Act liable for 'water rates' but exempt from all other taxation, and it was contended by the Crown unsuccessfully that the exemption must be confined on the principle of *ejusdem generis* to taxation of the type of water rates, i.e., to local taxation as distinguished from Provincial or Federal taxation.

INCOME-TAX LEGISLATION—THEORY OF—INTERNATIONAL ASPECTS

'It is the principle of domicile that regulates the levy of Income tax

This is certainly the rule in most of the systems and that it should be so is perhaps to some extent accounted for by the fact that attempts to levy and to collect Income tax in a foreign country would very frequently encounter insurmountable difficulties"—Bar's International Law quoted by Seshagiri Iyer, J., in *Commissioner of Income tax v Ramanathan Chetty*, 43 Mad. 75. The 'domicile' refers to persons as well as property or business, otherwise it is difficult to see how the above extract represents the same view as in the following extract from Wharton's Conflict of Laws Vol. I, which also the learned judge quoted as stating the same view—

'The power of taxation of any State is, of necessity, limited to persons, property or business within its territorial jurisdiction. The principle is so fundamental that it has been declared that an act of State legislature in violation thereof would be as much a nullity as if in conflict with the most explicit constitutional inhibition.'

It is obvious that a tax cannot be enforced unless either the country is the place of 'origin' of the income, i.e., there is a source of income there, whether tangible or not or the country is the place of 'domicile' of the

tax payer', i.e. he resides in the country (Domicile is not used in a legal but in an economic sense) Otherwise the country has no means of imposing taxation. The principles of domicile and origin are applied in varying degrees by different countries. Though the principles are clear enough when stated in the abstract they are exceedingly difficult of application in practice as it is not easy to state what is the cause or the source of the income. The result is continual and acute conflict between the fiscal interests of different countries on the one hand and a heavy burden in the shape of double taxation on the tax payer on the other. Political as well as economic considerations stand in the way of any really satisfactory arrangements being made between different countries. The problem is more difficult and obscure than jurists have generally assumed it to be as will be seen from the voluminous literature produced on the subject under the auspices of the League of Nations.

THE POSITION OF THE CROWN

It is a maxim in English law that the Crown is not bound by an Act of Parliament unless by express enactment referring to the Crown in unambiguous terms. The Crown therefore is not ordinarily within the scope of a Taxing Act. In India however the position has been somewhat different. See *Bell v. Municipal Commissioners for the City of Madras*, 25 Mad. 457 in which Bell the Superintendent of the Government Gun Carriage Factory was successfully prosecuted to conviction for failure to pay Municipal licence fees on account of timber belonging to Government.

Per Benson J.—In England owing to historical causes the Legislature has proceeded on the view that the Crown is not bound by a Statute unless named in it and we therefore find that the Crown is in many Statutes expressly stated to be bound but it is impossible to say broadly that in India the Crown is not bound by a Statute or the taxing provisions of a Statute unless expressly named in it. Such express inclusion is altogether exceptional. It would be more correct to say that, as a general rule the Indian Legislatures have proceeded on the assumption that the Government will be bound by the Statute unless expressly or by necessary implication excluded from its operation. Government when a party to litigation pays Court fees just as other suitors do because there is no special exemption in favour of Government in the Court Fees Act. On the other hand Government is specially exempted from the payment of stamp duties under the General Stamp Act, 1899 section 3 proviso 1 in cases where but for this exemption the Government would be liable to pay the duty chargeable in respect of such instrument. This amounts to a statutory declaration that Government would be liable to pay the duty but for the special exemption. In like manner goods belonging to Government are specially exempted from duty under the Sea Customs Act and the Indian Tariff Act and it would be easy to enumerate many other Acts in which exemptions are made in favour of Government on the evident assumption that but for such exemption the Government would be bound. 25 Mad. 466.

Per Bhaskiyam Aiyangar, J.—But it is unduly stretching the language of the rule to bring within its scope general words of a Statute imposing a tax and claim exemption for the Crown on the ground that the Crown is divested of any prerogative right, title or interest by giving full effect to the general words.

So far as exemption from any tax imposed by a Statute is concerned, the question for determination is whether according to the right construction of the Statute, the Crown is or is not made liable to pay the tax. In the former case, it is bound to pay, in the latter it is not, in neither case is there any question of prerogative. The rule of construction above adverted to cannot itself be regarded as a prerogative of the Crown. A Statute imposing a tax upon Crown property, which tax will be payable out of the public revenues, cannot reasonably be regarded as divesting the Crown of any right, title or interest, within the meaning of the above rules—especially when such tax is levied for purposes connected with the good government of the country, for which purpose, such revenues are in India, vested in trust in the Crown, by section 39 of 21 and 22 Vict, chap 106

The conclusions I come to, are—(i) The canon of interpretation of Statutes, that the prerogative or rights of the Crown cannot be taken away except by express words or necessary implication, is as applicable to the Statutes passed by the Indian Legislatures as to Parliamentary and Colonial Statutes, and this is really concluded by the authority of the Privy Council in more appeals than one from the Colonies,

(ii) When in an Indian Act, the Crown is not expressly included and the question is whether it is bound by necessary implication, the course of Indian Legislation and Acts *in pari materia* with the Act in question will have an important bearing upon the construction of the Act,

(iii) Notwithstanding that in several Indian enactments the Crown has been specially exempted, the above rule of interpretation will nevertheless hold good in construing the provisions of an enactment from the operation of which the Crown is not expressly exempted, when a question is raised as to whether such provisions take away a right, or prerogative of the Crown,

(iv) The said rule, based like other cognate rules of construction upon the maxim *generalia specialibus non derogant* is not really a prerogative of the Crown, though such rule as well as the rule relating to the construction of Crown grants are dealt with in treatises under the head of "Prerogatives of the Crown" and also loosely referred to as such in some English decisions,

(v) The English law as to the exemption of the Crown and Crown property from payment of tolls, poor rates and other taxes, local or imperial imposed by Statutes rests partly upon historical reasons and principally upon judicial decisions which do not proceed upon a course of reasoning or principle which will be binding on Indian Courts

(vi) Exemption from payment of tolls, rates and taxes is not in reality a prerogative of the Crown, but depends solely upon the right construction to be put upon the Crown grant or the Statute in question,

* * * * *

(ix) According to the uniform course of Indian Legislation, Statutes imposing duties or taxes bind Government as much as its subjects unless the very nature of the duty or tax is such as to be inapplicable to Government, and whenever it is the intention of the Legislature to exempt Government from any duty or tax which in its nature

is not inapplicable to Government, the Government is specially exempted, *Bell v Municipal Commissioners*, 25 Mad 457 at pp 500 502

(The exemption of Government goods from customs duties was repealed on 1st April 1924 and Government goods pay duty from that date.)

Similarly in Australia it has been held in *King v Sutton*, (1908) 5 C.L.R. 789, that the exemption of the Crown from taxation, in the absence of express provision to that effect applies to the Crown only in its capacity as the Executive Government of the country whose statutes are in question. It was accordingly held that the Federal Customs Act applied to the Crown in its character as the Executive Government of New South Wales, and that goods imported by the Government of New South Wales were liable accordingly to customs duties imposed by the Federal Government

Under the Government Trading Taxation Act III of 1926 every trade or business carried on by or on behalf of the Government of any part of His Majesty's Dominions exclusive of British India can be taxed in British India as though the business were that of a 'Company'. Similarly the other Dominions are entitled under their statutes, if any to tax the profits of any business carried on in those Dominions by or on behalf of the Government of India. This reciprocal arrangement which was arrived at in the Imperial Economic Conference in 1923 was designed to remove the handicaps against private trade that the previous exemption from taxation of State undertakings had created. Under the above Act, His Majesty's Dominions include territories under His Majesty's protection or in respect of which a mandate is being exercised by the Government of any part of His Majesty's Dominions. Therefore under the above Act the profits of business carried on by Indian States in British India become taxable. The above Act does not apply to States outside the British Empire as they are not parties to the arrangement.

An important change in the position was made by section 155 of the Government of India Act, 1935 which runs as follows

"155 (1) Subject as hereinafter provided the Government of a Province and the Ruler of a Federated State shall not be liable to Federal taxation in respect of lands or buildings situate in British India or income accruing arising or received in British India

Provided that—

(a) where a trade or business of any kind is carried on by or on behalf of the Government of a Province in any part of British India outside that Province or by a Ruler in any part of British India, nothing in this sub-section shall exempt that Government or Ruler from any Federal taxation in respect of that trade or business, or any operations connected therewith, or any income arising in connection therewith, or any property occupied for the purposes thereof

(b) nothing in this sub-section shall exempt a Ruler from any Federal taxation in respect of any lands, buildings or income being his personal property or personal income.

(2) Nothing in this Act affects any exemption from taxation enjoyed as of right at the passing of this Act by the Ruler of an Indian State in respect of any Indian Government securities issued before that date."

FOREIGN STATES—LIABILITY

The Government Trading Taxation Act above referred to applies only to Dominions in the British Empire. The liability of a foreign State,

that is to say, a State outside the *British Empire*, is therefore to be determined by other considerations. Broadly speaking, the liability to taxation depends largely on the same considerations as determine the liability of a foreign State to be sued in the Municipal Courts of the country. This is a difficult question of international law on which there appears to be difference of opinion. One school of jurists appears to think that if a foreign Government trades in this country, it is certainly liable to tax, though it will not be possible to enforce the liability, if the foreign State refuses voluntarily to discharge the liability, while another school seems to think that there is no liability to taxation at all. But from the fact that in regard to the British Dominions themselves the Legislature found it necessary to make an express provision as to the liability in the shape of the Government Trading Taxation Act, it must be presumed that in the absence of such legislation no liability would have attached to the British Dominions carrying on trade in India. In the same way, it would seem that we should assume that there is no liability in respect of trading carried on by foreign States. If it is intended to impose such a liability, what will presumably be done is for the Government of India to enter into an agreement with the foreign State concerned and then introduce the necessary legislation.

In either view—whether a foreign State is liable or not—it would seem that a foreign Government cannot be assessed at all, *inasmuch* as section 3 of the Income-tax Act refers (apart from Hindu undivided families) only to 'individuals', 'firms', 'companies' and 'associations of persons', and presumably a foreign Government is none of these. It also does not seem possible to make the local agent or agents of the foreign Government liable for the tax under sections 42 and 43 of the Act, *inasmuch* as these agents are presumably entitled to the same immunity from processes as the foreign Governments whom they represent.

THE INDIAN INCOME-TAX ACT (XI OF 1922)

AS MODIFIED UP TO THE 1ST SEPTEMBER, 1946

STATEMENT OF REPEALS AND AMENDMENTS

§ 2 Amended	Act IV of 1924 Act XI of 1924 Act XXI of 1930 Act VII of 1939 Act XL of 1940 Act XXIII of 1941 Ordinance of 1945
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INDIAN INCOME-TAX ACT (XI OF 1922)

(AS AMENDED UP TO 1ST JULY, 1946)

AN ACT TO CONSOLIDATE AND AMEND THE LAW RELATING TO INCOME TAX AND SUPER TAX

WHEREAS it is expedient to consolidate and amend the law relating to Income tax and Super tax It is hereby enacted as follows —

1 (1) This Act may be called THE INDIAN INCOME TAX ACT 1922

(2) It extends to the whole of British India including British Baluchistan and the Sonthal Parganas and applies also within the Indian States and the tribal areas to British subjects who are in the service of the Crown or of a local authority established in the exercise of the powers of the Crown Representative or the Central Government in that behalf and to all other servants of the Crown in the said States and areas

(3) It shall come into force on the first day of April 1922

2 In this Act unless there is anything repugnant in the subject or context —

Definitions

(1) 'agricultural income' means—

(a) any rent or revenue derived from land which is used for agricultural purposes and is either assessed to land revenue in British India or subject to a local rate assessed and collected by officers of the Crown as such

(b) any income derived from such land by—

(i) agriculture or

(ii) the performance by a cultivator or receiver of rent in kind of any process ordinarily employed by a cultivator or receiver of rent in kind to render the produce raised or received by him fit to be taken to market or

(iii) the sale by a cultivator or receiver of rent in kind of the produce raised or received by him in respect of which no process has been performed other than a process of the nature described in sub-clause (ii)

(c) any income derived from any building owned and occupied by the receiver of the rent or revenue of any such land or occupied by the cultivator, or the receiver of rent in kind of any land with respect to which the produce of which any operation mentioned in sub-clauses (ii) and (iii) of clause (b) is carried on

Provided that the building is on or in the immediate vicinity of the land and is a building which the receiver of the rent or revenue or the cultivator or the receiver of the rent in kind by reason of his connection with

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INDIAN INCOME-TAX ACT (XI OF 1922)

(AS AMENDED UP TO 1ST JULY 1946)

AN ACT TO CONSOLIDATE AND AMEND THE LAW RELATING TO INCOME TAX AND SUPER TAX

WHEREAS it is expedient to consolidate and amend the law relating to Income tax and Super tax It is hereby enacted as follows —

1 (1) This Act may be called THE INDIAN INCOME TAX ACT 1922

(2) It extends to the whole of British India including British Baluchistan and the Sonthal Parganas and applies also within the Indian States and the tribal areas to British subjects who are in the service of the Crown or of a local authority established in the exercise of the powers of the Crown Representative or the Central Government in that behalf and to all other servants of the Crown in the said States and areas

(3) It shall come into force on the first day of April 1922

2 In this Act unless there is anything repugnant in the subject or context —

Definitions

(1) agricultural income means—

(a) any rent or revenue derived from land which is used for agricultural purposes and is either assessed to land revenue in British India or subject to a local rate assessed and collected by officers of the Crown as such

(b) any income derived from such land by—

(i) agriculture or

(ii) the performance by a cultivator or receiver of rent in kind of any process ordinarily employed by a cultivator or receiver of rent in kind to render the produce raised or received by him fit to be taken to market or

(iii) the sale by a cultivator or receiver of rent in kind of the produce raised or received by him in respect of which no process has been performed other than a process of the nature described in sub-clause (ii)

(c) any income derived from any building owned and occupied by the receiver of the rent or revenue of any such land or occupied by the cultivator or the receiver of rent in kind of any land with respect to which the produce of which any operation mentioned in sub-clauses (ii) and (iii) of clause (b) is carried on

Provided that the building is on or in the immediate vicinity of the land and is a building which the receiver of the rent or revenue or the cultivator or the receiver of the rent in kind by reason of his connection with

(c) where a business, profession or vocation has been newly set up in the financial year preceding the year for which the assessment is to be made, the period from the date of the setting up of the business, profession or vocation to the 31st day of March next following or to the last day of the period determined under sub-clause (b), or, if the accounts of the assessee are made up to some other date than the 31st day of March and the case is not one for which a period has been determined by the Central Board of Revenue under sub-clause (b), then, at the option of the assessee, the period from the date of the setting up of the business, profession or vocation to such other date.

Provided that when such other date does not fall between the setting up of the business, profession or vocation and the next following 31st day of March it shall be deemed that there is no previous year, and

when the assessee is a partner in a firm, "previous year" in respect of his share of the income, profits and gains of the firm means the previous year as determined for the assessment of the income, profits and gains of the firm,

(12) 'principal officer' used with reference to a local authority or a company or any other public body or any association means—

(a) the secretary, treasurer, manager or agent of the authority, company, body or association or

(b) any person connected with the authority, company, body or association upon whom the Income tax Officer has served a notice of his intention of treating him as the principal officer thereof,

(13) 'public servant' has the same meaning as in the Indian Penal Code,

(14) 'registered firm' means a firm registered under the provisions of section 26-A,

(15) 'total income' means total amount of income, profits and gains referred to in sub-section (1) of section 4 computed in the manner laid down in this Act, and "total world income" includes all income, profits and gains wherever accruing or arising except income to which, under the provisions of sub-section (3) of section 4 this Act does not apply, and

(16) 'unregistered firm' means a firm which is not a registered firm.

CHAPTER I

CHARGE OF INCOME-TAX

3 Where any Act of the Central Legislature enacts that income-tax shall be charged for any year at any rate or rates, tax at that rate or those rates shall be charged for that year in accordance with, and subject to the provisions of, this Act in respect of the total income of the previous year of every individual, Hindu undivided family, company and local authority, and of every firm and other association of persons, or the partners of the firm or members of the association individually.

4 (1) Subject to the provisions of this Act, the total income of any previous year of any person includes all income profits and gains from whatever source derived which—

(a) are received or are deemed to be received in British India in such year by or on behalf of such person, or

(b) if such person is resident in British India during such year,—

(i) accrue or arise or are deemed to accrue or arise to him in British India during such year or

(ii) accrue or arise to him without British India during such year, or

(iii) having accrued or arisen to him without British India before the beginning of such year and after the 1st day of April 1933, are brought into or received in British India by him during such year or

(c) if such person is not resident in British India during such year, accrue or arise or are deemed to accrue or arise to him in British India during such year

Provided that there shall not be included in any assessment for the year ending on the 31st day of March, 1940, both the amount of the income profits and gains referred to in sub clause (i) of clause (b) and the amount of the income, profits and gains referred to in sub-clause (iii) of clause (b) but only the greater of these two amounts

Provided further that, in the case of a person not ordinarily resident in British India, income profits and gains which accrue or arise to him without British India shall not be so included unless they are derived from a business controlled in or a profession or vocation set up in India or unless they are brought into or received in British India by him during such year

Provided further that if in any year the amount of income accruing or arising without British India exceeds the amount brought into British India in that year, there shall not be included in the assessment of the income of that year so much of such excess as does not exceed four thousand five hundred rupees

Explanation 1—Income, profits and gains accruing or arising without British India shall not be deemed to be received in or brought into British India within the meaning of this sub-section by reason only of the fact that they are taken into account in a balance-sheet prepared in British India.

Explanation 2—Income which would be chargeable under the head 'Salaries' if payable in British India and not being pension payable without India shall be deemed to accrue or arise in British India wherever paid if it is earned in British India

Explanation 3—A dividend paid without British India shall be deemed to be income accruing and arising in British India to the extent to which it has been paid out of profits subjected to income-tax in British India.

(2) For the purposes of sub-section (1), where a husband is not resident in British India remittances received by his wife resident in British India out of any part of his income which is not included in his total income shall be deemed to be income accruing in British India to the wife.

(3) Any income, profits or gains falling within the following classes shall not be included in the total income of the person receiving them.—

(i) Any income derived from property held under trust or other legal obligation wholly for religious or charitable purposes,

and in the case of property so held in part only for such purposes, the income applied, or finally set apart for application, thereto

(ia) Any income derived from business carried on on behalf of a religious or charitable institution when the income is applied solely to the purposes of the institution and—

(a) the business is carried on in the course of the carrying out of a primary purpose of the institution or

(b) the work in connection with the business is mainly carried on by beneficiaries of the institution

(ii) Any income of a religious or charitable institution derived from voluntary contributions and applicable solely to religious or charitable purposes

(iii) The income of local authorities except income from a trade or business carried on by the authority so far as that income is not income arising from the supply of a commodity or service within its own jurisdictional area.

(iv) Interest on securities which are held by or are the property of, any Provident Fund to which the Provident Funds Act 1925, applies

[* * * * *

(vi) Any special allowance, benefit or perquisite specifically granted to meet expenses wholly and necessarily incurred in the performance of the duties of an office or employment of profit

(vii) Any receipts not being receipts arising from business or the exercise of a profession vocation or occupation, which are of a casual and non recurring nature or are not by way of addition to the remuneration of an employee

(viii) Agricultural income.

(ix) Any income received by trustees on behalf of a recognised provident fund as defined in clause (a) of section 58 A

(x) Any income received—

(a) by a person accredited as representative in British India for political purposes of an Indian State or the Ruler thereof, as his remuneration from the State or Ruler for service in such capacity,

(b) by a Consul General, Consul or Vice Consul or Consular Agent of a Foreign State, as remuneration from such state for service in such capacity,

(c) by a person employed by the consulate of a foreign state, not being a British subject or the subject of an Indian State, as remuneration from such Foreign State for service in such capacity,

(d) by a Trade Commissioner or other official representative in British India of the Government of any other the British Empire or of a Foreign Government, a salary, if the official salary of the correspondent any, of the Central Government resident for s in the country concerned enjoy a similar country,

(e) by a member of the staff of a Trade Commissioners or official representative referred to in sub clause (d) as his official salary when such member is a subject of the country represented and the country represented has made corresponding provisions for similar exemptions in the case of members of the staff of the corresponding officials of the Central Government.

(xi) With effect from the 2nd day of September 1939 the income chargeable under the head salaries of a Nepalese member of the Nepalese Military Force serving with His Majesty's Forces or of any member of an Indian State Force so serving and any other income accruing or arising without British India which is received in or brought into British India by any such member while the force to which he belongs is serving with His Majesty's Forces

(xii) Any income chargeable under the head 'Income from property' in respect of a building the erection of which is begun and completed between the 1st day of April 1946 and the 31st day of March 1948 (both dates inclusive) for a period of two years from the date of such completion

In this subsection charitable purpose includes relief of the poor education medical relief and the advancement of any other object of general public utility but nothing contained in clause (i) clause (ia) or clause (ii) shall operate to exempt from the provisions of this Act that part of the income of a private religious trust which does not enure for the benefit of the public

Residence in British India.

4 A For the purposes of this Act—

(a) any individual is resident in British India in any year if he—

(i) is in British India in that year for a period amounting in all to one hundred and eighty two days or more, or

(ii) maintains or has maintained for him a dwelling place in British India for a period or periods amounting in all to one hundred and eighty two days or more in that year, and is in British India for any time in that year or

(iii) having within the four years preceding that year been in British India for a period of or for periods amounting in all to three hundred and sixty five days or more is in British India for any time in that year otherwise than on an occasional or casual visit or

(iv) is in British India for any time in that year and the Income tax Officer is satisfied that such individual having arrived in British India during that year is likely to remain in British India for not less than three years from the date of his arrival.

(b) a Hindu undivided family firm or other association of persons is resident in British India unless the control and management of its affairs is situated wholly without British India and

(c) a company is resident in British India in any year (a) if the control and management of its affairs is situated wholly in British India in that year, or (b) if its income arising in British India in that year exceeds its income arising without British India in that year

Ordinary residence

4 B For the purposes of this Act—

(a) an individual is 'not ordinarily resident' in British India in any year if he has not been resident in British India in nine out of the ten years preceding that year or if he has not during the seven years preceding that year been in British India for a period of or for periods amounting in all to more than two years

(b) a Hindu undivided family is deemed to be ordinarily resident in British India if its manager is ordinarily resident in British India,

(c) a company firm or other association of persons is ordinarily resident in British India if it is resident in British India

CHAPTER II

INCOME TAX AUTHORITIES

5 (1) There shall be the following classes

Income tax authorities of income tax authorities for the purposes of this Act namely —

(a) the Central Board of Revenue

(b) Commissioners of Income tax

(c) Assistant Commissioners of Income-tax who may be either Appellate Assistant Commissioners of Income tax or Inspecting Assistant Commissioners of Income tax

(d) Income tax Officers

(2) The Central Government may appoint a Commissioner of Income tax for any area specified in the order of appointment and may appoint Commissioners of Income tax not more than three in all each to discharge without reference to area and to the exclusion of any Commissioner appointed for any area the functions of a Commissioner in respect of any cases or classes of cases assigned to him by the Central Board of Revenue

(3) The Central Government may appoint as many Appellate or Inspecting Assistant Commissioners of Income-tax and Income-tax Officers as it thinks fit.

(4) Appellate Assistant Commissioners of Income-tax shall be under the direct control of the Central Board of Revenue and shall perform their functions in respect of such persons or classes of persons or of such incomes or classes of income or in respect of such areas as the Central Board of Revenue may direct and where such directions have assigned to two or more Appellate Assistant Commissioners of Income-tax the same persons or classes of persons or the same incomes or classes of income or the same area in accordance with any orders which the Central Board of Revenue may make for the distribution and allocation of the work to be performed

(5) Inspecting Assistant Commissioners of Income-tax and Income-tax Officers shall perform their functions in respect of such persons or classes of persons or of such incomes or classes of income or in respect of such areas as the Commissioner of Income tax may direct and where such directions have assigned to two or more Inspecting Assistant Commissioners of Income tax or Income-tax Officers the same persons or classes of persons or the same incomes or classes of income or the same area in accordance with any orders which the Commissioner of Income tax may make for the distribution and allocation of the work to be performed The Commissioner may with the previous approval of the Central Board of Revenue by general or special order in writing direct that the powers conferred on the Income tax Officer and the Appellate Assistant Commissioner by or under this Act shall in respect of any specified case or class of cases be exercised

by the Inspecting Assistant Commissioner and the Commissioner, respectively, and for the purposes of any case in respect of which such order applies references in this Act or in any rules made hereunder to the Income tax Officer and the Appellate Assistant Commissioner shall be deemed to be references to the Inspecting Assistant Commissioner and the Commissioner, respectively

(6) The Central Board of Revenue may, by notification in the official Gazette, empower Commissioners of Income tax Appellate or Inspecting Assistant Commissioners of Income tax and Income tax Officers to perform such functions in respect of such classes of persons or such classes of income or such area as may be specified in the notification and thereupon the functions so specified shall cease to be performed in respect of the specified classes of persons or classes of income or area by the other authorities appointed under sub-sections (2) and (3)

(7) Assistant Commissioners of Income tax and Income tax Officers shall, for the purposes of this Act, be subordinate to the Commissioner of Income tax for the area in which they perform their functions, or where they perform functions assigned to them by a Commissioner of Income tax appointed without reference to area to that Commissioner

(7 A) The Commissioner of Income tax may transfer any case from one Income tax Officer subordinate to him to another and the Central Board of Revenue may transfer any case from any one Income tax Officer to another Such transfer may be made at any stage of the proceedings, and shall not render necessary the reissue of any notice already issued by the Income tax Officer from whom the case is transferred.

(8) All officers and persons employed in the execution of this Act shall observe and follow the orders instructions and directions of the Central Board of Revenue

Provided that no such orders instructions or directions shall be given so as to interfere with the discretion of the Appellate Assistant Commissioner in the exercise of his appellate functions

CHAPTER II-A

APPELLATE TRIBUNAL

5-A. (1) The Central Government shall appoint an Appellate Tribunal consisting of not more than ten persons to exercise the functions conferred on the Appellate Tribunal by this Act

The Appellate Tribunal

(2) The Appellate Tribunal shall consist of an equal number of judicial members and accountant members as hereinafter defined

Provided that the Tribunal shall not be deemed to be invalidly constituted merely by reason of a temporary inequality caused by the death retirement or removal of any member

(3) A judicial member shall be a person who has exercised the powers of a District Judge or who possesses such qualifications as are normally required for appointment to the post of District Judge, and an accountant member shall be a person who has, for a period of not less than six years, practised professionally as a Registered Accountant enrolled on the Register of Accountants maintained by the Central Government under the Auditors Certificate Rules, 1932

Provided that the Central Government may appoint as an accountant member of the Tribunal any person not possessing the qualifications required by this sub-section, if it is satisfied that he has qualifications and has had

(a) an individual is 'not ordinarily resident' in British India in any year if he has not been resident in British India in nine out of the ten years preceding that year or if he has not during the seven years preceding that year been in British India for a period of or for periods amounting in all to more than two years

(b) a Hindu undivided family is deemed to be ordinarily resident in British India if its manager is ordinarily resident in British India

(c) a company, firm or other association of persons is ordinarily resident in British India if it is resident in British India

CHAPTER II

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(a) the Central Board of Revenue

(b) Commissioners of Income tax

(c) Assistant Commissioners of Income tax who may be either Appellate Assistant Commissioners of Income tax or Inspecting Assistant Commissioners of Income tax

(d) Income-tax Officers

(2) The Central Government may appoint a Commissioner of Income tax for any area specified in the order of appointment and may appoint Commissioners of Income tax not more than three in all each to discharge without reference to area and to the exclusion of any Commissioner appointed for any area the functions of a Commissioner in respect of any cases or classes of cases assigned to him by the Central Board of Revenue

(3) The Central Government may appoint as many Appellate or Inspecting Assistant Commissioners of Income-tax and Income-tax Officers as it thinks fit.

(4) Appellate Assistant Commissioners of Income tax shall be under the direct control of the Central Board of Revenue and shall perform their functions in respect of such persons or classes of persons or of such incomes or classes of income or in respect of such areas as the Central Board of Revenue may direct, and where such directions have assigned to two or more Appellate Assistant Commissioners of Income tax the same persons or classes of persons or the same incomes or classes of income or the same area in accordance with any orders which the Central Board of Revenue may make for the distribution and allocation of the work to be performed

(5) Inspecting Assistant Commissioners of Income-tax and Income-tax Officers shall perform their functions in respect of such persons or classes of persons or of such incomes or classes of income or in respect of such areas as the Commissioner of Income tax may direct and where such directions have assigned to two or more Inspecting Assistant Commissioners of Income tax or Income-tax Officers the same persons or classes of persons or the same incomes or classes of income or the same area in accordance with any orders which the Commissioner of Income tax may make for the distribution and allocation of the work to be performed. The Commissioner may with the previous approval of the Central Board of Revenue by general or special order in writing direct that the powers conferred on the Income-tax Officer and the Appellate Assistant Commissioner by or under this Act shall in respect of any specified case or class of cases be exercised

by the Inspecting Assistant Commissioner and the Commissioner, respectively, and for the purposes of any case in respect of which such order applies references in this Act or in any rules made hereunder to the Income tax Officer and the Appellate Assistant Commissioner shall be deemed to be references to the Inspecting Assistant Commissioner and the Commissioner, respectively.

(6) The Central Board of Revenue may, by notification in the official Gazette, empower Commissioners of Income tax, Appellate or Inspecting Assistant Commissioners of Income tax and Income tax Officers to perform such functions in respect of such classes of persons or such classes of income or such area as may be specified in the notification and thereupon the functions so specified shall cease to be performed in respect of the specified classes of persons or classes of income or area by the other authorities appointed under sub sections (2) and (3)

(7) Assistant Commissioners of Income tax and Income tax Officers shall for the purposes of this Act, be subordinate to the Commissioner of Income tax for the area in which they perform their functions, or where they perform functions assigned to them by a Commissioner of Income tax appointed without reference to area to that Commissioner

(7 A) The Commissioner of Income tax may transfer any case from one Income tax Officer subordinate to him to another and the Central Board of Revenue may transfer any case from any one Income tax Officer to another. Such transfer may be made at any stage of the proceedings, and shall not render necessary the reissue of any notice already issued by the Income tax Officer from whom the case is transferred

(8) All officers and persons employed in the execution of this Act shall observe and follow the orders instructions and directions of the Central Board of Revenue

Provided that no such orders instructions or directions shall be given so as to interfere with the discretion of the Appellate Assistant Commissioner in the exercise of his appellate functions

CHAPTER II-A

APPELLATE TRIBUNAL.

5-A. (1) The Central Government shall appoint an Appellate Tribunal consisting of not more than ten persons to exercise the functions conferred on the Appellate Tribunal by this Act

The Appellate Tribunal

(2) The Appellate Tribunal shall consist of an equal number of judicial members and accountant members as hereinafter defined

Provided that the Tribunal shall not be deemed to be invalidly constituted merely by reason of a temporary inequality caused by the death retirement or removal of any member

(3) A judicial member shall be a person who has exercised the powers of a District Judge or who possesses such qualifications as are normally required for appointment to the post of District Judge, and an accountant member shall be a person who has for a period of not less than six years, practised professionally as a Registered Accountant enrolled on the Register of Accountants maintained by the Central Government under the Auditors Certificate Rules, 1932

Provided that the Central Government may appoint as an accountant member of the Tribunal any person not possessing the qualifications required by this sub section, if it is satisfied that he has qualifications and has had

adequate experience of a character which render him suitable for appointment to the Tribunal

(4) The Central Government shall appoint a judicial member of the Tribunal to be president thereof

(5) The powers and functions of the Appellate Tribunal may be exercised and discharged by Benches constituted from members of the Tribunal by the president of the Tribunal

(6) A Bench shall consist of not less than two members of the Tribunal and shall be constituted so as to contain an equal number of judicial members and accountant members, or so that the number of members of one class does not exceed the number of members of the other class by more than one

(7) If the members of a Bench differ in opinion on any point the point shall be decided according to the opinion of the majority if there is a majority, but if the members are equally divided they shall state the point or points on which they differ and the case shall be referred by the president of the Tribunal for hearing on such point or points by one or more of the other members of the Tribunal and such point or points shall be decided according to the opinion of the majority of the members of the Tribunal who have heard the case including those who first heard it

(8) Subject to the provisions of this Act the Appellate Tribunal shall have power to regulate its own procedure and the procedure of Benches of the Tribunal in all matters arising out of the discharge of its functions including the places at which the Benches shall hold their sittings

CHAPTER III TAXABLE INCOME.

6 Save as otherwise provided by this Act the following heads of income profits and gains shall be chargeable to income tax in the manner hereinafter appearing namely —

- (i) Salaries
- (ii) Interest on securities
- (iii) Income from property
- (iv) Profits and gains of business, profession or vocation
- (v) Income from other sources

7 (1) The tax shall be payable by an assessee under the head 'Salaries' in respect of any salary or wages, any annuity, pension or gratuity and any fees, commissions, perquisites or profits in lieu of or in addition to, any salary or wages which are due to him from, whether paid or not or are paid by or on behalf of, the Crown, a local authority, a company, or any other public body or association or any private employer and for the purposes of this sub-section advances by way of loan or otherwise of income chargeable under this head shall be deemed to be salary due on the date when the advance is received

Provided that the tax shall not be payable in respect of any sum which the assessee by the conditions of his employment is required to spend out of his remuneration wholly, necessarily and exclusively in the performance of his duties

Provided further that the tax shall not be payable in respect of any sum deducted from the salary payable by or on behalf of the Crown to any individual, being a sum deducted in accordance with the conditions of his service for the purpose of securing to him a deferred annuity or of making

provision for his wife or children provided that the sum so deducted shall not exceed one-sixth of the salary

Provided further that where tax is deductible at the source under section 18 the assessee shall not be called upon to pay the tax himself unless he has received the salary without such deduction

Explanation 1—The right of a person to occupy free of rent as a place of residence any premises provided by his employer is a perquisite for the purposes of this sub section

Explanation 2—A payment due to or received by an assessee from an employer or former employer or from a provident or other fund is to the extent to which it does not consist of contributions by the assessee or interest on such contributions a profit received in lieu of salary for the purposes of this sub section unless the payment is made solely as compensation for loss of employment and not by way of remuneration for past services

Provided that nothing herein contained shall render liable to income tax any payment from a provident fund to which the Provident Funds Act 1925 applies or any payment from a recognised provident fund within the meaning of Chapter IX A if such payment is exempted from payment of income-tax under the provisions of Chapter IX A or any payment from an approved superannuation fund within the meaning of Chapter IX B made on the death of a beneficiary or in lieu of or in commutation of an annuity or by way of refund of contributions on the death of a beneficiary or on his leaving the employment in connection with which the fund is established

(2) Any income which would be chargeable under this head if paid in British India shall be deemed to be so chargeable if paid to a British subject or any servant of His Majesty in any part of India by or on behalf of the Crown or by a local authority established in the exercise of the powers of the Crown Representative or the Central Government in that behalf

8 The tax shall be payable by an assessee under the head Interest on securities on securities in respect of the interest receivable by him on any security of the Central Government or of a Provincial Government or on debentures or other securities for money issued by or on behalf of a local authority or a company

Provided that no income-tax shall be payable under this section by the assessee in respect of any sum deducted from such interest by way of commission by a banker realizing such interest on behalf of the assessee or in respect of any interest payable on money borrowed for the purpose of investment in the securities by the assessee except interest chargeable under this Act which is payable without British India not being interest on a loan issued for public subscription before the 1st day of April, 1938 unless in respect of interest which is so chargeable tax has been paid or deducted under section 18 or unless there is a person in British India who may be appointed an agent under section 43 in respect of such interest

Provided further that no income-tax shall be payable on the interest receivable on any security of the Central Government issued or declared to be income-tax free

Provided further, that the income tax payable on the interest receivable on any security of a Provincial Government issued income-tax free shall be payable by the Provincial Government.

9 (1) The tax shall be payable by an assessee under the head "Income from property" in respect of the *bona fide* annual value of property consisting of any buildings or lands appurtenant thereto of which he is the owner, other than such portions of such property as he may occupy for the purposes of any business profession or vocation carried on by him the profits of which are assessable to tax, subject to the following allowances, namely —

- (i) where the property is in the occupation of the owner, or where it is let to a tenant and the owner has undertaken to bear the cost of repairs a sum equal to one-sixth of such value,
- (ii) where the property is in the occupation of a tenant who has undertaken to bear the cost of repairs, the difference between such value and the rent paid by the tenant up to but not exceeding one-sixth of such value,
- (iii) the amount of any annual premium paid to insure the property against risk of damage or destruction,
- (iv) where the property is subject to a mortgage or other capital charge, the amount of any interest on such mortgage or charge, where the property is subject to an annual charge not being a capital charge the amount of such charge, where the property is subject to a ground rent, the amount of such ground rent, and where the property has been acquired, constructed, repaired, renewed or reconstructed with borrowed capital, the amount of any interest payable on such capital

Provided that no allowance shall be made in respect of any interest or annual charge payable without British India and chargeable under this Act, not being interest on a loan issued for public subscription before the 1st day of April, 1938, except interest or a charge on which tax has been paid or from which tax has been deducted under section 18 or in respect of which there is an agent for the payee in British India who may be assessed under section 43,

- (v) any sums paid on account of land revenue in respect of the property,
- (vi) in respect of collection charges, a sum not exceeding the prescribed maximum,
- (vii) in respect of vacancies, that part of the annual value which is proportional to the period during which the property is wholly unoccupied or where the property is let out in parts, that portion of the annual value, appropriate to any vacant part, which is proportional to the period during which such part is wholly unoccupied,

(2) For the purposes of this section, the expression 'annual value' shall be deemed to mean the sum for which the property might reasonably be expected to let from year to year

Provided that, where the property is in the occupation of the owner for the purposes of his own residence, such sum shall, for the purposes of this section, be deemed not to exceed ten per cent of the total income of the owner.

(3) Where property is owned by two or more persons and their respective shares are definite and ascertainable, such persons shall not in respect of such property be assessed as an association of persons, but the share of each such person in the income from the property as computed in accordance with this section shall be included in his total income

10 (1) The tax shall be payable by an assessee under the head
 Business Profits and gains of business, profession or vocation in respect of profits or gains of any business, profession or vocation carried on by him.

(2) Such profits or gains shall be computed after making the following allowances, namely, —

(i) any rent paid for the premises in which such business, profession or vocation is carried on, provided that when any substantial part of the premises is used as a dwelling house by the assessee, the allowance under this clause shall be such sum as the Income tax Officer may determine having regard to the proportional annual value of the part so used

(ii) in respect of repairs, where the assessee is the tenant only of the premises, and has undertaken to bear the cost of such repairs, the amount paid on account thereof, provided that, if any substantial part of the premises is used by the assessee as a dwelling house, a proportional part only of such amount shall be allowed,

(iii) in respect of capital borrowed for the purposes of the business, profession or vocation, the amount of the interest paid

Provided that no allowance shall be made under this clause in any case for any interest chargeable under this Act which is payable without British India, not being interest on a loan issued for public subscription before the 1st day of April, 1938, except interest on which tax has been paid or from which tax has been deducted under section 18 or in respect of which there is an agent in British India who may be assessed under section 43 or, in the case of a firm for any interest paid to a partner of the firm.

Explanation—Recurring subscriptions paid periodically by shareholders or subscribers in such Mutual Benefit Societies as may be prescribed, shall be deemed to be capital borrowed within the meaning of this clause,

(iv) in respect of insurance against risk of damage or destruction of buildings, machinery, plant, furniture stocks or stores used for the purposes of the business profession or vocation the amount of any premium paid,

(v) in respect of current repairs to such buildings machinery, plant or furniture the amount paid on account thereof,

(vi) in respect of depreciation of such buildings machinery, plant or furniture being the property of the assessee a sum equivalent, where the assets are ships other than ships ordinarily plying on inland waters to such percentage on the original cost thereof to the assessee as may in any case or class of cases be prescribed and in any other case, to such percentage on the written down value thereof as may in any case or class of cases be prescribed and where the

buildings have been newly erected or the machinery or plant being new has been installed after the 31st day of March 1945 a further sum (which shall however not be deductible in determining the written down value for the purposes of this clause) in respect of the year of erection or installation equivalent—

(a) in the case of buildings the erection of which is begun and completed between the 1st day of April 1946 and the 31st day of March, 1948 (both dates inclusive) to fifteen per cent of the cost thereof to the assessee

(b) in the case of other buildings, to ten per cent of the cost thereof to the assessee

(c) in the case of machinery or plant to twenty per cent of the cost thereof to the assessee

Provided that—

(a) the prescribed particulars have been duly furnished

(b) where full effect cannot be given to any such allowance in any year not being a year which ended prior to the 1st day of April 1939 owing to there being no profits or gains chargeable for that year or owing to the profits or gains chargeable being less than the allowance then subject to the provisions of clause (a) of the proviso to sub section (2) of section 24 the allowance or part of the allowance to which effect has not been given as the case may be, shall be added to the amount of the allowance for depreciation for the following year and deemed to be part of that allowance or if there is no such allowance for that year be deemed to be the allowance for that year and so on for succeeding years and

(c) the aggregate of all such allowances made under this Act or any Act repealed hereby, or under the Indian Income tax Act 1886 shall in no case exceed the original cost to the assessee of the buildings machinery, plant, or furniture as the case may be,

(vi) in respect of any such building machinery or plant which has been sold or discarded or demolished or destroyed the amount by which the written down value thereof exceeds the amount for which the building machinery or plant as the case may be is actually sold or its scrap value

Provided that such amount is actually written off in the books of the assessee

Provided further that where the amount for which any such building machinery or plant is sold exceeds the written down value so much of the excess as does not exceed the difference between the original cost and the written down value shall be deemed to be profits of the previous year in which the sale took place

Provided further that where any insurance salvage or compensation moneys are received in respect of any such building machinery or plant which has been discarded or demolished or destroyed and the amount of such moneys does not exceed the written down value the amount allowable under this clause shall be the amount if any by which the difference between the written down value and the scrap value exceeds the amount of such moneys

Provided further that where any insurance salvage or compensation moneys are received in respect of any such building machinery or plant as aforesaid and the amount of such moneys exceeds the difference between the written down value and the scrap value no amount shall be allowable under this clause and so much of the excess as does not exceed the difference

between the original cost and the written down value less the scrap value shall be deemed to be profits of the previous year in which such moneys were received.

Provided further that for the purposes of this clause, the original cost of a building, the written down value of which is determined in accordance with the first proviso to sub-section (5), shall be deemed to be the written down value so determined as at the date of its being brought into use for the purposes of the business, profession or vocation,

- (vii) in respect of animals which have been used for the purposes of the business, profession or vocation otherwise than as stock in trade and have died or become permanently useless for such purposes, the difference between the original cost to the assessee of the animals and the amount, if any, realised in respect of the carcasses or animals,
- (ix) any sums paid on account of land-revenue, local rates or municipal taxes in respect of such part of the premises as is used for the purposes of the business, profession or vocation,
- (x) any sum paid to an employee as bonus or commission for services rendered, where such sum would not have been payable to him as profits or dividend if it had not been paid as bonus or commission

Provided that the amount of the bonus or commission is of a reasonable amount with reference to—

- (a) the pay of the employee and the conditions of his service;
- (b) the profits of the business, profession or vocation for the year in question, and
- (c) the general practice in similar business, professions or vocations,
- (xi) when the assessee's accounts in respect of any part of his business, profession or vocation are not kept on the cash basis, such sum, in respect of bad and doubtful debts due to the assessee in respect of that part of his business, profession or vocation, and in the case of an assessee carrying on a banking or money lending business such sum in respect of loans made in the ordinary course of such business as the Income tax Officer may estimate to be irrecoverable but not exceeding the amount actually written off as irrecoverable in the books of the assessee

Provided that if the amount ultimately recovered on any such debt or loan is greater than the difference between the whole debt or loan and the amount so allowed, the excess shall be deemed to be a profit of the year in which it is recovered, and if less, the deficiency shall be deemed to be a business expense of that year,

- (xii) any expenditure (not being in the nature of capital expenditure) laid out or expended on scientific research related to the business,
- (xiii) any sum paid to a scientific research association having as its objects the undertaking of scientific research related to the class of business carried on, and any sum paid to a

university, college or other institution to be used for such scientific research

Provided that such association, university, college or institution is for the time being approved for the purposes of this clause by the prescribed authority,

- (xiv) in respect of any expenditure of a capital nature on scientific research related to the business, an allowance for each of the five consecutive previous years beginning with the year in which the expenditure was incurred, or where the expenditure was incurred prior to the commencement of the business, for each of the five consecutive previous years beginning with the year in which the business was commenced, equal to one fifth of such expenditure

Provided that no allowance shall be made for any expenditure incurred more than three years before the commencement of the business

Provided further that—

(a) where an asset representing scientific research expenditure of a capital nature ceases to be used for scientific research related to such business—

(i) no allowance shall be made in respect of any previous year after the previous year in which the cessation takes place, and

(ii) if the aggregate of the amounts allowed under this clause added to the value of the asset immediately before the cessation is less than the said expenditure, there shall also be allowed in respect of the previous year in which the cessation takes place an additional deduction equal to the difference,

(b) where such asset is sold without having been used for other purposes, the sale proceeds shall be taken to be the value of the asset immediately before the cessation, and if an additional allowance or a greater additional allowance would have been made in respect of the previous year in which the cessation occurred on the basis of that value, an amount equal to the additional allowance which would have been made or, as the case may be, to the difference between the additional allowance which would have been made and the additional allowance which was made for that year shall be made in respect of the previous year in which the sale occurs,

(c) where the proceeds of the sale plus the total amount of the allowances made under this clause exceed the amount of the expenditure, the excess or the amount of the allowances so made, whichever is the less, shall be treated as a receipt of the business accruing at the time of the sale,

(d) where a deduction is allowed for any previous year under this clause in respect of expenditure represented wholly or partly by any asset, no deduction shall be allowed under clause (xi) or clause (xii) for the same previous year in respect of that asset,

(e) where an asset is used in the business after it ceases to be used for scientific research related to that business, and a claim for an allowance under clause (xi) or clause (xii) is made in respect of that asset, the actual cost to the assessee of the asset shall be treated as reduced by the amount of any deductions allowed under this clause,

(f) clause (b) of the proviso to clause (xi) shall apply in relation to deductions allowable under this clause as it applies in relation to deductions allowable in respect of depreciation,

(g) if any question arises under clause (xi), clause (xiii) or this clause as to whether, and if so to what extent any activity constitutes or constituted or any asset is or was being used for, scientific research, the Central Board of Revenue shall refer the question to the prescribed authority, whose decision shall be final

Explanation—In clause (xi), clause (xiii) and this clause—

(1) "scientific research" means any activities in the fields of natural or applied science for the extension of knowledge

(ii) references to expenditure incurred on scientific research do not include any expenditure incurred in the acquisition of rights in or arising out of, scientific research but save as aforesaid include all expenditure incurred for the prosecution of or the provision of facilities for the prosecution of, scientific research

(iii) references to scientific research related to a business or class of business include—

(a) any scientific research which may lead to or facilitate an extension of that business or, as the case may be all businesses of that class

(b) any scientific research of a medical nature which has a special relation to the welfare of workers employed in that business or as the case may be businesses of that class

(xv) any expenditure (not being in the nature of capital expenditure or personal expenses of the assessee) laid out or expended wholly and exclusively for the purpose of such business profession or vocation

(3) Where any building, machinery, plant or furniture in respect of which any allowance is due under clause (iv), clause (v), clause (vi) or clause (vii) of sub section (2) is not wholly used for the purposes of the business profession or vocation the allowance shall be restricted to the fair proportional part of the amount which would be allowable if such building, machinery, plant or furniture was wholly so used.

(4) Nothing in clause (ix) or clause (xv) of sub section (2) shall be deemed to authorise the allowance of any sum paid on account of any cess, rate or tax levied on the profits or gains of any business profession or vocation or assessed at a proportion of or otherwise on the basis of any such profits or gains, and nothing in clause (xv) of sub section (2) shall be deemed to authorise—

(a) any allowance in respect of a payment which is chargeable under the head Salaries if it is payable without British India and tax has not been paid thereon nor deducted therefrom under section 18, or

(b) any allowance in respect of any payment by way of interest, salary, commission or remuneration made by a firm to any partner of the firm, or

(c) any allowance in respect of a payment to a provident or other fund established for the benefit of employees unless the employer has made effective arrangements to secure that tax shall be deducted at source from any payments made from the fund which are taxable under the head 'Salaries'

(5) In sub section (2), 'paid' means actually paid or incurred according to the method of accounting upon the basis of which the profits or gains are computed under this section, 'plant' includes vehicles, books, scientific apparatus and surgical equipment purchased for the purposes of the business, profession or vocation, and 'written down value' means—

(a) in the case of assets acquired in the previous year, the actual cost to the assessee,

(b) in the case of assets acquired before the previous year the actual cost to the assessee less all depreciation actually allowed to him under this Act, or any Act repealed thereby, or under executive orders issued when the Indian Income-tax Act, 1886 was in force

Provided that in the case of a building previously the property of the assessee and brought into use for the purposes of the business, profession or vocation after the 28th day of February, 1946, 'written down value' means the actual cost to the assessee reduced by an amount equal to the depreciation calculated at the rate in force on that date that would have been allowable had the building been used for the aforesaid purposes since the date of its acquisition by the assessee and had the provisions of this Act relating to the allowance for depreciation been in force on and from the date of acquisition

Provided further that where the provisions of the proviso to sub section (2) of section 26 are applicable, the actual cost to the assessee referred to in clauses (a) and (b) shall be the actual cost to the person succeeded in the business, profession or vocation

(6) A trade, professional or similar association performing specific services for its members for remuneration definitely related to those services shall be deemed for the purposes of this section to carry on business in respect of those services, and the profits and gains therefrom shall be liable to tax accordingly

(7) Notwithstanding anything to the contrary contained in section 8, 9, 10, 12 or 18, the profits and gains of any business of insurance and the tax payable thereon shall be computed in accordance with the rules contained in the Schedule to this Act.

11 Omitted in 1939

12 (1) The tax shall be payable by an assessee under the head
Other sources 'Income from other sources' in respect of income profits and gains of every kind which may be included in his total income (if not included under any of the preceding heads)

(2) Such income, profits and gains shall be computed after making allowance for any expenditure (not being in the nature of capital expenditure) incurred solely for the purpose of making or earning such income, profits or gains, provided that no allowance shall be made on account of—

(a) any personal expenses of the assessee, or

(b) any interest chargeable under this Act which is payable without British India not being interest on a loan issued for public subscription before the 1st day of April 1938, or not being interest on which tax has been paid or from which tax has been deducted under section 18, or

(c) any payment which is chargeable under the head 'Salaries', if it is payable without British India and the tax has not been paid thereon nor deducted therefrom under section 18

(3) Where an assessee lets on hire machinery, plant or furniture belonging to him he shall be entitled to allowances in accordance with the provisions of clauses (iv), (v), (vi) and (vii) of sub section (2) of section 10

(4) Where an assessee lets on hire machinery, plant or furniture belonging to him and also buildings, and the letting of the buildings is inseparable from the letting of the said machinery, plant or furniture, he shall be entitled to allowances in accordance with the provisions of clauses (iv), (v), (vi) and (vii) of sub section (2) of section 10 in respect of such buildings

12 A Where a managing agent of a company is liable under an agreement made for adequate consideration to share Managing Agency commission with a third party or parties the said agent and the said party or parties shall file a declaration showing the proportion in which such commission is shared between them, and on proof to the satisfaction of the Income-tax Officer of the facts contained in such declaration such agent and each such party shall be chargeable only on the share to which such agent or party is entitled under the agreement.

13 Income, profits and gains shall be computed for the purposes of sections 10 and 12 in accordance with the method of accounting regularly employed by the assessee

Provided that if no method of accounting has been regularly employed, or if the method employed is such that, in the opinion of the Income tax Officer the income, profits and gains cannot properly be deduced therefrom, then the computation shall be made upon such basis and in such manner as the Income-tax Officer may determine.

14 (1) The tax shall not be payable by an assessee in respect of any sum which he receives as a member of a Hindu undivided family, where such income has been paid out of the income of the family

(2) The tax shall not be payable by an assessee—
(a) if a partner of an unregistered firm in respect of any portion of his share in the profits and gains of the firm computed in the manner laid down in clause (b) of sub section (1) of section 16 on which the tax has already been paid by the firm, or

(b) if a member of an association of persons other than a Hindu undivided family, a company or a firm, in respect of any portion of the amount which he is entitled to receive from the association on which the tax has already been paid by the association, or

(c) in respect of any income profits or gains accruing or arising to him within an Indian State unless such income, profits or gains are received or deemed to be received in or are brought into British India in the previous year by or on behalf of the assessee, or are assessable under section 42

15 (1) The tax shall not be payable in respect of any sums paid by an assessee to effect an insurance on the life of the assessee or on the life of a wife or husband of the assessee or in respect of a contract for a deferred annuity on the life of the assessee or on the life of a wife or husband of the assessee or as a contribution to any Provident Fund to which the Provident Funds Act, 1925, applies

(2) Where the assessee is a Hindu undivided family, there shall be exempted under sub-section (1) any sums paid to effect an insurance

the life of any male member of the family or of the wife of any such member

(2 A) Nothing in sub-section (1) or sub-section (2) shall apply to so much of any premium or other payment made on a policy other than a contract for a deferred annuity as is in excess of ten per cent of the actual capital sum assured and in calculating any such capital sum no account shall be taken of the value of any premiums agreed to be returned or of any benefit by way of bonus or otherwise which is to be or may be received either before or after death either by the person paying the premium or by any other person and which is not the sum actually assured

(3) The aggregate of any sums exempted under this section shall not together with any sums exempted under the second proviso to sub-section (1) of section 7 and any sums exempted under sub-section (1) of section 58 F exceed in the case of an individual one sixth of the total income of the assessee or six thousand rupees whichever is less and in the case of a Hindu undivided family, one-sixth of the total income of the assessee or twelve thousand rupees whichever is less

15 A The tax shall not be payable by an assessee in respect of such

Exemption of portion of
earned income

portion if any of the earned income included in his total income as is directed by the annual Act of the Central Legislature fixing the rate or rates of tax for any year to be deducted in making an assessment for that year, and for the purposes of determining the rates at which income-tax (but not super tax) is payable by the assessee for that year his total income shall be deemed to be the total income reduced by the said portion

Exemptions and exclusions
in determining the total
income.

16 (1) In computing the total income of an assessee—

(a) any sum exempted under the second proviso to sub-section (1) of section 7 the second and third provisos to section 8 sub-section (2) of section 14 and section 15 shall be included and any sum exempted under section 15 A shall also be included except for the purpose of determining the rates at which income-tax (but not super tax) is payable by the assessee to whom the exemption is given

(b) When the assessee is a partner of a firm then whether the firm has made a profit or a loss his share (whether a net profit or a net loss) shall be taken to be any salary interest commission or other remuneration payable to him by the firm in respect of the previous year increased or decreased respectively by his share in the balance of the profit or loss of the firm after the deduction of any interest salary commission or other remuneration payable to any partner in respect of the previous year

Provided that if his share so computed is a loss such loss may be set off or carried forward and set off in accordance with the provisions of section 24

(c) all income arising to any person by virtue of a settlement or disposition whether revocable or not and whether effected before or after the commencement of the Indian Income-tax (Amendment) Act 1939 from assets remaining the property of the settlor or disposer shall be deemed to be income of the settlor or disposer and all income arising to any person by virtue of a revocable transfer of assets shall be deemed to be income of the transferor

Provided that for the purposes of this clause a settlement, disposition or transfer shall be deemed to be revocable if it contains any provision for the retransfer directly or indirectly of the income or assets to the settlor, disponent or transferor, or in any way gives the settlor disponent or transferor a right to re-assume power directly or indirectly over the income or assets

Provided further that the expression settlement or disposition shall for the purposes of this clause include any disposition trust covenant, agreement or arrangement and the expression 'settlor or disponent in relation to a settlement or disposition shall include any person by whom the settlement or disposition was made

Provided further that this clause shall not apply to any income arising to any person by virtue of a settlement or disposition which is not revocable for a period exceeding six years or during the lifetime of the person and from which income the settlor or disponent derives no direct or indirect benefit but that the settlor shall be liable to be assessed on the said income as and when the power to revoke arises to him

(2) For the purposes of inclusion in the total income of an assessee any dividend shall be deemed to be income of the previous year in which it is paid credited or distributed or deemed to have been paid credited or distributed to him and shall be increased to such amount as would if income tax (but not super tax) at the rate applicable to the total income of a company for the financial year in which the dividend is paid credited or distributed or deemed to have been paid credited or distributed were deducted therefrom be equal to the amount of the dividend

Provided that when any portion of the profits and gains of the company out of which such dividend has been paid, credited or distributed or deemed to have been paid credited or distributed was not liable to income-tax in the hands of the company the increase to be made under this section shall be calculated upon only such proportion of the dividend as the amount of the profits and gains of the company liable to income tax bears to the total profits and gains of the company

(3) In computing the total income of any individual for the purpose of assessment there shall be included—

(a) so much of the income of a wife or minor child of such individual as arises directly or indirectly—

- (i) from the membership of the wife in a firm of which her husband is a partner
- (ii) from the admission of the minor to the benefits of partnership in a firm of which such individual is a partner
- (iii) from assets transferred directly or indirectly to the wife by the husband otherwise than for adequate consideration or in connection with an agreement to live apart, or
- (iv) from assets transferred directly or indirectly to the minor child not being a married daughter, by such individual and otherwise than for adequate consideration and

(b) so much of the income of any person or association of persons as arises from assets transferred otherwise than for adequate consideration to the person or association by such individual for the benefit of his wife or a minor child or both.

17 (1) Where a person is not resident in British India, and is a British subject as defined in section 17 of the British Nationality and Status of Aliens Act 1914 or a subject of a State in India or Burma or a native of a Tribal area the tax, including super tax, payable by him or on his behalf on his total income shall be an amount bearing to the total amount of the tax including super tax which would have been payable on his total world income had it been his total income the same proportion as his total income bears to his total world income, and in the case of any other non resident person the income tax payable by him or on his behalf on his total income shall be at the maximum rate and the super tax payable thereon shall be an amount bearing to the total amount of super tax which would have been payable on his total world income had it been his total income the same proportion as his total income bears to his total world income

(2) Where there is included in the total income of any assessee any income (including income from a share in an unregistered firm if assessed as such) exempted from tax by or under the provisions of this Act, the income-tax excluding super tax payable by the assessee shall be an amount bearing to the total amount of the income tax excluding super tax which would have been payable on the total income had no part of it been exempted the same proportion as the unexempted portion of the total income bears to the total income

(3) Where there is included in the total income of any assessee any income exempted from tax under clause (c) of sub-section (2) of section 14 the super tax payable by the assessee shall be an amount bearing to the total amount of the super tax which would have been payable on the total income had no part of it been so exempted the same proportion as the total income less the portion so exempted bears to the total income

(4) Where any income exempted from tax under clause (c) of sub-section (2) of section 14 which has been taken into account under sub-section (2) or sub-section (3) of this section as part of the total income of an assessee for the purpose of determining the income-tax or super tax payable by him is in a subsequent year brought into or received in British India by the assessee and becomes chargeable with tax accordingly, the tax including super tax payable by the assessee on his total income of that subsequent year shall be—

(a) the amount which bears to the total amount of the tax including super tax which would have been payable on his total income as reduced by the amount of the income so brought into or received in British India had such reduced income been his total income the same proportion as his total income bears to such reduced income or

(b) the amount which bears to the total amount of the tax including super tax which would have been payable on the amount of the income so brought into or received in British India had such income been his total income the same proportion as his total income bears to the amount of the income so brought into or received in British India whichever is the greater

(5) Where the amount of the total income of any assessee is deemed to be the total income reduced under the provisions of section 15 A by an allowance for earned income the expression 'total income' in this section shall, for the purpose of determining the amount of income tax (but not

super tax payable by the assessee, be deemed to refer to his total income so reduced

CHAPTER IV DEDUCTIONS AND ASSESSMENT

18

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(2) Any person responsible for paying any income chargeable under the head 'Salaries' shall, at the time of payment, deduct income tax and super tax on the amount payable at a rate representing the average of the rates applicable to the estimated total income of the assessee under this head

Payment by deduction at source.

Provided that such person may at the time of making any deduction, increase or reduce the amount to be deducted under this sub section for the purpose of adjusting any excess or deficiency arising out of any previous deduction or failure to deduct

(2-A) Notwithstanding anything hereinbefore contained, for the purpose of making the deduction under sub section (2), there shall be included in the amount payable any income chargeable under the head 'Salaries' which is payable to the assessee out of India by or on behalf of the Crown, and the value in rupees of such income shall be calculated at the prescribed rate of exchange

(2 B) Any person responsible for paying any income chargeable under the head 'Salaries' to a person not resident in British India shall at the time of payment deduct income-tax at the maximum rate and also super tax at the rate or rates applicable to the estimated income of the assessee under this head

(3) The person responsible for paying any income chargeable under the head 'Interest on securities' shall, unless otherwise prescribed in the case of any security of the Central Government, at the time of payment, deduct income-tax but not super tax on the amount of the interest payable at the maximum rate

Provided that where the Income tax Officer gives a certificate in writing (which certificate he shall give in every proper case on the application of the assessee) that to the best of his belief the total income or the total world income of a recipient will be less than the minimum liable to income-tax or will be liable to a rate of income tax less than the maximum rate, the person responsible for paying any income referred to in this sub section or in sub-section (2 B), as the case may be, to such recipient shall, until such certificate is cancelled by the Income tax Officer, pay the income without deduction or deduct the tax at such less rate, as the case may be

(3-A) Any person responsible for paying to a person not resident in British India any interest not being 'Interest on securities', or any other sum chargeable under the provisions of this Act, shall, at the time of payment, unless he is himself liable to pay income tax thereon as an agent, deduct income tax at the maximum rate

Provided that where the person so payable is a British subject as defined in section 27 of the British Nationality and Status of Aliens Act, 1914, or a subject of a State in India or Burma, and the Income-tax Officer gives a certificate in writing (which certificate he shall give in every proper case on the application of the assessee) that to the best of his belief the total world income of such person will be less than the minimum liable to income tax or that his total income will be liable to a rate of income-tax less than

the maximum rate, the person responsible for paying any income referred to in this sub-section shall until such certificate is cancelled by the Income-tax Officer, pay the income without deduction or deduct the tax at such less rate as the case may be

Provided further that nothing in this sub-section shall apply to any payment made in the course of transactions in respect of which the person responsible for making the payment is deemed under the first proviso to section 43 not to be an agent of the payee

(3 B) Where the Income tax Officer has reason to believe that the total world income of any person residing out of British India to whom any interest not being Interest on securities or any other sum chargeable under this Act is payable will in any year exceed the maximum amount which is not chargeable with super tax under the law for the time being in force he may by order in writing require the person responsible for making such payments to such person to deduct at the time of payment super tax at the rates determined by the Income tax Officer to be applicable to the total world income of such person in that year

(3 C) Where the person responsible for paying any interest not being Interest on securities or any other sum chargeable under this Act to any person makes to that person in any year payments exceeding in the aggregate the maximum amount which is not chargeable with super tax under the law for the time being in force, the person responsible for making such payments shall if he has not reason to believe that the recipient is resident in British India and no order under sub-section (3 B) has been received in respect of such recipient deduct at the time of payment super tax on the amount by which the total amount of such payments exceeds the maximum amount not chargeable with super tax at the rate applicable to such excess

(3-D) Where the Income tax Officer has reason to believe that any person who is a shareholder in a company is resident out of British India and that the total world income of such person will in any year exceed the maximum amount which is not chargeable to super tax under the law for the time being in force he may by order in writing require the principal officer of the company to deduct at the time of payment of any dividend from the company to the shareholder in that year super tax at such rate as the Income tax Officer may determine as being the rate applicable in respect of the income of the shareholder in that year

(3-E) If in any year the amount of any dividend or the aggregate amount of any dividends paid to any shareholder by a company increased in accordance with the provisions of sub-section (2) of section 16 exceeds the maximum amount of the total income of a person which is not chargeable to super tax under the law for the time being in force and the principal officer of the company has no reason to believe that the shareholder is resident in British India and no order under sub-section (3-D) has been received in respect of such shareholder by the principal officer from the Income tax Officer, the principal officer shall at the time of payment deduct super tax on the amount or such excess at the rate which would be applicable under the law for the time being in force if the amount of such dividend or dividends increased as aforesaid constituted the whole total income of the shareholder

(4) All sums deducted in accordance with the provisions of this section shall for the purpose of computing the income of an assessee be deemed to be income received

(5) Any deduction made in accordance with the provisions of this section and any sum by which a dividend has been increased under sub-section (2) of section 16 shall be treated as a payment of income-tax or super tax on behalf of the person from whose income the deduction was made, or of the owner of the security or of the shareholder, as the case may be, and credit shall be given to him therefor in the assessment, if any, made for the following year under this Act

Provided that if such person or such owner obtains, in accordance with the provisions of this Act a refund of any portion of the tax so deducted, no credit shall be given for the amount of such refund

Provided further that where such person or owner is a person whose income is included under the provisions of clause (c) of sub section (1) or sub section (3) of section 16 section 44-D or section 44-E in the total income of another person such other person shall be deemed to be the person or owner on whose behalf payment has been made and to whom credit shall be given in the assessment for the following year

(6) All sums deducted in accordance with the provisions of this section shall be paid within the prescribed time by the person making the deduction to the credit of the Central Government or as the Central Board of Revenue directs

(7) If any such person does not deduct or after deducting fails to pay the tax as required by or under this section he and in the cases specified in sub sections (3 D) and (3-E) the company of which he is the principal officer shall, without prejudice to any other consequences which he or it may incur, be deemed to be an assessee in default in respect of the tax

Provided that the Income tax Officer shall not make a direction under sub section (1) of section 46 for the recovery of any penalty from such person unless satisfied that such person has wilfully failed to deduct and pay the tax.

(8) The power to levy by deduction under this section shall be without prejudice to any other mode of recovery

(9) Every person deducting income tax or super tax in accordance with the provisions of sub-section (3), (3 A), (3 B), (3 C), (3 D) or (3 E) shall at the time of payment of the sum from which tax has been deducted furnish to the person to whom such payment is made a certificate to the effect that income tax or super tax has been deducted and specifying the amount so deducted, the rate at which the tax has been deducted and such other particulars as may be prescribed

18-A (1) (a) In the case of Income in respect of which provision is not made under section 18 for deduction of income-tax at the time of payment, the Income-tax Officer may, on or after the 1st day of

Advance payment of tax
April in any financial year, by order in writing require an assessee to pay quarterly to the credit of the Central Government on the 15th day of June, 15th day of September, 15th day of December, and 15th day of March in that year respectively, an amount equal to one-quarter of the income-tax and super tax payable on so much of such income as is included in his total income of the latest previous year in respect of which he has been assessed, if that total income exceeded six thousand rupees. Such income tax and super tax shall be calculated at the rates in force for the financial year in which he is required to pay the tax, and shall bear to the total amount of income-tax and super tax so calculated on the said total income the same proportion as the amount of such inclusions bears to his

total income or, in cases where under the provisions of sub-section (1) of section 17 both income tax and super tax or super tax are chargeable with reference to the total world income, shall bear to the total amount of income-tax and super tax which would have been payable on his total world income of the said previous year had it been his total income the same proportion as the amount of such inclusions bears to his total world income

Provided that, where the previous year of the assessee in respect of any source of income ends after the 31st day of December and before the 30th day of April, the order in writing issued by the Income-tax Officer requiring the payment of income-tax and super tax on that source of income shall substitute for the four quarterly payments hereinbefore specified, three payments of equal amount to be made on the 15th day of September, the 15th day of December and 15th day of March respectively

Provided further that if the assessee is a partner of a registered firm and an assessment of the firm has been completed for a previous year later than that for which the assessee's last assessment has been completed, his share in the profits of the firm shall, for the purposes of this sub-section, be included in his total income on the basis of the latest assessment of the firm

Provided further that, if after the making of an order by the Income-tax Officer and before the 15th day of February of the financial year an assessment of the assessee or of the registered firm of which he is a partner is completed in respect of a previous year later than that referred to in the order of the Income tax Officer, the Income tax Officer may make an amended order requiring the assessee to pay in one instalment on the specified date, or in equal instalments on the specified dates if more than one, falling after the date of the amended order the tax computed on the revised basis as reduced by the amount, if any paid in accordance with the original order but if the amount already paid exceeds the tax determined on the revised basis, the excess shall be refunded

(b) If the notice of demand issued under section 29 in pursuance of the order under clause (a) of this sub-section is served after any of the dates on which the instalments specified therein are payable the tax shall be payable in equal instalments on each of such of those dates as fall after the date of the service of the notice of demand or in one sum on the 15th day of March if the notice is served after the 15th day of December

(2) If any assessee who is required to pay tax by an order under sub-section (1) estimates at any time before the last instalment is due that the part of his income to which that sub-section applies for the period which would be the previous year for an assessment for the year next following is less than the income on which he is required to pay tax and accordingly wishes to pay an amount less than the amount which he is so required to pay, he may send to the Income-tax Officer an estimate of the tax payable by him calculated in the manner laid down in sub-section (1) on that part of his income for such period and shall pay such amount as accords with his estimate in equal instalments on such of the dates specified in sub-section (1) (a) as have not expired or in one sum if only the last of such dates has not expired

Provided that the assessee may send a revised estimate of the tax payable by him before any one of the dates specified in sub-section (1) (a) and adjust any excess or deficiency in respect of any instalment already paid in a subsequent instalment or in subsequent instalments.

(3) Any person who has not hitherto been assessed shall, before the 15th day of March, in each financial year, if his total income of the period which would be the previous year for an assessment for the financial year next following is likely to exceed six thousand rupees, send to the Income-tax Officer an estimate of the tax payable by him on that part of his income to which the provisions of section 18 do not apply of the said previous year calculated in the manner laid down in sub section (1), and shall pay the amount, on such of the dates specified in that sub section as have not expired by instalments which may be revised according to the proviso to sub-section (2)

(4) Where part of the income to which sub section (1), (2) or (3) applies consists of any income of the nature of commission which is receivable periodically and is not received or adjusted by the payer in the assessee's account before any of the quarterly instalments of tax become due, he may defer payment of tax on that part of his income to the date on which such income would be normally received or adjusted and if he does so he shall communicate to the Income tax Officer the date to which such payment is deferred

Provided that, if the tax of which the payment is deferred is not paid within fifteen days of the date on which such income or part thereof is received or adjusted by the payer in the assessee's account, the tax shall be payable with six per cent simple interest per annum from the date of such receipt or adjustment to the date of payment of the tax.

(5) The Central Government shall pay on any amount paid under this section simple interest at two per cent per annum from the date of payment to the date of the assessment (hereinafter called the 'regular assessment') made under section 23 of the income, profits and gains of the previous year for an assessment for the year next following the year in which the amount was payable

Provided that on any portion of such amount which is refunded under the foregoing provisions of this section interest shall be payable only up to the date on which the refund was made

(6) Where in any year an assessee has paid tax under sub-section (2) or sub section (3) on the basis of his own estimate, and the tax so paid is less than eighty per cent of the tax determined on the basis of the regular assessment, so far as such tax relates to income to which the provisions of section 18 do not apply and so far as it is not due to variations in the rates of tax made by the Finance Act enacted for the year for which the regular assessment is made, simple interest at the rate of six per cent per annum from the 1st day of January in the financial year in which the tax was paid up to the date of the said regular assessment shall be payable by the assessee upon the amount by which the tax so paid falls short of the said eighty per cent,

Provided that, where, as a result of an appeal under section 31 or section 33 or of a revision under section 33 A or of a reference to the High Court under section 66, the amount on which interest was payable under this sub-section has been reduced the interest shall be reduced accordingly and the excess interest paid, if any, shall be refunded together with the amount of income-tax that is refundable

Provided further that, where a business profession or vocation is newly set up and is assessable on the income, profits and gains of its first previous year in the financial year following that in which it is set up, the

interest payable shall be computed from the 1st day of April of the said financial year

(7) Where on making the regular assessment the Income tax Officer finds that any assessee has —

(a) under sub-section (2) or sub-section (3) underestimated the tax payable by him and thereby reduced the amount payable in any of the first three instalments or

(b) under sub-section (4) wrongly deferred the payment of tax on a part of his income

he may direct that the assessee shall pay simple interest at six per cent per annum in the case referred to in clause (a) for the period during which the payment was deficient on the difference between the amount paid in each such instalment and the amount which should have been paid having regard to the aggregate tax actually paid under this section during the year, and in the case referred to in clause (b) for the period during which the payment of tax was wrongly deferred on the amount which the payment was so deferred

Provided that for the purposes of this sub-section any instalment due before the expiry of six months from the commencement of the previous year in respect of which it is to be paid shall be deemed to have become due fifteen days after the expiry of the said six months

(8) Where on making the regular assessment the Income-tax Officer finds that no payment of tax has been made in accordance with the foregoing provisions of this section interest calculated in the manner laid down in sub-section (6) shall be added to the tax as determined on the basis of the regular assessment

(9) If the Income-tax Officer in the course of any proceedings in connection with the regular assessment is satisfied that any assessee —

(a) has furnished under sub-section (2) or sub-section (3) estimates of the tax payable by him which he knew or had reason to believe to be untrue or

(b) has without reasonable cause failed to comply with the provisions of sub-section (3) the assessee shall be deemed in the case referred to in clause (a) to have deliberately furnished inaccurate particulars of his income and in the case referred to in clause (b) to have failed to furnish the return of his total income and the provisions of section 28 so far as may be shall apply accordingly

Provided that the amount of penalty leviable shall in the case referred to in clause (a) be a sum not exceeding one and a half times the amount by which the tax actually paid during the year under the provisions of this section falls short of the tax that should have been paid by the assessee under sub-section (1) or eighty per cent. of the tax determined on the basis of the regular assessment as modified in the manner provided in sub-section (6) whichever is the less and in the case referred to in clause (b) one and a half times the said eighty per cent

(10) (a) If any assessee does not pay on the specified dates any instalment of tax that he is required to pay under sub-section (1) and does not before the date on which any such instalment as is not paid becomes due send under sub-section (2) an estimate or a revised estimate of the tax payable by him he shall be deemed to be an assessee in default in respect of such instalment or instalments

(b) If any assessee has sent under sub-section (2) or sub section (3) an estimate or a revised estimate of the tax payable by him, but does not pay any instalment in accordance therewith on the date or dates specified in sub-section (1), he shall be deemed to be an assessee in default in respect of such instalment or instalments

Provided that the assessee shall not under clause (a) or (b), be deemed to be in default in respect of any amount of which the payment is deferred under sub section (4) until after the date communicated by him to the Income tax Officer under that sub section

(11) Any sum other than a penalty or interest paid by or recovered from an assessee in pursuance of the provisions of this section shall be treated as a payment of tax in respect of the income of the period which would be the previous year for an assessment for the financial year next following the year in which it was payable, and credit therefor shall be given to the assessee in the regular assessment

19 In the case of income in respect of which provision is not made under section 18 for deduction of income tax at the time of payment, and in any case where income tax has not been deducted in accordance with the provisions of section 18, income tax shall be payable by the assessee direct

19-A The principal officer of every company shall, on or before the 15th day of June in each year furnish to the prescribed officer a return in the prescribed form and verified in the prescribed manner of the names and of the addresses as entered in the register of shareholders maintained by the company, of the shareholders to whom a dividend or aggregate dividends exceeding such amount as may be prescribed in this behalf has or have been distributed during the preceding year and of the amount so distributed to each such shareholder

20 The principal officer of every company shall, at the time of distribution of dividends, furnish to every person receiving a dividend a certificate to the effect that the company has paid or will pay income tax on the profits which are being distributed and specifying such other particulars as may be prescribed

20-A The person responsible for paying any interest not being interest on securities shall, on or before the fifteenth day of June in each year, furnish to the prescribed officer a return in the prescribed form and verified in the prescribed manner of the names and addresses of all persons to whom during the previous financial year he has paid interest or aggregate interest exceeding such amount not being less than four hundred rupees as may be prescribed in this behalf, together with the amount paid to each such person

21 The prescribed person in the case of every Government office and the principal officer or the prescribed person in the case of every local authority, company or other public body or association, and every private employer shall prepare, and, within thirty days from the 31st day of March in each year deliver or cause to be delivered to the Income tax Officer in the prescribed form and verified in the prescribed manner, a return in writing showing—

(a) the name and, so far as it is known, the address, of every person who was receiving on the said 31st day of March, or has received or to whom was due during the year ending on that date, from the authority, company, body, association or private employer, as the case may be, any income chargeable under the head "Salaries" of such amount as may be prescribed,

(b) the amount of the income so received or so due by each such person, and the time or times at which the same was paid or due, as the case may be,

(c) the amount deducted in respect of income tax and super-tax from the income of each such person

22 (1) The Income tax Officer shall, on or before the 1st day of May in each year, give notice by publication in the press and by publication in the prescribed manner, requiring every person whose total income during the previous year exceeded the maximum amount which is not chargeable to income-tax to furnish within such period not being less than sixty days as may be specified in the notice a return in the prescribed form and verified in the prescribed manner, setting forth (along with such other particulars as may be required by the notice) his total income and total world income during that year

Provided that the Income tax Officer may in his discretion extend the date for the delivery of the return in the case of any person or class of persons

(2) In the case of any person whose total income is in the Income-tax Officer's opinion, of such an amount as to render such person liable to income tax, the Income tax Officer may serve a notice upon him requiring him to furnish, within such period not being less than thirty days, as may be specified in the notice, a return in the prescribed form and verified in the prescribed manner setting forth (along with such other particulars as may be provided for in the notice) his total income and total world income during the previous year

Provided that the Income tax Officer may in his discretion extend the date for the delivery of the return

(3) If any person has not furnished a return within the time allowed by or under sub section (1) or sub section (2), or having furnished a return under either of those sub-sections discovers any omission or wrong statement therein he may furnish a return or a revised return as the case may be at any time before the assessment is made

(4) The Income tax Officer may serve on any person who has made a return under sub-section (1) or upon whom a notice has been served under sub section (2) a notice requiring him, on a date to be therein specified to produce, or cause to be produced, such accounts or documents as the Income-tax Officer may require

Provided that the Income-tax Officer shall not require the production of any accounts relating to a period more than three years prior to the previous year

(5) The prescribed form of the returns referred to in sub-sections (1) and (2) shall in the case of an assessee engaged in any business, profession or vocation, require him to furnish particulars of the location and style of the principal place wherein he carries on the business, profession

or vocation and of any branches thereof, the names and addresses of his partners, if any, in such business, profession or vocation and the extent of the share of the assessee and the shares of all such partners in the profits of the business, profession or vocation and any branches thereof

23 (1) If the Income tax Officer is satisfied without requiring the presence of the assessee or the production by him of any evidence that a return made under section 22 is correct and complete, he shall assess the total income of the assessee, and shall determine the sum payable by him on the basis of such return

(2) If the Income-tax Officer is not satisfied without requiring the presence of the person who made the return or the production of evidence that a return made under section 22 is correct and complete, he shall serve on such person a notice requiring him, on a date to be therein specified, either to attend at the Income-tax Officer's office or to produce, or to cause to be there produced, any evidence on which such person may rely in support of the return

(3) On the day specified in the notice issued under sub section (2), or as soon afterwards as may be, the Income-tax Officer, after hearing such evidence as such person may produce and such other evidence as the Income tax Officer may require, on specified points, shall, by an order in writing, assess the total income of the assessee, and determine the sum payable by him on the basis of such assessment

(4) If any person fails to make the return required by any notice given under sub section (2) of section 22 and has not made a return or a revised return under sub-section (3) of the same section, or fails to comply with all the terms of a notice issued under sub section (4) of the same section or, having made a return, fails to comply with all the terms of a notice issued under sub section (2) of this section, the Income-tax Officer shall make the assessment to the best of his judgment and determine the sum payable by the assessee on the basis of such assessment and in the case of a firm, may refuse to register it or may cancel its registration if it is already registered

Provided that the registration of a firm shall not be cancelled until fourteen days have elapsed from the issue of a notice by the Income tax Officer to the firm intimating his intention to cancel its registration

(5) Notwithstanding anything contained in the foregoing sub sections, when the assessee is a firm and the total income of the firm has been assessed under sub section (1), sub-section (3) or sub section (4), as the case may be,—

(a) in the case of a registered firm, the sum payable by the firm itself shall not be determined but the total income of each partner of the firm, including therein his share of its income, profits and gains of the previous year, shall be assessed and the sum payable by him on the basis of such assessment shall be determined

Provided that if such share of any partner is a loss it shall be set off against his other income or carried forward and set off in accordance with the provisions of section 24

Provided further that when any of such partners is a person not resident in British India, his share of the income, profits and gains of the firm shall be assessed on the firm at the rates which would be applicable if

it were assessed on him personally and the sum so determined as payable shall be paid by the firm and

(b) in the case of an unregistered firm the Income tax Officer may instead of determining the sum payable by the firm itself proceed in the manner laid down in clause (a) as applicable to a registered firm if, in his opinion the aggregate amount of the tax including super tax if any, payable by the partners under such procedure would be greater than the aggregate amount which would be payable by the firm and the partners individually if the firm were assessed as an unregistered firm

(6) Whenever the Income-tax Officer makes a determination in accordance with the provisions of sub-section (5) he shall notify to the firm by an order in writing the amount of the total income on which the determination has been based and the apportionment thereof between the several partners

23 A (1) Where the Income tax Officer is satisfied that in respect

Power to assess individual members of certain companies of any previous year the profits and gains distributed as dividends by any company up to the end of the sixth month after its accounts for that previous year are laid before the company

in general meeting are less than sixty per cent of the assessable income of the company of that previous year as reduced by the amount of income-tax and super tax payable by the company in respect thereof he shall unless he is satisfied that having regard to losses incurred by the company in earlier years or to the smallness of the profit made the payment of a dividend or a larger dividend than that declared would be unreasonable make with the previous approval of the Inspecting Assistant Commissioner an order in writing that the undistributed portion of the assessable income of the company of that previous year as computed for income-tax purposes and reduced by the amount of income tax and super tax payable by the company in respect thereof shall be deemed to have been distributed as dividends amongst the shareholders as at the date of the general meeting aforesaid and thereupon the proportionate share thereof of each shareholder shall be included in the total income of such shareholder for the purpose of assessing his total income

Provided that when the reserves representing accumulations of past profits which have not been the subject of an order under this sub-section exceed the paid up capital of the company together with any loan capital which is the property of the shareholders or the actual cost of the fixed assets of the company whichever of these is greater this section shall apply as if instead of the words sixty per cent of the assessable income the words one hundred per cent of the assessable income were substituted

Provided further that no order under this sub-section shall be made where the company has distributed not less than fifty five per cent. of the assessable income of the company as reduced by the amount of income tax and super tax payable by the company in respect thereof unless the company on receipt of a notice from the Income-tax Officer that he proposes to make such an order fails to make within three months of the receipt of such notice a further distribution of its profits and gains so that the total distribution made is not less than sixty per cent. of the assessable income of the company of the previous year concerned as reduced by the amount of income tax and super tax payable by the company in respect thereof

Provided further that this sub section shall not apply to any company in which the public are substantially interested or to a subsidiary company of such a company if the whole of the share capital of such subsidiary company is held by the parent company or by the nominees thereof

Explanation—For the purpose of this sub section—a company shall be deemed to be a company in which the public are substantially interested if shares of the company (not being shares entitled to a fixed rate of dividend whether with or without a further right to participate in profits) carrying not less than twenty five per cent of the voting power have been allotted unconditionally to or acquired unconditionally by and are at the end of the previous year beneficially held by the public (not including a company to which the provisions of this sub section apply) and if any such shares have in the course of such previous year been the subject of dealings in any stock exchange in British India or are in fact freely transferable by the holders to other members of the public

(2) The Inspecting Assistant Commissioner shall not give his approval to any order proposed to be passed by the Income tax Officer under this section until he has given the company concerned an opportunity of being heard

(3) * * * * *

(ii) Where the proportionate share of any member of a company in the undistributed profits and gains of the company has been included in his total income under the provisions of sub-section (1) the tax payable in respect thereof shall be recoverable from the company if it cannot be recovered from such member

(iii) Where tax is recoverable from a company under this sub-section a notice of demand shall be served upon it in the prescribed form showing the sum so payable and such company shall be deemed to be the assessee in respect of such sum for the purposes of Chapter VI

(4) Where tax has been paid in respect of any undistributed profits and gains of a company under this section and such profits and gains are subsequently distributed in any year the proportionate share therein of any member of the company shall be excluded in computing his total income of that year

(5) When a company is a shareholder deemed under sub-section (1) to have received a dividend the amount of the dividend thus deemed to have been paid to it shall be deemed to be part of its total income for the purpose also of the application of that sub-section to distributions of profits by that company

24 (1) Where any assessee sustains a loss of profits or gains in any year under any of the heads mentioned in section 6 he shall be entitled to have the amount of the loss set-off against his income profits or gains under any other head in that year

Set-off of loss in computing aggregate income
Provided that where the loss sustained is a loss of profits or gains which would but for the loss have accrued or arisen within an Indian State and would under the provisions of clause (c) of sub-section (2) of section 14 have been exempted from tax such loss shall not be set off except

against profits or gains accruing or arising within an Indian State and exempt from tax under the said provisions

Provided further that where the assessee is an unregistered firm which has not been assessed under the provisions of clause (b) of sub-section (5) of section 23 in the manner applicable to a registered firm, any such loss shall be set off only against the income, profits and gains of the firm and not against the income, profits and gains of any of the partners of the firm, and where the assessee is a registered firm, any loss which cannot be set off against other income, profits and gains of the firm shall be apportioned between the partners of the firm and they alone shall be entitled to have the amount of the loss set off under this section

(2) Where any assessee sustains a loss of profits or gains in any year, being a previous year not earlier than the previous year for the assessment for the year ending on the 31st day of March 1940, under the head 'Profits and gains of business profession or vocation', and the loss cannot be wholly set off under sub-section (1), the portion not so set off shall be carried forward to the following year and set off against the profits and gains, if any of the assessee from the same business, profession or vocation for that year and if it cannot be wholly so set off, the amount of loss not so set off shall be carried forward to the following year, and so on, but no loss shall be so carried forward for more than six years and a loss arising in the previous years for the assessment for the years ending on the 31st day of March, 1940, the 31st day of March, 1941, the 31st day of March, 1942 the 31st day of March, 1943 and the 31st day of March, 1944, respectively shall be carried forward only for one, two, three, four and five years, respectively

Provided that—

(a) Where the loss sustained is a loss of profits and gains of a business, profession or vocation to which the first proviso to sub-section (1) is applicable, and the profits and gains of that business profession or vocation are, under the provisions of clause (c) of section (2) of section (14) exempt from tax such loss shall not be set off except against profits and gains accruing or arising in an Indian State from the same business, profession, or vocation and exempt from tax under the said provisions,

(b) where depreciation allowance is, under clause (b) of the proviso to clause (vi) of sub-section (2) of section 10, also to be carried forward, effect shall first be given to the provisions of this sub-section,

(c) nothing herein contained shall entitle any assessee, being a registered firm, to have carried forward and set off any loss which has been apportioned between the partners, under the proviso to sub-section (1), or entitle any assessee, being a partner in an unregistered firm which has not been assessed under the provisions of clause (b) of sub-section (5) of section 23 in the manner applicable to a registered firm to have carried forward and set off against his own income any loss sustained by the firm,

(d) where an unregistered firm is assessed as a registered firm under clause (b) of sub-section (5) of section 23, during any year, its losses shall also be carried forward and set off under this section as if it were a registered firm,

(e) where a change has occurred in the constitution of a firm, nothing in this section shall be deemed to entitle the firm to have set off so much of the loss proportionate to the share of a retired or deceased partner computed in accordance with the provisions of clause (b) of sub-section (1)

of section 16 as exceeds his share of profits, if any, of the previous year in the firm, or to entitle any partner to the benefit of any portion of the said loss which is not apportionable to him under the said clause (b), and where any person carrying on any business, profession or vocation has been succeeded in such capacity by another person otherwise than by inheritance, nothing in this section shall be deemed to entitle any person other than the person incurring the loss to have it set off against his income, profits or gains

(3) When, in the course of the assessment of the total income of any assessee, it is established that a loss of profits or gains has taken place which he is entitled to have set off under the provisions of this section the Income-tax Officer shall notify to the assessee by order in writing the amount of the loss as computed by him for the purposes of this section

24-A. (1) When it appears to the Income tax Officer that any person may leave British India during the current financial year, or shortly after its expiry and that he has no present intention of returning the Income tax Officer may proceed to assess him on his total income of the period from the expiry of the last previous year of which the income has been assessed in his hands to the probable date of his departure from British India or where he has not been previously assessed on his total income of the period up to the probable date of his departure from British India. The assessment shall be made on the total income of each completed previous year included in such period at the rate at which such income would have been charged had it been fully assessed and as respects the period from the expiry of the last of such completed previous years to the probable date of departure the Income-tax Officer shall estimate the total income of such person during such period and assess it at the rate in force for the financial year in which such assessment is made

Provided that nothing herein contained shall authorise an Income-tax Officer to assess any income, profits or gains which have escaped assessment or have been under assessed or have been assessed at too low a rate or have been the subject of excessive relief under this Act but in respect of which he is debarred from issuing a notice under section 34

(2) For the purpose of making an assessment under sub section (1), the Income-tax Officer may serve a notice upon such person requiring him to furnish, within such time not being less than seven days as may be specified in the notice a return in the same form and verified in the same manner as a return under sub-section (2) of section 22 setting forth (along with such other particulars as may be provided for in the notice) his total income for each of the completed previous years comprised in the relevant period referred to in the first sentence of sub section (1) and his estimated total income for the period from the expiry of the last such completed previous year to the probable date of his departure, and the provisions of this Act shall, so far as may be apply as if the notice were a notice issued under sub-section (2) of section 22

24-B (1) Where a person dies, his executor, administrator or other legal representative shall be liable to pay out of the estate of the deceased person to the extent to which the estate is capable of meeting the charge the tax assessed as payable by such person, or any tax which would have been payable by him under this Act if he had not died.

(2) Where a person dies before the publication of the notice referred to in sub-section (1) of section 22 or before he is served with a notice under sub-section (2) of section 22 or section 34, as the case may be, his executor, administrator or other legal representative shall, on the serving of the notice under sub-section (2) of section 22 or under section 34, as the case may be, comply therewith, and the Income-tax Officer may proceed to assess the total income of the deceased person as if such executor, administrator or other legal representative were the assessee.

(3) Where a person dies without having furnished a return which he has been required to furnish under the provisions of section 22, or having furnished a return which the Income tax Officer has reason to believe to be incorrect or incomplete the Income tax Officer may make an assessment of the total income of such person and determine the tax payable by him on the basis of such assessment and for this purpose may by the issue of the appropriate notice which would have had to be served upon the deceased person had he survived require from the executor, administrator or other legal representative of the deceased person any accounts documents or other evidence which he might under the provisions of sections 22 and 23 have required from the deceased person.

25 (1) Where any business, profession or vocation to which sub-section (3) is not applicable is discontinued in any year, an assessment may be made in that year on the basis of the income, profits or gains of the period between the end of the previous year and the date of such discontinuance in addition to the assessment, if any, made on the basis of the income, profits or gains of the previous year.

(2) Any person discontinuing any such business profession or vocation shall give to the Income tax Officer notice of such discontinuance within fifteen days thereof, and, where any person fails to give the notice required by this sub-section, the Income-tax Officer may direct that a sum shall be recovered from him by way of penalty not exceeding the amount of tax subsequently assessed on him in respect of any income, profits or gains of the business, profession or vocation up to the date of its discontinuance.

(3) Where any business, profession or vocation on which tax was at any time charged under the provisions of the Indian Income tax Act, 1918, is discontinued, then, unless there has been a succession by virtue of which the provisions of sub-section (4) have been rendered applicable, no tax shall be payable in respect of the income, profits and gains of the period between the end of the previous year and the date of such discontinuance, and the assessee may further claim that the income, profits and gains of the previous year shall be deemed to have been the income, profits and gains of the said period. Where any such claim is made, an assessment shall be made on the basis of the income, profits and gains of the said period, and if an amount of tax has already been paid in respect of the income, profits and gains of the previous year exceeding the amount payable on the basis of such assessment, a refund shall be given of the difference.

(4) Where the person who was at the commencement of the Indian Income-tax (Amendment) Act, 1939, carrying on any business profession or vocation on which tax was at any time charged under the provisions of the Indian Income tax Act, 1918, is succeeded in such capacity by another person the change not being merely a change in the constitution of a partnership no tax shall be payable by the first mentioned person in respect

of the income, profits and gains of the period between the end of the previous year and the date of such succession, and such person may further claim that the income, profits and gains of the previous year shall be deemed to have been the income, profits and gains of the said period. Where any such claim is made, an assessment shall be made on the basis of the income, profits and gains of the said period, and, if an amount of tax has already been paid in respect of the income, profits and gains of the previous year exceeding the amount payable on the basis of such assessment, a refund shall be given of the difference.

Provided that sub sections (3) and (4) shall not apply—

(a) to super tax except where the income, profits and gains of the business, profession or vocation were assessed to super tax for the first time either for the year beginning on the 1st day of April, 1920 or for the year beginning on the 1st day of April, 1921

(b) to a business, profession or vocation on which income tax was at any time charged in the hands of a company under the Indian Income tax Act, 1886, or on which income tax would have been charged in the hands of a company for the assessment year ending on the 31st day of March, 1918, if the company having been in existence in that year had also been in existence in the year ending on the 31st day of March, 1917

(5) No claim to the relief afforded under sub-section (3) or sub section (4) shall be entertained unless it is made before the expiry of one year from the date on which the business profession or vocation was discontinued or the succession took place, as the case may be

(6) Where an assessment is to be made under sub-section (1), sub-section (3) or sub section (4), the Income-tax Officer may serve on the person whose income, profits and gains are to be assessed, or, in the case of a firm, on any person who was a member of such firm at the time of its discontinuance, or, in the case of a company, on the principal officer thereof, a notice containing all or any of the requirements which may be included in a notice under sub section (2) of section 22, and the provisions of this Act shall so far as may be, apply accordingly as if the notice were a notice issued under that sub section

25-A (1) Where, at the time of making an assessment under

Assessment after partition of a Hindu undivided family

section 23, it is claimed by or on behalf of any member of a Hindu family hitherto assessed as undivided that a partition has taken place among the members of such family, the Income tax

Officer shall make such inquiry thereinto as he may think fit, and if he is satisfied that the joint family property has been partitioned among the various members or groups of members in definite portions he shall record an order to that effect

Provided that no such order shall be recorded until notices of the inquiry have been served on all the members of the family

(2) Where such an order has been passed or where any person has succeeded to a business, profession or vocation formerly carried on by a Hindu undivided family whose joint family property has been partitioned on or after the last day on which it carried on such business profession or vocation the Income-tax Officer shall make an assessment of the total income received by or on behalf of the joint family as such, as if no partition had taken place, and each member or group of members shall, in addition to any

income-tax for which he or it may be separately liable and notwithstanding anything contained in sub-section (1) of section 14, be liable for a share of the tax on the income so assessed according to the portion of the joint family property allotted to him or it and the Income tax Officer shall make assessments accordingly on the various members and groups of members in accordance with the provisions of section 23

Provided that all the members and groups of members whose joint family property has been partitioned shall be liable jointly and severally for the tax assessed on the total income received by or on behalf of the joint family as such

(3) Where such an order has not been passed in respect of a Hindu family hitherto assessed as undivided such family shall be deemed, for the purposes of this Act, to continue to be a Hindu undivided family

26 (1) Where at the time of making an assessment under section 23, it is found that a change has occurred in the constitution of a firm or that a firm has been newly constituted the assessment shall be made on the firm as constituted at the time of making the assessment

Change in constitution of a firm
Provided that the income profits and gains of the previous year shall for the purpose of inclusion in the total incomes of the partners be apportioned between the partners who in such previous year were entitled to receive the same

Provided further that when the tax assessed upon a partner cannot be recovered from him it shall be recovered from the firm as constituted at the time of making the assessment

(2) Where a person carrying on any business profession or vocation has been succeeded in such capacity by another person such person and such other person shall subject to the provisions of sub-section (4) of section 25 each be assessed in respect of his actual share, if any, of the income, profits and gains of the previous year

Provided that, when the person succeeded in the business, profession or vocation cannot be found, the assessment of the profits of the year in which the succession took place up to the date of succession and for the year preceding that year shall be made on the person succeeding him in like manner and to the same amount as it would have been made on the person succeeded or when the tax in respect of the assessment made for either of such years assessed on the person succeeded cannot be recovered from him, it shall be payable by and recoverable from the person succeeding, and such person shall be entitled to recover from the person succeeded the amount of any tax so paid

26-A (1) Application may be made to the Income-tax Officer on behalf of any firm constituted under an instrument of partnership specifying the individual shares of the partners, for registration for the purposes of this Act and of any other enactment for the time being in force relating to income-tax or super tax.

Procedure in registration of firms
(2) The application shall be made by such person or persons, and at such times and shall contain such particulars and shall be in such form, and be verified in such manner, as may be prescribed, and it shall be dealt with by the Income tax Officer in such manner as may be prescribed

27 Where an assessee, within one month from the service of a notice of demand issued as hereinafter provided, satisfies the Income-tax Officer that he was prevented by sufficient cause from making the return required by section 22, or that he did not receive the notice issued under sub-section (4) of section 22, or sub section (2) of section 23, or that he had not a reasonable opportunity to comply, or was prevented by sufficient cause from complying with the terms of the last mentioned notices, the Income-tax Officer shall cancel the assessment and proceed to make a fresh assessment in accordance with the provisions of section 23

28 (1) If the Income-tax Officer, the Appellate Assistant Commissioner or the Appellate Tribunal in the course of any proceedings under this Act, is satisfied that any person—

(a) has without reasonable cause failed to furnish the return of his total income which he was required to furnish by notice given under sub-section (1) or sub section (2) of section 22 or section 34 or has without reasonable cause failed to furnish it within the time allowed and in the manner required by such notice, or

(b) has without reasonable cause failed to comply with a notice under sub section (4) of section 22 or sub section (2) of section 23, or

(c) has concealed the particulars of his income or deliberately furnished inaccurate particulars of such income,

he or it may direct that such person shall pay by way of penalty, in the case referred to in clause (a), in addition to the amount of the income-tax and super tax, if any, payable by him a sum not exceeding one and a half times that amount, and in the cases referred to in clauses (b) and (c), in addition to any tax payable by him, a sum not exceeding one and a half times the amount of the income tax and super tax, if any, which would have been avoided if the income as returned by such person had been accepted as the correct income

Provided that—

(a) no penalty for failure to furnish the return of his total income shall be imposed on an assessee whose total income is less than three thousand five hundred rupees unless he has been served with a notice under sub section (2) of section 22,

(b) where a person has failed to comply with a notice under sub-section (2) of section 22 or section 34 and proves that he has no income liable to tax, the penalty imposable under this sub section shall be a penalty not exceeding twenty five rupees,

(c) no penalty shall be imposed under this sub-section upon any person assessable under section 42 as the agent of a person not resident in British India for failure to furnish the return required under section 22 unless a notice under sub section (2) of that section or under section 34, has been served on him,

(d) when the person liable to penalty is a registered firm or an unregistered firm treated under section 23 (5) (b) as is registered firm, so that the amount of the income-tax and super tax payable by the firm itself has not been determined, that amount shall be taken to be an amount equal to the tax which would have been payable by an unregistered firm on an income equal to the firm's total income, and, in the cases referred to in clauses (b) and (c), the amount of the income tax and super tax which would have

been avoided if the income as returned had been accepted as the correct income shall be taken to be the difference between the amount of the tax which would have been payable by an unregistered firm on an income equal to the firm's total income and the amount of the tax payable by an unregistered firm on an income equal to the income of the firm as actually returned by the firm

(2) If the Income tax Officer the Appellate Assistant Commissioner or the Appellate Tribunal in the course of any proceedings under this Act is satisfied that the profits of a registered firm have been distributed otherwise than in accordance with the shares of the partners as shown in the instrument of partnership registered under this Act governing such distribution and that any partner has thereby returned his income below its real amount he or it may direct that such partner shall in addition to the income-tax and super tax if any payable by him pay by way of penalty a sum not exceeding one and a half times the amount of income tax and super tax which has been avoided or would have been avoided if the income returned by such partner had been accepted as his correct income and no refund or other adjustment shall be claimable by any other partner by reason of such direction

(3) No order shall be made under sub-section (1) or sub-section (2) unless the assessee or partner in the case may be has been heard or has been given a reasonable opportunity of being heard

(4) No prosecution for an offence against this Act shall be instituted in respect of the same facts on which a penalty has been imposed under this section

(5) An Appellate Assistant Commissioner or the Appellate Tribunal on making an order under sub-section (1) or sub-section (2) shall forthwith send a copy of the same to the Income tax Officer

(6) The Income-tax Officer shall not impose any penalty under this section without the previous approval of the Inspecting Assistant Commissioner

29 When any tax, penalty or interest is due in consequence of any order passed under or in pursuance of this Act, Notice of demand the Income tax Officer shall serve upon the assessee or other person liable to pay such tax penalty or interest a notice of demand in the prescribed form specifying the sum so payable

30 (1) Any assessee objecting to the amount of income assessed under section 23 or section 27 or the amount Appeal against assessment under this Act of loss computed under section 24 or the amount of tax determined under section 23 or section 27 or denying his liability to be assessed under this Act or objecting to the cancellation by an Income tax Officer of the registration of a firm under sub-section (4) of section 23 or to a refusal to register a firm under sub-section (4) of section 23 or section 26-A or to make a fresh assessment under section 27 or objecting to any order under sub-section (2) of section 25 or section 25 A or sub-section (2) of section 26 or section 28 made by an Income tax Officer or objecting to any penalty imposed by an Income tax Officer under sub-section (6) of section 44-E or sub-section (5) of section 44-F or sub-section (1) of section 46 or objecting to a refusal of an Income tax Officer to allow a claim to a refund under section 48 49 or 49 F or to the amount of the refund allowed by the Income tax Officer under any of those sections and any assessee being a company, objecting to an order made by an Income-tax Officer under sub-section (1) of sec

tion 23 A may appeal to the Appellate Assistant Commissioner against the assessment or against such refusal or order

Provided that no appeal shall lie against an order under sub section (1) of section 46 unless the tax has been paid

Provided further that where the partners of a firm are individually assessable on their shares in the total income of the firm, any such partner may appeal to the Appellate Assistant Commissioner against any order of an Income tax Officer determining the amount of the total income or the loss of the firm or the apportionment thereof between the several partners but in respect of matters which are determined by such order may not appeal against the assessment of his own total income

Provided further that a shareholder in a company in respect of which an order under section 23 A has been passed by an Income-tax Officer may not in respect of matters determined by such order appeal against the assessment of his own total income

(1 A) Any person having in accordance with the provisions of sub section (3 A) (3 B) or (3 C) of section 18 read with sub-section (6) of that section deducted and paid tax in respect of any sum chargeable under this Act other than interest who denies his liability to make such deductions may appeal to the Appellate Assistant Commissioner to be declared not liable to make such deduction

(2) The appeal shall ordinarily be presented within thirty days of the payment of the tax deducted under sub section (3 A) (3 B) or (3 C) of section 18 or of receipt of the notice of demand relating to the assessment or penalty objected to or of the order in writing notifying the amount of total income on which the determination under sub-section (5) of section 23 was based and the apportionment thereof between the several partners or of the loss computed under section 24 or of the intimation of the refusal to pass an order under sub-section (1) of section 25 A, or to register a firm under section 26-A or of the date of the refusal to make a fresh assessment under section 27 or of the intimation of an order under sub section (1) of section 23 A or under section 48, 49 or 49 F, as the case may be but the Appellate Assistant Commissioner may admit an appeal after the expiration of the period if he is satisfied that the appellant had sufficient cause for not presenting it within that period

(3) The appeal shall be in the prescribed form and shall be verified in the prescribed manner

31 (1) The Appellate Assistant Commissioner shall fix a day and place for the hearing of the appeal and may from time to time adjourn the hearing

Hearing of appeal (2) The Appellate Assistant Commissioner may before disposing of any appeal make such further inquiry as he thinks fit or cause further inquiry to be made by the Income tax Officer

(2 A) The Appellate Assistant Commissioner may, at the hearing of an appeal allow an appellant to go into any ground of appeal not specified in the grounds of appeal if the Appellate Assistant Commissioner is satisfied that the omission of that ground from the form of appeal was not wilful or unreasonable

(3) In disposing of an appeal the Appellate Assistant Commissioner may in the case of an order of assessment —

(a) confirm, reduce enhance or annul the assessment or

(b) set aside the assessment and direct the Income-tax Officer to make a fresh assessment after making such further inquiry as the Income-

tax Officer thinks fit or the Appellate Assistant Commissioner may direct, and the Income-tax Officer shall thereupon proceed to make such fresh assessment, and determine where necessary the amount of tax payable on the basis of such fresh assessment

or, in the case of an order cancelling the registration of a firm under sub section (4) of section 23 or refusing to register a firm under sub section (4) of section 23 or section 26-A or to make a fresh assessment under section 27,

(c) confirm such order or cancel it and direct the Income-tax Officer to register the firm or to make a fresh assessment as the case may be

or, in the case of an order under sub section (2) of section 25 or sub-section (1) of section 23 A or sub-section (2) of section 26 or sections 48 49 or 49 F—

(d) confirm cancel or vary such order

or, in the case of an order under sub-section (1) of section 25 A,

(e) confirm such order or cancel it and either direct the Income tax Officer to make further inquiry and pass a fresh order or to make an assessment in the manner laid down in sub-section (2) of section 25 A

or in the case of an order under section 28 or sub section (6) of section 44-E or sub section (5) of section 44 F or sub section (1) of section 46

(f) confirm or cancel such order or vary it so as either to enhance or reduce the penalty

or in the case of an appeal against a computation of loss under section 24,

(g) confirm or vary such computation

or in the case of an appeal under sub section (1 A) of section

30

(h) decide that the person is or is not liable to make the deduction and in the latter case direct the refund of the sum paid under sub section (6) of section 18

Provided that the Appellate Assistant Commissioner shall not enhance an assessment or a penalty unless the appellant has had a reasonable opportunity of showing cause against such enhancement

Provided further that at the hearing of any appeal against an order of an Income tax Officer the Income tax Officer shall have the right to be heard either in person or by a representative

(4) Where as the result of an appeal any change is made in the assessment of a firm or association of persons or a new assessment of a firm or association of persons is ordered to be made the Appellate Assistant Commissioner may authorise the Income tax Officer to amend accordingly any assessment made on any partner of the firm or any member of the association

(5) The Appellate Assistant Commissioner shall on the conclusion of the appeal communicate the orders passed by him to the assessee and to the Commissioner

32 [Omitted]

33 (1) Any assessee objecting to an order passed by an Appellate Assistant Commissioner under section 28 or section 31 may appeal to the Appellate Tribunal within sixty days of the date on which such order is communicated to him

Appeals against orders of
Appellate Assistant Com-
missioner

(2) The Commissioner may, if he objects to any order passed by an Appellant Assistant Commissioner under section 31, direct the Income-tax Officer to appeal to the Appellate Tribunal against such order and such appeal may be made at any time before the expiry of sixty days from the date on which the order is communicated to the Commissioner by the Appellate Assistant Commissioner

(2 A) The Tribunal may admit an appeal after the expiry of the sixty days referred to in sub sections (1) and (2) if it is satisfied that there was sufficient cause for not presenting it within that period

(3) An appeal to the Appellate Tribunal shall be in the prescribed form and shall be verified in the prescribed manner, and shall except in the case of an appeal referred to in sub section (2), be accompanied by a fee of one hundred rupees

(4) The Appellate Tribunal may after giving both parties to the appeal an opportunity of being heard pass such orders thereon as it thinks fit, and shall communicate any such orders to the assessee and to the Commissioner

(5) Where as the result of an appeal any change is made in the assessment of a firm or association of persons or a new assessment is ordered to be made, the Appellate Tribunal may authorise the Income tax Officer to amend accordingly any assessment made on any partner of the firm or any member of the association

(6) Save as provided in section 66 orders passed by the Appellate Tribunal on appeal shall be final

33 A (1) The Commissioner may of his own motion call for the record of any proceeding under this Act in which an order has been passed by any authority subordinate to him and may make such inquiry or cause such inquiry to be made and, subject to the provisions of this Act, may pass such order thereon not being an order prejudicial to the assessee as he thinks fit

Provided that the Commissioner shall not revise any order under this sub section if—

(a) where an appeal against the order lies to the Appellate Assistant Commissioner or to the Appellate Tribunal the time within which such appeal may be made has not expired, or

(b) the order is pending on an appeal before the Appellate Assistant Commissioner or has been made the subject of an appeal to the Appellate Tribunal, or

(c) the order has been made more than one year previously

(2) The Commissioner may, on application by an assessee for revision of an order under this Act passed by any authority subordinate to the Commissioner, made within one year from the date of the order, call for the record of the proceeding in which such order was passed and on receipt of the record may make such inquiry or cause such inquiry to be made, and subject to the provisions of this Act may pass such order thereon, not being an order prejudicial to the Assessee as he thinks fit

Provided that the Commissioner shall not revise any order under this sub section if—

(a) where an appeal against the order lies to the Appellate Assistant Commissioner or to the Appellate Tribunal but has not been made, the time within which such appeal may be made has not expired, or in the case of an appeal to the Appellate Tribunal the assessee has not waived his right of appeal, or

(b) where an appeal against the order has been made to the Appellate Assistant Commissioner, the appeal is pending before the Appellate Assistant Commissioner, or

(c) the order has been made the subject of an appeal to the Appellate Tribunal

Provided further that an order by the Commissioner declining to interfere shall be deemed not to be an order prejudicial to the assessee.

(3) Every application by an assessee under sub section (2) shall be accompanied by a fee of twenty five rupees

34 (1) If in consequence of definite information which has come into his possession the Income-tax Officer discovers that income, profits or gains chargeable to income tax have escaped assessment in any year or have been under assessed, or have been assessed at too low a rate or have been the subject of excessive relief under this Act, the Income-tax Officer may, in any case in which he has reason to believe that the assessee has concealed the particulars of his income or deliberately furnished inaccurate particulars thereof at any time within eight years and in any other case at any time within four years of the end of that year serve on the person liable to pay tax on such income, profits or gains or, in the case of a company, on the principal officer thereof a notice containing all or any of the requirements which may be included in a notice under sub section (2) of section 22 and may proceed to assess or re-assess such income profits or gains, and the provisions of this Act shall so far as may be, apply accordingly as if the notice were a notice issued under that sub-section

Provided that the tax shall be charged at the rate at which it would have been charged had the income, profits or gains not escaped assessment or full assessment, as the case may be

Provided further that when the income, profits or gains concerned are income, profits or gains liable to assessment for a year ending prior to the commencement of the Indian Income tax (Amendment) Act, 1939, or where the assessment made or to be made is an assessment made or to be made on a person deemed to be the agent of a non resident person under section 43, this sub-section shall have effect as if for the periods of eight years and four years a period of one year were substituted

(2) No order of assessment under section 23 or of assessment or re-assessment under sub section (1) of this section shall be made after the expiry, in any case to which clause (c) of sub section (1) of section 28 applies of eight years and in any other case of four years from the end of the year in which the income, profits or gains were first assessable

Provided that nothing contained in this sub-section shall apply to a re-assessment made in pursuance of an order under section 31, section 33, section 66 or section 66-A

35 (1) The Commissioner or Appellate Assistant Commissioner may, at any time within four years from the date of any order passed by him in appeal or, in the case of the Commissioner in revision under section 33 A and the Income-tax Officer may, at any time within four years from the date of any assessment order or refund order passed by him, on his own motion rectify any mistake apparent from the record of the appeal revision, assessment or refund as the case may be, and shall within the like period rectify any such mistake which has been brought to his notice by an assessee

Provided that no such rectification shall be made, having the effect

of enhancing an assessment or reducing a refund unless the Commissioner, the Appellate Assistant Commissioner or the Income tax Officer, as the case may be, has given notice to the assessee of his intention so to do and has allowed him a reasonable opportunity of being heard

Provided further that no such rectification shall be made of any mistake in any order passed more than one year before the commencement of the Indian Income tax (Amendment) Act 1939

(2) The provisions of sub section (1) apply also in like manner to the rectification of mistakes by the Appellate Tribunal

(3) Where any such rectification has the effect of reducing the assessment, the Income tax Officer shall make any refund which may be due to such assessee

(4) Where any such rectification has the effect of enhancing the assessment or reducing a refund the Income tax Officer shall serve on the assessee a notice of demand in the prescribed form specifying the sum payable and such notice of demand shall be deemed to be issued under section 29 and the provisions of this Act shall apply accordingly

36 In the determination of the amount of tax or of a refund payable under this Act fractions of an anna less than six pies shall be disregarded and fractions of an anna equal to or exceeding six pies shall be regarded as one anna

37 The Income tax Officer, Appellate Assistant Commissioner, Commissioner and Appellate Tribunal shall for the purposes of this Chapter have the same powers as are vested in a Court under the Code of Civil Procedure 1908 when trying a suit in respect of the following matters namely —

(a) enforcing the attendance of any person and examining him on oath or affirmation,

(b) compelling the production of documents and

(c) issuing commissions for the examination of witnesses, and any proceeding before an Income tax Officer Appellate Assistant Commissioner Commissioner or Appellate Tribunal under this Chapter shall be deemed to be a judicial proceeding within the meaning of sections 193 and 228 and for the purposes of section 196 of the Indian Penal Code

38 The Income-tax Officer or Assistant Commissioner may, for the purposes of this Act,—

(1) require any firm or Hindu undivided family to furnish him with a return of the members of the firm or of the manager or adult male members of the family as the case may be and of their addresses

(2) require any person whom he has reason to believe to be a trustee guardian, or agent to furnish him with a return of the names of the persons for or of whom he is trustee guardian or agent and of their addresses

(3) require any assessee to furnish a statement of the names and addresses of all persons to whom he has paid in any year rent interest commission royalty or brokerage or any annuity not being an annuity taxable under the head 'Salaries', amounting to more than four hundred rupees together with particulars of all such payments made

39 The Income tax Officer or Assistant Commissioner or any person

Power to inspect the register of members of any company

authorized in writing in this behalf by the Income tax Officer or Assistant Commissioner may inspect and if necessary take copies or cause copies to be taken, of any register of the members, debenture holders or mortgagees of any company or of any entry in such register

CHAPTER V

LIABILITY IN SPECIAL CASES

40 (1) Where the guardian or trustee of any person being a minor,

Guardians trustees and agents

lunatic or idiot (all of which persons are herein after in this sub section included in the term beneficiary) is entitled to receive on behalf of such beneficiary or is in receipt on behalf of such beneficiary of any income profits or gains chargeable under this Act the tax shall be levied upon and recoverable from such guardian or trustee, as the case may be in like manner and to the same amount as it would be leviable upon and recoverable from any such beneficiary if of full age or sound mind, and in direct receipt of such income profits or gains and all the provisions of this Act shall apply accordingly

(2) Where the trustee or agent of any person not resident in British India and not being a minor lunatic or idiot (such person being hereinafter in this sub section referred to as a beneficiary) is entitled to receive on behalf of such beneficiary or is in receipt on behalf of such beneficiary of any income profits or gains chargeable under this Act the tax if not levied on the beneficiary direct may be levied upon and recovered from such trustee or agent as the case may be in like manner and to the same amount as it would be leviable upon and recoverable from the beneficiary if in direct receipt of such income profits or gains and all the provisions of this Act shall apply accordingly

41 (1) In the case of income profits or gains chargeable under this

Courts of Wards etc. Act which the Courts of Wards the Administrators General the Official Trustees or any receiver or manager (including any person whatever his designation who in fact manages property on behalf of another) appointed by or under any order of a Court or any trustee or trustees appointed under a trust declared by a duly executed instrument in writing whether testamentary or otherwise (including the trustee or trustees under any Wakf deed which is valid under the Mussalman Wakf Validating Act 1913) are entitled to receive on behalf of any person the tax shall be levied upon and recoverable from such Court of Wards Administrator General Official Trustee receiver or manager or trustee or trustees in the like manner and to the same amount as it would be leviable upon and recoverable from the person on whose behalf such income profits or gains are receivable and all the provisions of this Act shall apply accordingly

Provided that where any such income profits or gains or any part thereof are not specifically receivable on behalf of any one person or where the individual shares of the persons on whose behalf they are receivable are indeterminate or unknown the tax shall be levied and recoverable at the maximum rate but where such persons have no other personal income chargeable under the Act and none of them is an artificial judicial person, as if such income profits or gains or such part thereof were the total income of an association of persons

Provided further that when part only of the income profits and gains of a trust is chargeable under this Act that proportion only of the

income, profits and gains receivable by a beneficiary from the trust which the part so chargeable bears to the whole income, profits and gains of the trust shall be deemed to have been derived from that part

(2) Nothing contained in sub section (1) shall prevent either the direct assessment of the person on whose behalf income, profits or gains therein referred to are receivable or the recovery from such person of the tax payable in respect of such income, profits or gains

42 (1) All income, profits or gains accruing or arising whether directly or indirectly, through or from any business connection in British India or through or from any property in British India, or through or from any asset or source of income in British India, or through or from any money lent at interest and brought into British India in cash or in kind, shall be deemed to be income accruing or arising within British India and where the person entitled to the income, profits or gains is not resident in British India shall be chargeable to income tax either in his name or in the name of his agent, and in the latter case such agent shall be deemed to be, for all the purposes of this Act, the assessee in respect of such income-tax

Non residents
Provided that where the person entitled to the income profits or gains is not resident in British India the income tax so chargeable may be recovered by deduction under any of the provisions of section 18 and that any arrears of tax may be recovered also in accordance with the provisions of this Act from any assets of the non resident person which are, or may at any time come, within British India

Provided further that any such agent, or any person who apprehends that he may be assessed as such an agent, may retain out of any money payable by him to such non resident person a sum equal to his estimated liability under this sub-section and in the event of any disagreement between the non resident person and such agent or person as to the amount to be so retained, such agent or person may secure from the Income tax Officer a certificate stating the amount to be so retained pending final settlement of the liability, and the certificate so obtained shall be his warrant for retaining that amount

Provided further that the amount recoverable from such agent or person at the time of final settlement shall not exceed the amount specified in such certificate except to the extent to which such agent or person may at such time have in his hands additional assets of such non resident person

(2) Where a person not resident or not ordinarily resident in British India, carries on business with a person resident in British India and it appears to the Income-tax Officer that owing to the close connection between such persons, the course of business is so arranged that the business done by the resident person with the person not resident or not ordinarily resident produces to the resident either no profits or less than the ordinary profits which might be expected to arise in that business, the profits derived therefrom or which may reasonably be deemed to have been derived therefrom, shall be chargeable to income tax in the name of the resident person who shall be deemed to be for all the purposes of this Act, the assessee in respect of such income-tax.

(3) In the case of a business of which all the operations are not carried out in British India, the profits and gains of the business deemed under this section to accrue or arise in British India shall be only such profits and gains as are reasonably attributable to that part of the operations carried out in British India

43 Any person employed by or on behalf of a person residing out of British India or having any business connection with such person, or through whom such person is in the receipt of any income, profits or gains upon whom the Income tax Officer has caused a notice to be served of his intention of treating him as the agent of the non resident person shall for all the purposes of this Act be deemed to be such agent

Provided that where transactions are carried on in the ordinary course of business through a broker in British India in such circumstances that the broker does not in respect of such transactions deal directly with or on behalf of a non resident principal but deals with or through a non resident broker who is carrying on such transactions in the ordinary course of his business and not as a principal such first mentioned broker shall not be deemed to be an agent under this section in respect of such transactions.

Provided further that no person shall be deemed to be the agent of a non resident person unless he has had an opportunity of being heard by the Income tax Officer as to his liability

44 Where any business profession or vocation carried on by a firm or association of persons has been discontinued or where an association of persons is dissolved every person who was at the time of such discontinuance or dissolution a partner of such firm or a member of such association shall in respect of the income profits and gains of the firm or association, be jointly and severally liable to assessment under Chapter IV and for the amount of tax payable and all the provisions of Chapter IV shall so far as may be apply to any such assessment

CHAPTER V A

SPECIAL PROVISIONS RELATING TO CERTAIN CLASSES OF SHIPPING

44 A The provisions of this chapter shall, notwithstanding anything contained in the other provisions of this Act apply for the purpose of the levy and recovery of tax in the case of any person who resides out of British India and carries on business in British India in any year as the owner or charterer of a ship (such person hereinafter in this chapter being referred to as the principal) unless the Income-tax Officer is satisfied that there is an agent of such principal from whom the tax will be recoverable in the following year under the other provisions of this Act

44 B (1) Before the departure from any port in British India of any ship in respect of which the provisions of this chapter apply the master of the ship shall prepare and furnish to the Income tax Officer a return of the full amount paid or payable to the principal or to any person on his behalf, on account of the carriage of all passengers live stock or goods shipped at that port since the last arrival of the ship thereat

(2) On receipt of the return the Income tax Officer shall assess the amount referred to in sub-section (1) and for this purpose may call for such accounts or documents as he may require and one-twentieth of the amount so assessed shall be deemed to be the amount of the profits and gains accruing to the principal on account of the carriage of the passengers live-stock and goods shipped at the port.

(3) When the profits and gains have been assessed as aforesaid, the Income tax Officer shall determine the sum payable as tax thereon at the

rate for the time being applicable to the total income of a company, and such sum shall be payable by the master of the ship, and a port-clearance shall not be granted to the ship until the Customs-collector or other officer duly authorised to grant the same, is satisfied that the tax has been duly paid

44-C Nothing in this chapter shall be deemed to prevent a principal from claiming, in the year following that in which any payment has been made on his behalf under this chapter, that an assessment be made of his total income in the previous year, and that the tax payable on the basis thereof be determined in accordance with the other provisions of this Act, and if he so claims, any such payment as aforesaid shall be treated as a payment in advance of the tax and the difference between the sum so paid, and the amount of tax found payable by him shall be paid by him or refunded to him as the case may be

CHAPTER V B

SPECIAL PROVISIONS RELATING TO AVOIDANCE OF LIABILITY TO INCOME TAX AND SUPER TAX.

44-D. (1) Where any person has, by means of a transfer of assets, by virtue or in consequence whereof, either alone or in conjunction with associated operations any income which if it were the income of such person would be chargeable to income-tax becomes payable to a person not resident or to a person resident but not ordinarily resident in British India, acquired any rights by virtue or in consequence of which he has within the meaning of this section power to enjoy such income, whether forthwith or in the future that income shall, whether it would or would not have been chargeable to income tax apart from the provisions of this section, be deemed to be income of such first mentioned person for all the purposes of this Act

(2) Where any person receives or is entitled to receive, whether before or after any transfer of assets by virtue or in consequence whereof either alone or in conjunction with associated operations any income becomes payable to a person not resident or resident but not ordinarily resident in British India, any sum paid or payable by way of a loan or repayment of a loan or any other sum, being a sum which is not paid or payable for full consideration in money or money's worth, paid or payable otherwise than as income, such income shall, whether it would or would not have been chargeable to income tax apart from the provisions of this section, be deemed to be the income of the first mentioned person for all the purposes of this Act

(3) Sub-sections (1) and (2) shall not apply if such first mentioned person shows to the satisfaction of the Income-tax Officer either—

(a) that neither the transfer nor any associated operation had for its purpose or for one of its purposes the avoidance of liability to taxation, or

(b) that the transfer and all associated operations were *bona fide* commercial transactions and were not designed for the purpose of avoiding liability to taxation.

(4) For the purposes of this section, an "associated operation" means, in relation to any transfer, an operation of any kind effected by any person in relation to any of the assets transferred or any assets representing

whether directly or indirectly any of the assets transferred, or to the income arising from any such assets, or to any assets representing whether directly or indirectly the accumulations of income arising from any such assets

(5) A person shall, for the purposes of this section, be deemed to have power to enjoy income of a person not resident, or resident but not ordinarily resident, in British India, if—

(a) the income is in fact so dealt with by any person as to be calculated at some point of time and, whether in the form of income or not, to enture for the benefit of the first mentioned person, or

(b) the receipt or accrual of the income operates to increase the value to such first mentioned person of any assets held by him or for his benefit, or

(c) such first mentioned person receives or is entitled to receive at any time any benefit provided or to be provided out of that income or out of moneys which are or will be available for the purpose by reason of the effect or successive effects of the associated operations on that income and on any assets which represent that income, or

(d) such first mentioned person has power by means of the exercise of any power of appointment or power of revocation or otherwise to obtain for himself, whether with or without the consent of any other person the beneficial enjoyment of the income, or

(e) such first mentioned person is able, in any manner whatsoever and whether directly or indirectly, to control the application of the income

(6) In determining whether a person has power to enjoy income within the meaning of this section regard shall be had to the substantial result and effect of the transfer and any associated operations, and all benefits which may at any time accrue to such person as a result of the transfer and any associated operations shall be taken into account irrespective of the nature or form of the benefits

(7) For the purposes of this section—

(a) the expression "assets" includes property or rights of any kind, and the expression "transfer" in relation to rights includes the creation of those rights,

(b) the expression "benefit" includes a payment of any kind,

(c) references to income of a person not resident or of a person not ordinarily resident in British India shall, where the amount of the income of a company for any year or period has been deemed to have been distributed under sub section (1) of section 23 A, include references to so much of the income of the company for that year or period as is equal to the amount deemed to have been distributed to that person,

(d) references to assets representing any assets, income, or accumulations of income include references to shares in or obligations of any company to which, or obligation of any other person to whom, those assets, that income or those accumulations are or have been transferred,

(e) any body corporate incorporated outside British India shall be treated as if it were resident out of British India whether it is so resident or not

(8) The provisions of this section shall apply for the purposes of assessment to income-tax and super-tax for the year ending on the 31st day of March, 1940, and subsequent years, and shall apply, in relation to transfers of assets and associated operations whether carried out before or after the commencement of the Indian Income tax (Amendment) Act, 1939

(9) Where any person has been charged to tax on any income deemed to be his under the provisions of this section and that income is subsequently received by him whether as income or in any other form it shall not again be deemed to form part of his income for the purposes of this Act.

44 E (1) Where the owner of any securities (in this sub section and in sub-section (2) referred to as the owner)
 Avoidance of tax by cer in sub-section (2) referred to as the owner)
 tam transactions in secu agrees to sell or transfer those securities and
 rities by the same or any collateral agreement—

(a) agrees to buy back or re-acquire the securities or

(b) acquires an option which he subsequently exercises to buy back or re-acquire the securities

then if the result of the transaction is that any interest becoming payable in respect of the securities is receivable otherwise than by the owner the interest payable as aforesaid shall whether it would or would not have been chargeable to tax apart from the provisions of this section be deemed for all the purposes of this Act to be the income of the owner and not to be the income of any other person

(2) The references in sub-section (1) to buying back or re-acquiring the securities shall be deemed to include references to buying or acquiring similar securities so however that where similar securities are bought or acquired the owner shall be under no greater liability to tax than he would have been under if the original securities had been bought back or re-acquired.

(3) Where any person carrying on a business which consists wholly or partly in dealing in securities agrees to buy or acquire any securities and by the same or any collateral agreement—

(a) agrees to sell back or re-transfer the securities or

(b) acquires an option which he subsequently exercises to sell back or re-transfer the securities

then if the result of the transaction is that any interest becoming payable in respect of the securities is receivable by him no account shall be taken of the transaction in computing for any of the purposes of this Act the profits arising from or loss sustained in the business

(4) Sub section (3) shall have effect subject to any necessary modifications as if references to selling back or re-transferring the securities included references to selling or transferring similar securities

(5) For the purpose of this section—

(a) the expression "interest" includes a dividend

(b) the expression "securities" includes stocks and shares

(c) securities shall be deemed to be similar if they entitle their holders to the same rights against the same persons as to capital and interest and the same remedies for the enforcement of those rights notwithstanding any difference in the total nominal amounts of the respective securities or in the form in which they are held or the manner in which they can be transferred.

(6) The Income-tax Officer may by notice in writing require any person to furnish him within such time as he may direct (not being less than twenty-eight days), in respect of all securities of which such person was the owner at any time during the period specified in the notice such particulars as he considers necessary for the purposes of this section and for the purpose of discovering whether tax has been borne in respect of the interest on all those securities and if that person without reasonable excuse

fails to comply with the notice he shall be liable to a penalty not exceeding five hundred rupees and to a further penalty of the like amount for every day after the infliction of such penalty during which the failure continues

44-F (1) Any person upon whom notice is served by the Income tax

Avoidance of tax by sales
cum divide d

Officer requiring him to furnish a statement of particulars relating to any securities in which at any time during the period specified in the notice he has had any beneficial interest and in respect of which within such period either no income was received by him or the income received by him was less than the sum to which the income would have amounted if the income from such securities had accrued from day to day and been apportioned accordingly shall whether an assessment to income tax or super tax in respect of his total income has or has not been made for the relevant year or years of assessment furnish such a statement and such particulars in the form and within the time (not being less than twenty eight days) required by the notice

(2) If it appears to the Income tax Officer by reference to all the circumstances in relation to the securities of any such person (including circumstances with respect to sales purchases dealings contracts arrangements transfers or any other transactions relating to such securities) that such person has thereby avoided or would avoid more than ten per cent of the amount of the income tax or super tax for any year which would have been payable in his case in respect of the income from those securities if the income had been deemed to accrue from day to day and had been apportioned accordingly and the income so deemed to have been apportioned to him had been treated as part of his total income from all sources for the purposes of income tax or super tax then those securities shall be deemed to be securities to which sub section (3) applies

(3) For the purposes of assessment to income tax or super tax in the case of any such person the income from any securities to which this sub section applies shall be deemed to accrue from day to day and in the case of the sale or transfer of any such securities by or to him shall be deemed to have been received as and when it is deemed to have accrued

Provided that this section shall not apply if such person proves to the satisfaction of the Income tax Officer that the avoidance of income tax or super tax was exceptional and not systematic and that there was not in his case in any of the three preceding years any such avoidance of income tax or super tax, or that the provisions of section 44 E have been applied in his case in respect of such income

(4) If any person fails to furnish any statement or particulars required under this section or if the Income-tax Officer is not satisfied with any statement or particulars furnished under this section the Income-tax Officer may make an estimate of the amount of the income which under the foregoing provisions of this section is to be deemed to form part of the person's total income for the purposes of income tax or super tax.

(5) If any person without reasonable excuse fails to furnish any statement or particulars required under this section he shall be liable to a penalty not exceeding five hundred rupees and to a further penalty of the like amount for every day after the infliction of such penalty during which the failure continues

(6) For the purpose of this section the expression 'securities' includes stocks and shares

CHAPTER VI

RECOVERY OF TAX AND PENALTIES

45 Any amount specified as payable in a notice of demand under sub section (3) of section 23 A or under section 29 Tax when payable or an order under section 31 or section 33 shall be paid within the time at the place and to the person mentioned in the notice or order, or if a time is not so mentioned then on or before the first day of the second month following the date of the service of the notice or order and any assessee failing so to pay shall be deemed to be in default provided that when an assessee has presented an appeal under section 30 the Income tax Officer may in his discretion treat the assessee as not being in default as long as such appeal is undisposed of

Provided further that where an assessee has been assessed in respect of income arising outside British India in a country the laws of which prohibit or restrict the remittance of money to British India the Income tax Officer shall not treat the assessee as in default in respect of that part of the tax which is due in respect of that amount of his income which by reason of such prohibition or restriction cannot be brought into British India and shall continue to treat the assessee as not in default in respect of such part of the tax until the prohibition or restriction is removed.

Explanation—For the purposes of this section income shall be deemed to have been brought into British India if it has been utilized or could have been utilized for the purposes of any expenditure actually incurred by the assessee without British India or if the income whether capitalized or not has been brought into British India in any form

46 (1) When an assessee is in default in making a payment of income tax the Income tax Officer may in his discretion direct that in addition to the amount Mode and time of recovery of the arrears a sum not exceeding that amount shall be recovered from the assessee by way of penalty

(1 A) For the purposes of sub section (1) the Income tax Officer may direct the recovery of any sum less than the amount of the arrears and may enhance the sum so directed to be recovered from time to time in the case of a continuing default so however that the total sum so directed to be recovered shall not exceed the amount of the arrears payable

(2) The Income tax Officer may forward to the Collector a certificate under his signature specifying the amount of arrears due from an assessee and the Collector on receipt of such certificate shall proceed to recover from such assessee the amount specified therein as if it were an arrear of land revenue

Provided, that, without prejudice to any other powers of the Collector in this behalf he shall for the purpose of recovering the said amount have the powers which under the Code of Civil Procedure 1908 a Civil Court has for the purpose of the recovery of an amount due under a decree.

(3) In any area with respect to which the Commissioner has directed that any arrears may be recovered by any process enforceable for the recovery of an arrear of any municipal tax or local rate imposed under any enactment for the time being in force in any part of the province the Income-tax Officer may proceed to recover the amount due by such process

(4) The Commissioner may direct by what authority any powers or duties incident under any such enactment as aforesaid to the enforcement of any process for the recovery of a municipal tax or local rate shall be

exercised or performed when that process is employed under sub-section (3)

(5) If any assessee is in receipt of any income chargeable under the head Salaries the Income-tax Officer may require any person paying the same to deduct from any payment subsequent to the date of such requisition any arrears due from such assessee, and such person shall comply with any such requisition and shall pay the sums so deducted to the credit of the Central Government, or as the Central Board of Revenue directs

(6) If the recovery of income tax in any area has been entrusted to a Provincial Government under section 124 (1) of the Government of India Act 1935 the Provincial Government may direct with respect to that area or any part thereof that income tax shall be recovered therein with and as an addition to any municipal tax or local rate by the same person and in the same manner as the municipal tax or local rate is recovered.

(7) Save in accordance with the provisions of sub section (1) of section 42 or of the proviso to section 45 no proceedings for the recovery of any sum payable under this Act shall be commenced after the expiration of one year from the last day of the financial year in which any demand is made under this Act

Provided that where the sum payable is allowed to be paid by instalments the period of one year herein referred to shall be reckoned from the date on which the last of such instalments was due

47 Any sum imposed by way of penalty under the provisions of sub-section (2) of section 25 section 28 sub-section (6) of section 44-F sub section (5) of section 44-F or sub section (1) of section 46 and any interest payable under the provisions of sub sections (4) (6) (7) or (8) of section 18 A shall be recoverable in the manner provided in this Chapter for the recovery of arrear of tax.

CHAPTER VII

REFUNDS

48 (1) If any individual Hindu undivided family company local authority firm or other association of persons or any partner of a firm or member of an association individually satisfies the Income tax Officer or other authority appointed by the Central Government in this behalf that the amount of tax paid by him or on his behalf or treated as paid on his behalf for any year exceeds the amount with which he is properly chargeable under this Act for that year he shall be entitled to a refund of any such excess

(2) The Appellate Assistant Commissioner or the Appellate Tribunal in the exercise of their appellate powers if satisfied to the like effect shall cause a refund to be made by the Income tax Officer of any amount found to have been wrongly paid or paid in excess

(3) Where income of one person is included under any provision of this Act in the total income of any other person such other person only shall be entitled to a refund under this section in respect of such income

(4) Nothing in this section shall operate to validate any objection or appeal which is otherwise invalid or to authorise the revision of any assessment or other matter which has become final and conclusive or the review by any officer of a decision of his own which is subject to appeal or revision or where any relief is specifically provided elsewhere in this Act, to entitle any person to any relief other or greater than that relief or to entitle any person to claim a refund of tax payable before the commencement of the

Indian Income tax (Amendment) Act, 1939, which he would not be entitled to claim but for the passing of that Act.

49 (1) If any person who has paid by deduction under section 18 or otherwise Indian income tax for any year on any part of his income proves to the satisfaction of the Income-tax Officer that he has paid by deduction or otherwise United Kingdom income tax for the corresponding year in respect of the same part of his income, and that the rate at which he was entitled to, and has obtained, relief under the provisions of section 27 of the Finance Act, 1920, is less than the Indian rate of tax charged in respect of that part of his income, he shall be entitled to a refund of a sum calculated on that part of his income at a rate equal to the difference between the Indian rate of tax or the appropriate rate of United Kingdom income tax, whichever is less, and the rate at which he was entitled to and obtained relief under that section.

Provided that in no case shall the rate at which such refund is calculated exceed half the Indian rate of tax appropriate to the income of the person entitled to relief.

(2) In sub section (1)—

(a) the expression 'Indian income tax' means income tax and super tax charged in accordance with the provisions of this Act,

(b) the expression "Indian rate of tax" means the amount of Indian income-tax exclusive of super tax after deduction of any relief due to a claimant under the other provisions of this Act but before deduction of any relief due to him under this section divided by his total income after deducting therefrom any income (including income from a share in an unregistered firm) exempted from tax by or under the provisions of this Act, added to the amount of Indian super tax before deduction of any relief due to the claimant under this section divided by his total income,

(c) the expression "United Kingdom income tax" means income-tax and super tax chargeable in accordance with the provisions of the Income-tax Acts,

(d) the expression 'appropriate rate of United Kingdom income tax' has the meaning assigned to that expression in section 27 of the Finance Act, 1920, as amended by the Finance Act 1927

49-A. (1) The Central Government may, by notification in the

Relief in respect of
Indian State and Dominion
income-tax

Official Gazette make provision for the granting of relief in respect of income on which has been paid both income tax (including super tax) under this Act and Dominion income-tax

(2) For the purposes of this section "Dominion income-tax" means any income tax or super tax charged under any law in force in any Indian State or in any part of His Majesty's Dominions (other than the United Kingdom) where the laws of that State or part provide for relief in respect of tax charged on income both in that State or part and in British India which appears to the Central Board of Revenue to correspond to the relief which may be granted by this section

49-B. Where any dividend has been paid, credited or distributed or

Income tax on company's
dividend deemed to have
been paid by shareholder

is deemed to have been paid, credited or distributed to any of the persons specified in section 3 who is a shareholder of a company which is assessed to income-tax in British

India or elsewhere, such person shall be deemed in respect of such dividend himself to have paid income-tax (exclusive of super tax) at the rate applicable to the total income of a company for the financial year in which the dividend has been paid, credited or distributed or is deemed to have been paid credited or distributed on so much of the dividend as bears to the whole the same proportion as the amount of income on which the company is liable to pay income-tax bears to the whole income of the company

49 C Where any dividend has been paid, credited or distributed or deemed to have been paid credited or distributed to a shareholder of a company which has obtained the relief referred to in section 49 or granted under section 49 A or under the India and Burma (Income tax Relief) Order 1936 the shareholder shall be deemed in respect of such dividend himself to have obtained such relief at the rate at which such relief has been granted in respect of income tax only to the company for the financial year preceding the year in which the dividend was paid credited or distributed or is deemed to have been paid credited or distributed

(2) If the rate at which a shareholder is deemed under sub section (1) to have obtained relief exceeds the rate at which he would have been entitled to relief had such relief been given direct to him by or under the said sections or Order, any excess shall be recovered from him either as an addition to the tax payable by him on any assessment made on him under section 23 or section 34 or by setting it off against any relief due to him under section 48

49 D If any person who has paid by deduction or otherwise Indian income tax for any year in respect of any income arising without British India in a country the laws of which do not provide for any relief in respect of income tax charged in British India proves that he has paid income tax by deduction or otherwise under the laws of the said country in respect of the same income he shall be entitled to the deduction from the Indian income-tax payable of a sum equal to one half of such Indian income tax or to one half of such tax payable in the said country whichever is the less

Explanation—The expression 'Indian income tax' in this section means income tax and super tax charged in accordance with the provisions of this Act

49 E Where under any of the provisions of this Act a refund is found to be due to any person the Income-tax Officer Appellate Assistant Commissioner or Commissioner as the case may be may, in lieu of payment of the refund set off the amount to be refunded or any part of that amount against the tax if any remaining payable by the person to whom the refund is due

49 F Where through death incapacity, bankruptcy liquidation or other cause a person who would but for such cause have been entitled to a refund under any of the provisions of this Act or to make a claim under section 48 or 49 is unable to receive such refund or to make such claim his executor administrator or other legal representative or the trustee or receiver, as the

case may be, shall be entitled to receive such refund or to make such claim for the benefit of such person or his estate

50 No claim to any refund of income-tax or super-tax under this Chapter shall be allowed, unless it is made within four years from the last day of the financial year commencing next after the expiry of the previous year in which the income arose accrued or was received or was deemed to have arisen accrued or been received or was brought into British India

Limitation of claims for refund. Provided that where the claim is to a refund of income tax or super tax paid prior to the commencement of the Indian Income-tax (Amendment) Act, 1939, the claim shall not be allowed unless it is made within one year from the last day of the year in which the tax was recovered or before the last day of the financial year commencing after the expiry of the previous year as defined in clause (11) of section 2 in which the income arose on which the tax was recovered whichever period may expire later

Provided further that a claim to refund under section 49 of tax paid prior to the commencement of the Indian Income tax (Amendment) Act 1939, may be admitted after the period of limitation herein prescribed when the applicant satisfies the Commissioner or an Assistant Commissioner of Income-tax specially empowered in this behalf by the Central Board of Revenue, that he had sufficient cause for not making the claim within such period

CHAPTER VIII OFFENCES AND PENALTIES

Failure to make payments or deliver returns or state-
ments or allow inspection. 51 If a person fails without reasonable cause or excuse—

(a) to deduct and pay any tax as required by section 18 or under sub-section (5) of section 46,

(b) to furnish a certificate required by sub-section (9) of section 18 or by section 20 to be furnished,

(c) to furnish in due time any of the returns mentioned in section 19-A, section 20 A, section 21, sub-section (2) of section 22, or section 38

(d) to produce, or cause to be produced, on or before the date mentioned in any notice under sub section (4) of section 22 such accounts and documents as are referred to in the notice

(e) to grant inspection or allow copies to be taken in accordance with the provisions of section 39

he shall on conviction before a Magistrate be punishable with fine which may extend to ten rupees for every day during which the default continues

52 If a person makes a statement in a verification mentioned in section 19 A or section 20-A or section 21 or section 22 or sub section (2) of section 26-A or sub section (3) of section 30 or sub section (3) of section 33 which is false and which he either knows or believes to be false or does not believe to be true he shall be punishable on conviction before a Magistrate with simple imprisonment which may extend to six months or with fine which may extend to one thousand rupees or with both

False statement in declaration. 53 (1) A person shall not be proceeded against for an offence under section 51 or section 52 except at the instance of the Inspecting Assistant Commissioner

Prosecution to be at instance of Assistant Commissioner

(2) The Inspecting Assistant Commissioner may either before or after the institution of proceedings compound any such offence

54 (1) All particulars contained in any statement made return furnished or accounts or documents produced by a public servant, under the provisions of this Act, or in any evidence given or affidavit or deposition made in the course of any proceedings under this Act other than proceedings under this Chapter, or in any record of any assessment proceeding or any proceeding relating to the recovery of a demand prepared for the purposes of this Act shall be treated as confidential and notwithstanding anything contained in the Indian Evidence Act 1872 no Court shall save as provided in this Act be entitled to require any public servant to produce before it any such return accounts documents or record or any part of any such record or to give evidence before it in respect thereof

(2) If a public servant discloses any particulars contained in any such statement return accounts documents evidence affidavit deposition or record he shall be punishable with imprisonment which may extend to six months and shall also be liable to fine

(3) Nothing in this section shall apply to the disclosure—

(a) of any such particulars for the purposes of a prosecution under the Indian Penal Code in respect of any such statement return accounts documents evidence, affidavit or deposition or for the purposes of a prosecution under this Act or

(b) of any such particulars to any person acting in the execution of this Act where it is necessary to disclose the same to him for the purposes of this Act or

(c) of any such particulars occasioned by the lawful employment under this Act of any process for the service of any notice or the recovery of any demand or

(d) of any such particulars to a Civil Court in any suit to which Government is a party which relates to any matter arising out of any proceeding under this Act or

(e) of any such particulars to the Auditor General of India for the purpose of enabling him to discharge his functions under section 144 of the Government of India Act 1935 or

(f) of any such particulars to any officer appointed by the Auditor General of India or the Central Board of Revenue to audit income-tax receipts or refunds or

(g) of any such particulars relevant to any inquiry into the conduct of an official of the Income tax Department to any persons appointed Commissioners under the Public Servants (Inquiries) Act 1850 or to an officer otherwise appointed to hold such inquiry or to a Public Service Commission established under the Government of India Act 1935, when exercising its functions in relation to any matter arising out of any such inquiry or

(gg) of any such particulars relevant to any enquiry into a charge of misconduct in connection with income tax proceedings against a lawyer or registered accountant to the authority referred to in sub-section (3) of section 61 when exercising the functions referred to in that sub-section

(h) of any such particulars occasioned by the lawful exercise by a public servant of his powers under the Indian Stamp Act 1899 to impound an insufficiently stamped document, or

(*e*) of such facts to an authorised officer of the United Kingdom, or of any Indian State or of any part of His Majesty's Dominions which has entered into an agreement with British India for the granting of double taxation relief as may be necessary for the purpose of enabling such relief or a refund under section 49 of this Act to be given or

(*f*) of such facts to an officer of a Provincial Government as may be necessary for the purpose of enabling that Government to levy or realise any tax imposed by it on agricultural income or

(*g*) of such facts to any authority exercising powers under the Sea Customs Act 1878 or any Act of the Central Legislature imposing a duty of excise as may be necessary for enabling it duly to exercise such powers or

(*h*) of such facts to any person charged by law with the duty of inquiring into the qualifications of electors as may be necessary to establish whether a person is or is not entitled to be entered on an electoral roll or

(*i*) of so much of such particulars to the appropriate authority as may be necessary to establish whether a person has or has not been assessed to income tax in any particular year or years where under the provisions of any law for the time being in force such fact is required to be established.

(4) Nothing in this section shall apply to the production by a public servant before a Court of any document declaration or affidavit filed or the record of any statement or deposition made in a proceeding under section 25 A or section 26-A or to the giving of evidence by a public servant in respect thereof

(5) No prosecution shall be instituted under this section except with the previous sanction of the Commissioner

CHAPTER IX

SUPER TAX.

55 In addition to the income tax charged for any year there shall be charged levied and paid for that year in respect of the total income of the previous year of any individual Hindu undivided family, company local authority unregistered firm or other association of persons not being a registered firm or the partners of the firm or members of the association individually an additional duty of income tax (in this Act referred to as super tax) at the rate or rates laid down for that year by Act of the Central Legislature

Provided that where under the provisions of clause (b) of sub-section (5) of section 23 an unregistered firm has been assessed in the manner applicable to a registered firm super tax shall be payable by each partner of the firm individually on his share in the income, profits and gains of the firm and not by the firm itself

Provided further that where the profits and gains of an unregistered firm or other association of persons not being a company have been assessed to super tax super tax shall not be payable by a partner of the firm or a member of the association as the case may be in respect of the amount of such profits and gains which is proportionate to his share

56 Except in cases to which section 15 A applies or to which by clause (a) of the proviso to sub-section (3) and (4) of section 23 those sub-sections do not apply and subject to the provisions of this Chapter the total income of any individual Hindu undivided family, company, local

authority, unregistered firm or other association of persons shall, for the purposes of super tax, be the total income as assessed for the purposes of income tax, and where an assessment of total income has become final and conclusive for the purposes of income tax for any year, the assessment shall also be final and conclusive for the purposes of super-tax for the same year

58 (1) All the provisions of this Act, relating to the charge, assessment, collection and recovery of income-tax except those contained in section 3, the second proviso to sub-section (1) of section 7, the second and third provisos to section 8, clauses (a) and (b) of sub-section (2) of section 14, and sections 15, 15-A 19 and 20 and the first proviso to sub-section (1) of section 41 and section 58-F and sub-section (2) of section 58-G shall apply, so far as may be, to the charge, assessment, collection and recovery of super-tax.

(2) Save as provided in sub-sections (2), (2-A), (2-B), (3-B), (3 C), (3-D) and (3-E) of section 18, and section 58 H super tax shall be payable by the assessee direct

CHAPTER IX-A

SPECIAL PROVISIONS RELATING TO CERTAIN CLASSES OF PROVIDENT FUNDS

Definitions

58-A In this Chapter, unless there is anything repugnant in the subject or context,—

(a) a 'recognised provident fund' means a provident fund which has been and continues to be recognised by the Commissioner, in accordance with the provisions of this Chapter,

(b) an "employer" means—

(i) a Hindu undivided family, company, firm or other association of persons, or

(ii) an individual engaged in a business, profession or vocation whereof the profits and gains are assessable to income-tax under section 10,

maintaining a provident fund for the benefit of his or its employees,

(c) an "employee" means an employee participating in a provident fund, but does not include a personal or domestic servant,

(d) a "contribution" means any sum credited by or on behalf of any employee out of his salary, or by an employer out of his own monies, to the individual account of an employee, but does not include any sum credited as interest,

(e) the "balance to the credit" of an employee means the total amount to the credit of his individual account in a provident fund at any time,

(f) the "annual accretion" to the balance to the credit of an employee means the increase to such balance in any year, arising from contributions and interest,

(g) the "accumulated balance due to an employee means the balance to his credit, or such portion thereof as may be claimable by him under the regulations of the fund, on the day he ceases to be an employee of the employer maintaining the fund, and

(h) the "regulations of a fund" means the special body of regulations governing the constitution and administration of a particular provident fund.

58-B (1) The Commissioner of Income tax may accord recognition

The according and with to any provident fund which in his opinion,
drawal of recognition. satisfies the conditions prescribed in section 58 C
and the rules made thereunder, and may, at any
time, withdraw such recognition if, in his opinion, the provident fund
contravenes any of those conditions

(2) An order according recognition shall take effect on such date as
the Commissioner may fix in accordance with any rules the Central Board
of Revenue may make in this behalf, such date not being later than the last
day of the financial year in which the order is made

(3) An order withdrawing recognition shall take effect from the
day on which it is made

(3 A) An order according recognition to a provident fund shall not
unless the Commissioner otherwise directs, be affected by the fact that the
fund is subsequently amalgamated with another provident fund on the
occurrence of an amalgamation of the undertakings in connection with which
the two funds are maintained, or that it subsequently absorbs the whole or
a part of another provident fund belonging to an undertaking which is wholly
or in part transferred to or merged in the undertaking of the employer
maintaining the first mentioned fund

(4) An employer objecting to an order of the Commissioner refus-
ing to recognise or on order withdrawing recognition from a provident fund
may appeal, within sixty days of such order, to the Central Board of Re-
venue

The appeal shall be in the form and shall be verified in the manner
prescribed by the Central Board of Revenue

58-C (1) In order that a provident fund may receive and retain
Conditions to be satisfied recognition, it shall satisfy the conditions set
by a recognised provident out below and any other conditions which the
fund Central Government may, by rule, prescribe—

(a) All employees shall be employed in India or shall be employ-
ed by an employer whose principal place of business is in British India

Provided that the Commissioner may, if he thinks fit and subject
to such conditions if any, as he thinks proper to attach to the recognition,
accord recognition to a fund maintained by an employer whose principal
place of business is not in British India notwithstanding that a proportion
not exceeding ten per cent of the employees is employed outside India

(b) The contributions of an employee in any year shall be a defi-
nite proportion of his salary for that year, and shall be deducted by the
employer from the employee's salary in that proportion, at each periodical
payment of such salary in that year, and credited to the employee's indi-
vidual account in the fund

Provided that an employee who retains his employment while serv-
ing in His Majesty's Forces or when taken into or employed in the National
Service under the National Service (European British Subjects) Act,
1940 or the National Service (Technical Personnel) Ordinance, 1940, may,
notwithstanding that he receives from the employer no salary or a salary
less than he would have received had he not entered His Majesty's Service
or been so taken into or employed in the National Service contribute to the
fund during his service in His Majesty's Forces or while so taken into
or employed in the National Service a sum not exceeding the amount he
would have contributed had he continued to receive from the employer the
same salary (including increments, if any) as he would have received had

he not entered His Majesty's Forces or been taken into or employed in the National Service

(c) Subject to the provisions of section 58-D, the contributions of an employer to the individual account of an employee in any year shall not exceed the amount of the contributions of the employee in that year, and shall be credited to the employee's individual account at intervals not exceeding one year

(d) The fund shall consist of contributions as above specified and of donations if any, received by the trustees of accumulations thereof, and of interest (simple and compound) credited in respect of such contributions donations and accumulations and of securities purchased therewith and of no other sums

(e) The fund shall be vested in two or more trustees or in the Official Trustee, under a trust which shall not be revocable save with the consent of all the beneficiaries.

(f) The employer shall not be entitled to recover any sum what soever from the fund save in cases where the employee is dismissed for misconduct or voluntarily leaves his employment otherwise than on account of ill health or other unavoidable cause before the expiration of the term of service specified in this behalf in the regulations of the fund

In such cases the recoveries made by the employer shall be limited to the contributions made by him to the individual account of the employee, and to interest (simple and compound) credited in respect of such contributions and accumulations thereof in accordance with the regulations of the fund.

(g) The accumulated balance due to an employee shall be payable on the day he ceases to be an employee of the employer maintaining the fund.

(h) Save as provided in clause (g), or in accordance with such conditions and restrictions as the Central Government may by rules prescribe no portion of the balance to the credit of an employee shall be payable to him

(2) Where there is a repugnance between any regulation of a recognised provident fund and any provision of this Chapter or of the rules made thereunder the regulation shall to the extent of the repugnance be of no effect.

The Commissioner may at any time require that such repugnance shall be removed from the regulations of the fund.

58-D Subject to any rules which the Central Government may make in this behalf, the Commissioner may, in respect of any particular fund relax the provisions of condition (c) of sub-section (1) of section 58-C—

Power to relax restrictions of employer's contributions in certain cases

(a) so as to permit the payment of larger contributions by an employer to the individual accounts of employees whose salary does not exceed five hundred rupees per mensem and

(b) so as to permit the crediting by employers to the individual accounts of employees of periodical bonuses or other contributions of a contingent nature where the calculation and payment of such bonuses or other contributions is provided for on definite principles by the regulations of the fund

58 E The annual accretion in any year to the balance at the credit of an employee participating in a recognised provident fund shall be deemed to have been received by him in that year and shall be included in his total income for that year, and subject to the exemptions specified in section 58 F shall be liable to income tax and super tax

Provided that for the purpose of sub-section (3) of section 15 out of such annual accretion only the employee's own contributions shall be included in his total income

58 F (1) An employee shall not be liable to pay income tax on contributions to his individual account in a recognised provident fund in so far as the aggregate of such contributions in any year does not exceed one-sixth of his salary in that year or six thousand rupees whichever is less

(2) Interest credited on the accumulated balance of any employee in a recognised provident fund shall be exempt from payment of income-tax if and in so far as it does not exceed one third of the salary of the employee for the year concerned and in so far as it is allowed at a rate not exceeding such rate as the Central Government may by notification in the Official Gazette fix in this behalf

58 G (1) Where the accumulated balance due to an employee participating in a recognised provident fund becomes payable such accumulated balance shall be exempt from payment of super tax except to the extent of an amount equal to the aggregate of the amounts of super tax on annual accretion that would have been payable under section 58 E up to the first day of April 1933 if the Indian Income-tax (Second Amendment) Act 1933 had come into force on the 15th March 1930

(2) Where an employee participating in a recognised provident fund has rendered continuous service with his employer for a period of not less than five years and the accumulated balance due to him becomes payable such accumulated balance shall be exempt from payment of income-tax and shall be excluded from the computation of his total income

Provided that the Commissioner of Income-tax may allow such exemption and exclusion where the employee has rendered continuous service with the employer for a period of less than five years if in his opinion the service has been terminated by reason of the employee's ill health or by the contraction or discontinuance of the employer's business or other cause beyond the control of the employee

(3) Where exemption from payment of income tax is not allowed under the provisions of sub-section (2), the Income tax Officer shall calculate the total of the various sums of income-tax and super tax which would have been payable by the employee in respect of his total income for each of the years concerned if the fund had not been a recognised provident fund and the amount by which such total exceeds the total of all sums paid by or on behalf of such employee by way of tax for such years shall be payable by the employee in addition to any other income-tax and super-tax for which he may be liable for the year in which the accumulated balance due to him becomes payable

58 H The trustees of a recognised provident fund, or other person authorised by the regulations of the fund to make payment of accumulated balances due to employees, shall at the time an accumulated balance due to an employee is paid, deduct therefrom any income tax payable under sub-section (3) of section 58 G and any income tax and super tax payable on an employee's total income as determined under sub-section (3) of section 58 J and sub-sections (4) to (9) of section 18 shall apply as if the sum to be deducted were income tax payable under the head Salaries

58 I (1) The accounts of a recognised provident fund shall be maintained by the trustees of the fund and shall be in such form and for such periods, and shall contain such particulars as the Central Board of Revenue may prescribe

(2) The accounts shall be open to inspection at all reasonable times by Income tax authorities and the trustees shall furnish to the Income-tax Officer such abstracts thereof as the Central Board of Revenue may prescribe

58 J (1) Where recognition is accorded to a provident fund with existing balances an account shall be made of the fund up to the day before the day on which the recognition takes effect showing the balance to the credit of each employee on such day and containing such further particulars as the Central Board of Revenue may prescribe

(2) The account shall also show in respect of the balance to the credit of each employee the amount thereof which is to be transferred to that employee's account in the recognised provident fund and such amount (hereinafter called his transferred balance) shall be shown as the balance to his credit in the recognised provident fund on the date on which the recognition of the fund takes effect and sub-sections (3) and (4) shall apply thereto

Any portion of the balance to the credit of an employee in the existing fund which is not transferred to the recognised fund shall be excluded from the accounts of the recognised fund and shall be liable to income tax and super tax in accordance with the provisions of this Act other than this chapter

(3) Subject to such rules as the Central Board of Revenue may make in this behalf the Income tax Officer shall make a calculation of the aggregate of all sums comprised in a transferred balance which would have been liable to income tax if this chapter had been in force from the date of the institution of the fund without regard to any tax which may have been paid on any such sum and such aggregate (if any) shall be deemed to be income received by the employee in the year in which the recognition of the fund takes effect and shall be included in the employee's total income for that year and for the purposes of assessment the remainder of the transferred balance shall be disregarded but no other exemption or relief, by way of refund or otherwise shall be granted in respect of any sum comprised in such transferred balance

Provided that in cases of serious accounting difficulty the Commissioner shall have power subject to the said rules to make a summary calculation of such aggregate.

(4) Notwithstanding anything contained in condition (h) of sub section (1) of section 58-C an employee in order to enable him to pay the amount of tax assessed on his total income as determined under sub section (3), shall be entitled to withdraw from the balance to his credit in the recognised provident fund a sum not exceeding the difference between such amount and the amount to which he would have been assessed if the transferred balance had not been included in his total income

(5) Nothing in this section shall affect the rights of the persons administering an unrecognised provident fund or dealing with it or with the balance to the credit of any individual employee before recognition is accorded in any manner which may be lawful

58-K. (1) Where an employer who maintains a provident fund Treatment of fund transferred by employer to trustee (whether recognised or not) for the benefit of his employees and has not transferred the fund or any portion of it, transfers such fund or portion to trustees in trust for the employees participating in the fund the amount so transferred shall be deemed to be of the nature of capital expenditure

(2) When an employee participating in such fund is paid the accumulated balance due to him therefrom any portion of such balance as represents his share in the amounts so transferred to the trustee (without addition of interest, and exclusive of the employee's contributions and interest thereon) shall if the employer has made effective arrangements to secure that tax shall be deducted at source from the amount of such share when paid to the employee be deemed to be an expenditure by the employer within the meaning of clause (xi) of sub section (2) of section 10 incurred in the year in which the accumulated balance due to the employee is paid.

58-L. (1) All rules made under this chapter shall be subject to the provisions of sub-sections (4) and (5) of section 59

(2) In addition to any power conferred by this chapter the Central Government may make rules —

(a) prescribing the statements and other information to be submitted with an application for recognition

(b) limiting the contributions to a recognised provident fund by employees of a company who are shareholders in the company,

(c) providing for the assessment by way of penalty of any consideration received by an employee for an assignment of or creation of a charge upon his beneficial interest in a recognised provident fund

(d) determining the extent to and the manner in which exemption from payment of income tax and super tax may be granted in respect of contributions and interest credited to the individual accounts of employees in a provident fund from which recognition has been withdrawn, and

(e) generally to carry out the purposes of this chapter and to secure such further control over the recognition of provident funds and the administration of recognised provident funds as it may deem requisite

58 M. This Chapter shall not apply to any Application of this chapter to provident fund to which the Provident Funds Act 1925, applies

CHAPTER IX B

SPECIAL PROVISIONS RELATING TO CERTAIN CLASSES OF SUPERANNUATION FUNDS

Definitions.

58 N In this Chapter unless there is any thing repugnant in the subject or context—

(a) approved superannuation fund means a superannuation fund or any part of a superannuation fund which has been and continues to be approved by the Central Board of Revenue in accordance with the provisions of this Chapter,

(b) 'employer employee and contribution have in relation to superannuation funds the meanings assigned to those expressions in section 58-A in relation to provident funds

(c) 'ordinary annual contribution means an annual contribution of a fixed amount or an annual contribution computed on some definite basis by reference to the earnings the contributions or the number of members of the fund.

58 O (1) The Central Board of Revenue may accord approval to any superannuation fund or any part of a superannuation fund which in its opinion complies with the requirements of section 58-P and may at any time withdraw such approval if in its opinion the circumstances of the fund or part cease to warrant the continuance of the approval

(2) The Central Board of Revenue shall communicate in writing to the trustees of the fund the grant of approval with the date on which the approval is to take effect and where the approval is granted subject to conditions those conditions

(3) The Central Board of Revenue shall communicate in writing to the trustees of the fund any withdrawal of approval with the reasons for such withdrawal and the date on which the withdrawal is to take effect.

(4) The Central Board of Revenue shall neither refuse nor withdraw approval to any superannuation fund or any part of a superannuation fund unless it has given the trustees of that fund a reasonable opportunity of being heard in the matter

58 P In order that a superannuation fund may receive and retain approval the following conditions shall be satisfied namely—

(a) the fund shall be a fund established under an irrevocable trust in connection with a trade or undertaking carried on in British India

(b) the fund shall have for its sole purpose the provision of annuities for employees in the trade or undertaking on their retirement at or after a specified age or on their becoming incapacitated prior to such retirement or for the widows children or dependants of persons who are or have been such employees on the death of those persons and

(c) the employer in the trade or undertaking shall be a contributor to the fund

Provided that the Central Board of Revenue may if it thinks fit and subject to such conditions if any as it thinks proper to attach to the approval approve a fund or any part of a fund—

(i) notwithstanding that the rules of the fund provide for the return in certain contingencies of contributions paid to the fund or

(ii) if the main purpose of the fund is the provision of such annuities as aforesaid notwithstanding that such provision is not its sole purpose or

(iii) notwithstanding that the trade or undertaking in connection with which the fund is established is carried on only partly in British India.

58-Q (1) An application for approval of a superannuation fund or part of a superannuation fund for any year of Application for approval assessment shall be made in writing before the end of that year by the trustees of the fund to the Income-tax Officer, and shall be accompanied by a copy of the instrument under which the fund is established and by two copies of the rules and of the accounts of the fund for the last year for which such accounts have been made up. The Central Board of Revenue may require such further information to be supplied as it thinks proper.

(2) If any alteration in the rules, constitution, objects or conditions of the fund is made at any time after the date of the application for approval, the trustees of the fund shall forthwith communicate such alteration to the Income-tax Officer, and in default of such communication any approval given shall, unless the Central Board of Revenue otherwise orders, be deemed to have been withdrawn from the date on which the alteration took effect.

58-R. Income derived from investments or deposits of an approved superannuation fund shall be exempt from payment of income tax, and any sum paid by an employer or an employee by way of contribution towards an approved superannuation fund shall, in the case of an employer, be deducted in computing his income, profits or gains for the purpose of assessment, and, in the case of an employee, be treated for all the purposes of this Act as if it were a sum to which the provisions of section 15 apply.

Provided that no such exemption shall be allowable to an employee in respect of any sum which is not an ordinary annual contribution.

Provided further that where a contribution by an employer is not an ordinary annual contribution it shall, for the purposes of this section, be treated, as the Central Board of Revenue may direct, either as an expense incurred in the year in which the sum is paid, or as an expense to be spread over such period of years as the Central Board of Revenue thinks proper.

58 S (1) Where any contributions (including interest on contributions if any) are repaid to an employee, the amount so repaid shall be deemed for the purposes of income-tax to be income of the employee for that year.

(2) Where any contributions (including interest on contributions, if any) are repaid to an employee during his lifetime but not at or in connection with the termination of his employment, income-tax on the amount so repaid or paid shall except in the case of an employee whose employment was carried on abroad, be deducted by the trustees of the fund at the average rate of tax at which the employee was liable to income-tax during the preceding three years or during such period, if less than three years as he was a member of the fund, and shall be paid by the trustees to the credit of the Central Government within the prescribed time and in such manner as the Central Board of Revenue may direct.

58-T. Where an employer deducts from the emoluments paid to an

Deduction from pay of, and contributions on behalf of, employee to be included in return under section 21

employee or pays on his behalf any contributions of that employee to an approved superannuation fund, he shall include all such deductions or payments in the return which he is required to furnish under section 21

58-U. If a fund or a part of a fund for any reason ceases to be an

Liabilities of trustees on cessation of approval of fund

approved superannuation fund, the trustees of the fund shall nevertheless remain liable to account for tax on any sum paid—

(a) on account of returned contributions (including interest on contributions, if any), and

(b) in commutation or in lieu of annuities, in so far as the sum so paid is in respect of contributions made before the fund or part of the fund ceased to be an approved fund under the provisions of this Chapter

58-V. The trustees of an approved superannuation fund and any

Particulars to be furnished in respect of superannuation funds

employer who contributes to an approved superannuation fund shall, when required by notice from the Income-tax Officer, within twenty-one days of the date of such notice—

(a) furnish to the Income-tax Officer a return containing such particulars of contributions made to the fund as the notice may require;

(b) prepare and deliver to the Income-tax Officer a return containing—

(i) the name and place of residence of every person in receipt of an annuity from the fund,

(ii) the amount of the annuity payable to each annuitant,

(iii) particulars of every contribution (including interest on contributions, if any) returned to the employer or to employee, and

(iv) particulars of sums paid in commutation or in lieu of annuities;

(c) furnish to the Income-tax Officer a copy of the accounts of the fund to the last date prior to such notice to which such accounts have been made up, together with such other information and particulars as the Central Board of Revenue may reasonably require

CHAPTER X

MISCELLANEOUS

59. (1) The Central Board of Revenue may, subject to the control

Power to make rules of the Central Government, make rules for carrying out the purposes of this Act and for the ascertainment and determination of any class of income. Such rules may be made for the whole of British India or for such part thereof as may be specified.

(2) Without prejudice to the generality of the foregoing power, such rules may—

(a) prescribe the manner in which, and the procedure by which, the income, profits and gains shall be arrived at in the case of—

(i) incomes derived in part from agriculture and in part from business;

(ii) persons residing out of British India;

(b) prescribe the procedure to be followed on applications for refunds

(c) provide for such arrangements with His Majesty's Government as may be necessary to enable the appropriate relief to be granted under section 27 of the Finance Act, 1920, or under section 49 of this Act,

(d) prescribe the year which, for the purpose of relief under section 49, is to be taken as corresponding to the year of assessment for the purposes of section 27 of the Finance Act, 1920, and

(e) provide for any matter which by this Act is to be prescribed

(3) In cases coming under clause (a) of sub section (2), where the income, profits and gains liable to tax cannot be definitely ascertained or can be ascertained only with an amount of trouble and expense to the assessee which in the opinion of the Central Board of Revenue is unreasonable, the rules made under that sub section may—

(a) prescribe methods by which an estimate of such income profits and gains may be made, and

(b) in cases coming under sub clause (i) of clause (a) of sub section (2), prescribe the proportion of the income which shall be deemed to be income, profits and gains liable to tax,

and an assessment based on such estimate or proportion shall be deemed to be duly made in accordance with the provisions of this Act

(4) The power to make rules conferred by this section shall except on the first occasion of the exercise thereof, be subject to the condition of previous publication

(5) Rules made under this section shall be published in the Official Gazette, and shall thereupon have effect as if enacted in this Act

60 (1) The Central Government may, by notification in the Official Gazette, make an exemption reduction in rate or other modification in respect of income tax in favour of any class of income or in regard to the whole or any part of the income of any class of persons

(2) Where, by reason of any portion of an assessee's salary being paid in arrears or in advance or by reason of his having received in any one financial year salary for more than twelve months or a payment which is under the provisions of sub section (1) of section 7 a profit in lieu of salary, his income is assessed at a rate higher than that at which it would otherwise have been assessed, the Central Government may grant the appropriate relief

(3) After the commencement of the Indian Income tax (Amendment) Act, 1939, the power conferred by sub section (1) shall not be exercisable, except for the purpose of rescinding an exemption reduction or modification already made

61 (1) Any assessee, who is entitled or required to attend before the Appellate Tribunal or any Income-tax authority in connection with any proceeding under this Act otherwise than when required under section 37 to attend personally for examination on oath or affirmation may attend by a person authorised by him in writing in this behalf, being a relative of or a person regularly employed by the assessee or a lawyer or accountant or Income-tax practitioner and not being disqualified by or under sub section (3)

(2) In this section,—

(i) a person regularly employed by the assessee shall include any officer of a Scheduled Bank with which the assessee maintains a current account or has other regular dealings,

(ii) "lawyer" means a Barrister at Law or Solicitor or any other person entitled to plead in any Court of law in British India,

(iii) "accountant" means a registered accountant enrolled in the Register of Accountants maintained by the Central Government under the Auditors Certificate Rules 1932, or a holder of a restricted certificate under the Restricted Certificate Rules, 1932 or a member of an association of accountants recognised in this behalf by the Central Board of Revenue,

(iv) "Income-tax practitioner" means—

(a) any person who before the 1st day of April, 1938, attended before an Income tax authority on behalf of any assessee otherwise than in the capacity of an employee or relative of that assessee,

(b) any person who has passed any accountancy examination recognised in this behalf by the Central Board of Revenue, or

(c) any person who has acquired such educational qualifications as the Central Board of Revenue may prescribe for this purpose.

(3) No person who has been dismissed from Government service after the 1st day of April 1938, shall be qualified to represent an assessee under sub section (1) and if any lawyer or registered accountant is found guilty of misconduct in connection with any income-tax proceedings by the authority empowered to take disciplinary action against members of the profession to which he belongs, or if any other person is found guilty of such misconduct by the Commissioner of income-tax the Commissioner of Income tax may direct that he shall be thenceforward disqualified to represent an assessee under sub-section (1)

Provided that—

(a) no such direction shall be made in respect of any person unless he is given a reasonable opportunity of being heard

(b) any person against whom such direction is made may, within one month of the making of the direction, appeal to the Central Board of Revenue to have the direction cancelled and

(c) no such direction shall take effect until one month from the making thereof or, when an appeal is preferred, until the disposal of the appeal

62 A receipt shall be given for any money paid or recovered under this Act

Receipts to be given

63 (1) A notice or requisition under this Act may be served on the person therein named either by post or, as if it were a summons issued by a Court under the

Service of notices

Code of Civil Procedure, 1908

(2) Any such notice or requisition may, in the case of a firm or a Hindu undivided family, be addressed to any member of the firm or to the manager, or any adult male member of the family and, in the case of any other association of persons be addressed to the principal officer thereof

64 (1) Where an assessee carries on a business, profession or vocation at any place, he shall be assessed by the

Place of assessment

Income-tax Officer of the area in which that place is situate or, where the business, profession or vocation is carried on

in more places than one, by the Income tax Officer of the area in which the principal place of his business profession or vocation is situate

(2) In all other cases, an assessee shall be assessed by the Income-tax Officer of the area in which he resides

(3) Where any question arises under this section as to the place of assessment, such question shall be determined by the Commissioner, or, where the question is between places in more provinces than one by the Commissioners concerned or, if they are not in agreement, by the Central Board of Revenue

Provided that before any such question is determined, the assessee shall have had an opportunity of representing his views

Provided further that the place of assessment shall not be called in question by an assessee if he has made a return in response to the notice under sub section (1) of section 22 and has stated therein the principal place wherein he carries on his business profession or vocation or if he has not made such a return shall not be called in question after the expiry of the time allowed by the notice under sub section (2) of section 22 or under section 34 for the making of a return

Provided further that if the place of assessment is called in question by an assessee the Income-tax Officer shall if not satisfied with the correctness of the claim refer the matter for determination under this sub section before assessment is made

(4) Notwithstanding anything contained in this section every Income-tax Officer shall have all the powers conferred by or under this Act on an Income tax Officer in respect of any income, profits or gains accruing or arising or received within the area for which he is appointed

(5) The provisions of sub section (1) and sub section (2) shall not apply and shall be deemed never at any time to have applied to any assessee—

(a) on whom an assessment or re assessment for the purposes of this Act has been is being or is to be made in the course of any case in respect of which a Commissioner of Income tax appointed without reference to area under sub section (2) of section 5 is exercising the functions of a Commissioner of Income tax, or

(b) where by any direction given or any distribution or allocation of work made by the Commissioner of Income tax under sub section (5) of section 5, or in consequence of any transfer made by him under sub-section (7-A) of section 5, a particular Income tax Officer has been charged with the function of assessing that assessee, or

(c) who or whose income is included in a class of persons or a class of incomes specified in any notification issued under sub section (6) of section 5,

but the assessment of such person whether the proceedings began before or after the 1st day of April, 1939 shall be made by the Income tax Officer for the time being charged with the function of making such assessment by the Central Board of Revenue or by the Commissioner of Income tax to whom he is subordinate, as the case may be

65 Every person deducting retaining or paying any tax in pursuance of this Act in respect of income belonging to another person is hereby indemnified for the deduction retention or payment thereof

66 (1) Within sixty days of the date upon which he is served with notice of an order under sub section (4) of section 33 the assessee or the Commissioner may by application in the prescribed form accompanied where application is made by the assessee by a fee of one hundred rupees, require the Appellate Tribunal to refer to the High Court any question of law arising out of such order, and the Appellate Tribunal shall within ninety days of the receipt of such application draw up a statement of the case and refer it to the High Court

Provided that, if in the exercise of its powers under sub section (2), the Appellate Tribunal refuses to state a case which it has been required by the assessee to state the assessee may, within thirty days from the date on which he receives notice of the refusal to state the case withdraw his application and if he does so the fee paid shall be refunded

(2) If on any application being made under sub section (1) the Appellate Tribunal refuses to state the case on the ground that no question of law arises the assessee or the Commissioner, as the case may be may within six months from the date on which he is served with notice of the refusal apply to the High Court and the High Court may, if it is not satisfied of the correctness of the decision of the Appellate Tribunal require the Appellate Tribunal to state the case and to refer it and on receipt of any such requisition the Appellate Tribunal shall state the case and refer it accordingly

(3) If on any application being made under sub section (1) the Appellate Tribunal rejects it on the ground that it is time barred the assessee or the Commissioner as the case may be may, within two months from the date on which he is served with notice of the rejection apply to the High Court and the High Court if it is not satisfied of the correctness of the Appellate Tribunal's decision may require the Appellate Tribunal to treat the application as made within the time allowed under sub section (1)

(4) If the High Court is not satisfied that the statement in a case referred under this section are sufficient to enable it to determine the question raised thereby the Court may refer the case back to the Appellate Tribunal to make such additions thereto or alterations therein as the Court may direct in that behalf

(5) The High Court upon the hearing of any such case shall decide the questions of law raised thereby and shall deliver its judgment thereon containing the grounds on which such decision is found and shall send a copy of such judgment under the seal of the Court and the signature of the Registrar to the Appellate Tribunal which shall pass such orders as are necessary to dispose of the case conformably to such judgment

(6) Where a reference is made to the High Court the costs shall be in the discretion of the Court

(7) Notwithstanding that a reference has been made under this section to the High Court income-tax shall be payable in accordance with the assessment made in the case

Provided that if the amount of an assessment is reduced as a result of such reference the amount overpaid shall be refunded with such interest as the Commissioner may allow unless the High Court on intimation given by the Commissioner within thirty days of the receipt of the result of such reference that he intends to ask for leave to appeal to His Majesty in

Council, makes an order authorising the Commissioner to postpone payment of such refund until the disposal of the appeal to His Majesty in Council

(7 A) Section 5 of the Indian Limitation Act 1908 shall apply to an application to the High Court by an assessee under sub section (2) or sub section (3)

(8) For the purposes of this section 'the High Court' means—

(a) in relation to British Baluchistan the High Court of Judicature at Lahore

(b) in relation to the province of Ajmer Merwara the High Court of Judicature at Allahabad and

(c) in relation to the province of Coorg, the High Court of Judicature at Madras

66 A (1) When any case has been referred to the High Court under section 66 it shall be heard by a Bench of not less than two Judges of the High Court and in respect of such case the provisions of section 98 of the Code of Civil Procedure 1908, shall, so far as may be apply notwithstanding anything contained in the Letters Patent of any High Court established by Letters Patent or in any other law for the time being in force

Reference to be heard by Benches of High Courts and appeal to lie in certain cases to Privy Council

Provided that where in any reference heard by the Bench of the Court of the Judicial Commissioner of the North West Frontier Province, a difference of opinion arises between the Judicial Commissioner and the Judge of the said Court the opinion of the Judicial Commissioner shall prevail

(2) An appeal shall lie to His Majesty in Council from any judgment of the High Court delivered on a reference made under section 66 in any case which the High Court certifies to be a fit one for appeal to His Majesty in Council

(3) The provisions of the Code of Civil Procedure 1908 relating to appeals to His Majesty in Council shall so far as may be apply in the case of appeals under this section in like manner as they apply in the case of appeals from decrees of a High Court

Provided that nothing in this sub-section shall be deemed to affect the provisions of sub section (5) or sub section (7) of section 66

Provided further that the High Court may, on petition made for the execution of the order of His Majesty in Council in respect of any costs awarded thereby, transmit the order for execution to any Court subordinate to the High Court

(4) Where the judgment of the High Court is varied or reversed in appeal under this section effect shall be given to the order of His Majesty in Council in the manner provided in sub sections (5) and (7) of section 66 in the case of a judgment of the High Court

(5) Nothing in this section shall be deemed—

(a) to bar the full and unqualified exercise of His Majesty's pleasure in receiving or rejecting appeals to His Majesty in Council or otherwise howsoever, or

(b) to interfere with any rules made by the Judicial Committee of the Privy Council and for the time being in force for the presentation of appeals to His Majesty in Council or their conduct before the said Judicial Committee

67. No suit shall be brought in any Civil Court to set aside or modify any assessment made under this Act, and no prosecution, suit or other proceeding shall lie against any officer of the Crown for anything in good faith done or intended to be done under this Act

67-A In computing the period of limitation prescribed for an appeal under this Act or for an application under section 66 the day on which the order complained of was made and the time requisite for obtaining a copy of such order shall be excluded

67-B If on the first day of April in any year provision has not yet been made by an Act of the Indian Legislature for the charging of income tax for that year, this Act shall nevertheless have effect until such provision is so made as if the provision in force in the preceding year or the provision proposed in the Bill then before the Legislature whichever is more favourable to the assessee were actually in force

THE SCHEDULE

[See section 10 (7)]

RULES FOR THE COMPUTATION OF THE PROFITS AND GAINS OF INSURANCE BUSINESS

1 In the case of any person who carries on or at any time in the preceding year carried on life insurance business the profits and gains of such person from that business shall be computed separately from his income profits or gains from any other business

2 The profits and gains of life insurance business shall be taken to be either—
 (a) the gross external incomes of the preceding year from that business less the management expenses of that year or
 (b) the annual average of the surplus arrived at by adjusting the surplus or deficit disclosed by the actuarial valuation made for the last intervaluation period ending before the year for which the assessment is to be made so as to exclude from it any surplus or deficit included therein which was made in any earlier intervaluation period and any expenditure other than expenditure which may under the provisions of section 10 of this Act be allowed for in computing the profits and gains of a business whichever is the greater

Provided that the amount to be allowed as management expenses shall not exceed—

(a) $7\frac{1}{2}$ per cent of the premiums received during the preceding year in respect of single premium life insurance policies plus
 (b) in respect of the first year's premiums received in respect of other life insurance policies for which the number of annual premiums payable is less than twelve or for which the number of years during which premiums are payable is less than twelve for each such premium or each such year $7\frac{1}{2}$ per cent of such first year's premiums received during the preceding year plus
 (c) 90 per cent of the first year's premiums received during the preceding year in respect of all other life insurance policies, plus
 (d) 12 per cent of all renewal premiums received during the preceding year

3 In computing the surplus for the purpose of rule 2,—
 (a) one half of the amounts paid to or reserved for or expended on behalf of policyholders shall be allowed as a deduction

Provided that in the first such computation made under this rule of any such surplus no account shall be taken of any such amounts to the extent to which they are paid out or reserved in respect of any surplus brought forward from a previous intervaluation period

Provided further that if any amount so reserved for policyholders ceases to be so reserved, and is not paid to or expended on behalf of policyholders one half

of such amount, if it has been previously allowed as a deduction, shall be treated as part of the surplus for the period in which the said amount ceased to be so reserved,

(b) any amount either written off or reserved in the accounts or through the actuarial valuation balance sheet to meet depreciation of or loss on the realisation of securities or other assets, shall be allowed as a deduction, and any sums taken credit for in the accounts or actuarial valuation balance sheet on account of appreciation of or gains on the realisation of the securities or other assets shall be included in the surplus

Provided that if upon investigation it appears to the Income tax Officer after consultation with the Superintendent of Insurance that having due regard to the necessity for making reasonable provision for bonuses to participating policyholders and for contingencies the rate of interest or other factor employed in determining the liability in respect of outstanding policies is materially inconsistent with the valuation of the securities and other assets so as artificially to reduce the surplus such adjustment shall be made to the allowance for depreciation of or to the amount to be included in the surplus in respect of appreciation of such securities and other assets as shall increase the surplus for the purposes of these rules to a figure which is fair and just,

(c) interest received in respect of any securities of the Central Government which have been issued or declared to be income tax free shall not be excluded but the whole amount of such interest received during the intervalation period shall be exempt from income tax under the second proviso to section 8 though not from super tax.

4 Where for any year an assessment is made in accordance with the annual average of a surplus disclosed by a valuation for an intervalation period exceeding twelve months then in computing the tax payable for that year credit shall not be given in accordance with sub-section (5) of section 18 for the tax paid in the preceding year, but credit shall be given for the annual average of the income tax paid by deduction at source from interest on securities or otherwise during such period

5 For the purposes of these rules—

(i) 'preceding year' means that year for which annual accounts are required to be prepared under the Insurance Act 1938 immediately preceding the year for which the assessment is to be made or until the commencement of the Insurance Act, 1938 the previous year as defined in section 2 of this Act

(ii) 'gross external incomes' means the full amount of incomes from interest dividends fines and fees and all other incomes from whatever source derived (except premiums received from policyholders and interest and dividends on any annuity fund) and includes also profits from reversions and on the sale or the granting of annuities but excludes profits on the realisation of securities or other assets

Provided that incomes including the annual value of the property occupied by the assessee, which but for the provisions of sub-section (7) of section 10 would have been assessable under section 9 shall be computed upon the basis laid down in the last named section and that there shall be allowed from such gross incomes such deductions as are permissible under that section

(iii) 'management expenses' means the full amount of expenses (including commissions) incurred exclusively in the management of the business of life insurance, and in the case of a company carrying on other classes of business as well as the business of life insurance in addition thereto a fair proportion of the expenses incurred in the general management of the whole business. Bonuses or other sums paid to or reserved on behalf of policyholders depreciation of and losses on the realisation of securities or other assets and any expenditure other than expenditure which may under the provisions of section 10 of this Act be allowed for in computing the profits and gains of a business are not management expenses for the purposes of these rules

(iv) 'life insurance business' means life insurance business as defined in clause (11) of section 2 of the Insurance Act 1938

(v) 'securities' includes stocks and shares

6 The profits and gains of any business of insurance other than life insurance shall be taken to be the balance of the profits disclosed by the annual accounts copies of which are required under the Insurance Act 1938, to be furnished to the Superintendent of Insurance after adjusting such balance so as to exclude from it any expenditure other than expenditure which may under the provisions of section 10 of this Act be allowed for in computing the profits and gains of a business. Profits

and losses on the realisation of investments and depreciation and appreciation of the value of investments shall be dealt with as provided in rule 3 for the business of life insurance

7 The profits and gains of companies carrying on dividing society or assessment business shall be taken to be 15 per cent of the premium income of the previous year, or in the case of non resident companies 15 per cent of the British Indian premium income of the previous year

8 The profits and gains of the British Indian branches of an insurance company not resident in British India in the absence of more reliable data may be deemed to be the proportion of the total world income of the company corresponding to the proportion which its British Indian premium income bears to its total premium income For the purpose of this rule the total world income of life insurance companies not resident in British India whose profits are periodically ascertained by actuarial valuation shall be computed in the manner laid down in these rules for the computation of the profits and gains of life insurance business carried on in British India

9 These rules apply to the assessment of the profits of any business of insurance carried on by a mutual insurance association

INDIAN INCOME-TAX RULES, 1922

Notification No 31 T, dated the 1st April, 1922 as subsequently amended

In exercise of the powers conferred by section 59 of the Indian Income-tax Act, 1922 (XI of 1922), the Board of Inland Revenue has made the following rules, namely —

R. 1 These rules may be called the Indian Income tax Rules, 1922.

R. 2 Any firm constituted under an Instrument of Partnership specifying the individual shares of the partners may under the provisions of section 26 A of the Indian Income tax Act 1922 (hereinafter in these rules referred to as the Act), register with the Income tax Officer the particulars contained in the said Instrument on application made in this behalf

Such application shall be signed by all the partners (not being minors) personally and shall be made—

- (a) before the income of the firm is assessed for any year under section 23 of the Act or
- (b) if no part of the income of the firm has been assessed for any year under section 23 of the Act before the income of the firm is assessed under section 34 of the Act or
- (c) with the permission of the Appellate Assistant Commissioner hearing an appeal under section 30 of the Act before the assessment is confirmed reduced, enhanced or annulled or
- (d) if the Appellate Assistant Commissioner sets aside the assessment and directs the Income tax Officer to make a fresh assessment, before such fresh assessment is made or
- (e) before or after the dissolution of the firm in respect of the assessment or assessments to be made on its income up to the date of dissolution

Provided that where an application is made under clause (e) after dissolution of the firm it shall be signed by all partners (not being minors) who were partners in the firm immediately before dissolution and by the legal representative of any such person who is deceased

R. 3 The application referred to in Rule 2 shall be made and verified in the form annexed to this rule and shall be accompanied by the original instrument of partnership under which the firm is constituted together with a copy thereof, provided that if the Income-tax Officer is satisfied that for some sufficient reason the original Instrument cannot conveniently be produced he may accept a copy of it certified in writing by all the partners (not being minors) or where the application is made after dissolution of the firm by all the persons (not being minors) referred to in the proviso to the said Rule to be a correct copy and in such a case the application shall be accompanied by a duplicate copy

FORM I

Form of application for registration of a firm under section 26-A of the Indian Income tax Act, 1922

To
The Income tax Officer,

Dated _____ 19
Income tax year 19 _____ | 19

1 We _____ beg to apply for the registration of our firm under section 26 A of the Indian Income-tax Act 1922, for the assessment for the income tax year 19 _____ | 19

2 The original | a certified copy of the Instrument of Partnership under which the firm is constituted specifying the individual shares of the _____ a copy partners together with _____ is enclosed The prescribed a duplicate copy particulars are given in the Schedule below

3 We do hereby certify that the profits (or loss if any) of the _____ previous year were _____ divided or credited as period up to the date of dissolution were | will be shown in Section B of the Schedule and that the information given above and in the attached Schedule is correct

(Signatures)
(Address)

SCHEDULE.

NOTE.—This application must be signed by all the partners (not being minors) in the firm as constituted at the date on which the application is made or where the application is made after dissolution of the firm by all persons (not being minors) who were partners in the firm immediately before dissolution and by the legal representative of any such person who is deceased

Name of partner	Address	Date of admittance to partnership	(1) Interest on capital or loans (if any)	(1) Salary or commiss on from firm	(2) Share in the balance of profits (or loss) (annas and pies in the rupee)	Remarks.
1	2	3	4	5	6	7

- (a) Particulars of the firm as constituted at the date of this application
- (b) Particulars of the apportionment of the income profits or gains (or loss) of the business profession or vocation in the previous year between the partners who in that previous year were entitled to share in such income profits or gains (or loss)

NOTE.—(1) If the interest, salary and (or) commission is payable (or allowable) only if there are sufficient profits available this fact should be noted by marking the items in the appropriate columns with the letter R (In other cases the interest, salary and (or) commission may exceed the total profits so as to leave a balance of net loss divisible in column 6)

(2) If any partner is entitled to share in profits but is not liable to bear a similar proportion of any losses this fact should be indicated by putting against his share in column 6 the letter P

R 4 (1) If on receipt of the application referred to in Rule 3 the Income tax Officer is satisfied that there is or was a firm in existence constituted as shown in the instrument of partnership and that the application has been properly made he shall enter in writing at the foot of the instrument or certified copy as the case may be a certificate in the following form namely —

instrument of partnership

This _____ has this
certified copy of an instrument of partnership
day been registered with me the Income tax Officer for
in the province of _____ under
section 26-A of the Indian Income-tax Act 1922 and this certificate of registration shall have effect for the assessment for the year ending on the 31st day of March 19

(2) If the Income tax Officer is not so satisfied he shall pass an order in writing refusing to recognise the instrument of partnership or the certified copy thereof and furnish a copy of such order to the applicants

(3) The certificate referred to in paragraph (1) above shall be signed by the Income tax Officer who shall thereupon return to the applicants the instrument of partnership or the certified copy thereof as the case may be and shall retain the copy or the duplicate copy thereof

R 5 The certificate of registration granted under Rule 4 shall have effect only for the assessment to be made for the year mentioned therein

R. 6 Any firm to whom a certificate of registration has been granted under Rule 4 may apply to the Income-tax Officer to have the certificate of registration renewed for a subsequent year Such application shall be signed personally by all the partners (not being minors) of the firm or where the application is made after dissolution of the firm by all persons (not being minors) who were partners in the firm immediately before dissolution and by the legal representative of any such person who is deceased and accompanied by a certificate in the form set out below The application shall be made within the time and subject to the conditions if any which are specified in clause (a) clause (b) clause (c) clause (d) or clause (e) as the case may be of Rule 2

Form of application for the Renewal of Registration of a firm under section 26-A of the Indian Income tax Act 1922

To

The Income tax Officer

Dated

19

Assessment for the Income tax year

19 | 19

1 We beg to apply for the renewal of the registration of our firm under section 26-A of the Indian Income tax Act, 1922 for the assessment for the Income tax year 19 [19] instrument of partnership

2 The _____ was registered by the Income tax Officer for _____ certified copy of the instrument of partnership of _____ on the _____ of _____ in the province of _____ and we hereby certify that the constitution of the firm specified in the instrument of partnership _____ so registered on _____ certified copy of the instrument of partnership remains unaltered

3 We do hereby further certify that the profits and loss (if any) of the _____ previous year were _____ period up to the date of dissolution were/will be divided or credited as shown below

Particulars of apportionment of the income profits or gains (or loss) of the business profession or vocation in the previous year or the period up to the date of dissolution between the partners who were entitled to share in such income, profits or gains (or loss)

Name of partner	Address	Date of admittance to partnership	(1)	(1)	(2)	Remarks
			Interest on capital or loans (if any)	Salary or commission from firm	Share in the balance of profits (or loss) (annas and pies in the rupee)	
1	2	3	4	5	6	7

NOTE (1) If the interest, salary and/or commission is payable (or allowable) only if there are sufficient profits available this fact should be noted by marking the items in the appropriate columns with the letter 'R'. (In other cases the interest, salary and/or commission may exceed the total profits so as to leave a balance of net loss divisible in column 6)

(2) If any partner is entitled to share in profits but is not liable to bear a similar portion of any losses this fact should be indicated by putting against his share in column (6) the letter P

(Signatures)
(Address)

NOTE —The application must be signed by all the partners (not being minors) in the firm or if made after dissolution of the firm by all persons (not being minors) who were partners in the firm immediately before dissolution and by the legal representative of any such person who is deceased

R. 6-A On receipt of an application under Rule 6 the Income-tax Officer may, if he is satisfied that the application is in order and that there is or was a firm in existence constituted as shown in the instrument of partnership, grant to the assessee a certificate signed and dated by him in the following form —

"The registration of the firm of granted on is renewed by me and will remain effective for the assessment for the year ending on the 31st day of March 19"

If the Income-tax Officer is not so satisfied, he shall pass an order in writing refusing to renew the registration of the firm

R. 6-B. In the event of the Income-tax Officer being satisfied that the certificate granted under Rule 4 or under Rule 64 has been obtained without there being a genuine firm in existence he may cancel the certificate so granted

R. 7. Under section 9 (1) (iv) of the Act, the sum to be allowed in respect of collection charges shall not exceed 6 per cent of the annual value of the property.

R. 8. An allowance under section 10 (2) (vi) of the Act in respect of depreciation of buildings, machinery, plant or furniture shall be made in accordance with the following statement —

Class of buildings, machinery, plant or furniture.	Rate.	Remarks.
	Percentage on the written down value.	
I. Buildings*—		
(1) First class—substantial buildings of selected materials	2½	* Double these rates may be allowed for factory buildings excluding office, godowns, officers' and employees' quarters.
(2) Second class—buildings of less substantial construction	5	
(3) Third class buildings of construction inferior to that of second class buildings but not including purely temporary erections	7½	
(4) Purely temporary erections such as wooden structures		(No rate prescribed, renewals will be allowed as Revenue expenditure).
II. Furniture and Fittings—		
(1) General	6	
(2) Rate for furniture and fittings used in hotels and boarding houses	9	
III. Machinery and Plant—		
(1) General rate.	7	An extra allowance up to a maximum of 50 per cent. of the normal allowance will be allowed by the Income-tax officer where a concern claims such allowance on account of double or multiple shift working and satisfies the Income-tax officer that the concern has actually worked double or multiple shifts. This extra allowance will be proportionate to the number of days during which double or multiple shifts are

Class of buildings, machinery, plant or furniture.	Rate	Remarks
(2) Special rates to be applied to the whole of the machinery and plant used in the following concerns. (1) A Flour mills† (2) Rice mills (3) Bone mills (4) Sugar mills† (5) D stillers (6) Ice factories. (7) Aerating gas factories (8) Match factories (9) Tea factories (10) Shoe and other leather goods factories (11) Starch factories (12) Coffee manufacturing concerns E (1) Paper mills (2) Strawboard mills (3) Ship-building and Engineering works. (4) Iron and brass foundries (5) Aluminium factories (6) Electrical Engineering works	Percentage on the written down value 9 10	worked For the purpose of granting this extra allowance, the normal number of working days throughout the year will be taken as 300 and if, for example, a concern has worked double or multiple shifts for 100 days the extra allowance will be $\frac{1}{3}$rd of 50 per cent of the normal allowance for the whole year This applies to all concerns whether the general rate or any special rate applies to them but does not apply to an item of machinery or plant, specifically excepted by the letters 'N E. S.A.' being shown against it.* The special rates specified hereinafter may be adopted at the option of the assessee for electrical machinery, air conditioning machinery, locomotives, rolling stock, tramways, and railways, weighing machines, calculating machines, type writers, Neo-post franking machines, accounting machines, other office machinery, refrigeration plant containers, etc., and motor vehicles used in the concern † Replacements of rollers will be allowed as Revenue expenditure

* 'NESA'—No extra-shift allowance

of buildings, machinery, plant or furniture	Rate.	Remarks.
	Percentage on the written down value	
(7) Motor car repairing works		
(8) Internal combustion engine repairing works		
(9) Galvanizing works		
(10) Patent Stone works		
(11) Oil extraction factories		
(12) Chemical works		
(13) Soap and Candle works		
(14) Lime works		
(15) Saw Mills		
(16) Tin and can making works		
(17) Dyeing and bleaching works		
(18) Cement works using rotary Kilns		
(19) Rod mills		
(20) Hydraulic presses		
(21) Brick manufacture		
(22) Tile making industry		
(23) Manufacture of vegetable ghee		
(24) Manufacture of optical instruments		
(25) Coke manufacture		
(26) Manufacture of concrete pipes		
(27) Glass manufacture and the manufacture of vacuum tubes and vacuum bulbs		
(28) Telephone operating concerns		
(29) Wire and nail making mills		
(30) Iron and Steel industry *(Blast furnace plant, Steel making plant, Steel rolling plant, forges, generators, boilers, and Sheet mills)		*Replacement of rolling mill rolls will be allowed as revenue expenditure.
(31) Tanneries		
(32) Battery manufacture		
(33) Manufacture of Healds and Reeds (Knitting, Reed making, Varnishing, Doubling, Winding and polishing machines)		
(34) Manufacture of Confectionery (including biscuits and peppermints)		
(35) Manufacture of pottery and other clay products		
Rubber goods factories.		
(a) General machinery and plant	12	
(b) Moulds (N. E. S. A.)	40	
Silk manufacturing—Weaving machinery worked by electric motors including winding machines, twisting frames, doubling machines, part winding machines, warping machines, looms, Stentering machines and hydro-extractors	12	
) Special rates to be applied to other machinery and plant.		
Ropeway structures (N. E. S. A.)—		
(1) Trestle and station steel work	6	
(2) Driving and tension gearing	10	
(3) Carriers	12	
(4) Ropeway ropes and rope sheaves and connected parts	30	
Salt Works—		
(1) Machinery, plant, locomotives, wagons and rolling stock.	10	
(1) Bore and Blowing plant (N. E. S. A.)	10	

Class of buildings, machinery, plant or furniture	Rate.	Remarks
	Percentage on the written down value	
(3) General plant and machinery used in engineering shops	10	
(4) Reservoirs, condensers, salt pans, delivery channels and piers, if constructed of masonry, concrete, cement, asphalt or similar materials (N E S A)	6	
NOTE—Repairs to similar works made of earth will be allowed as revenue expenditure		
(5) Piers, quays and jetties, constructed entirely or mainly of steel (N E S A)	7½	
(6) Piers, quays and jetties constructed entirely or mainly of wood (N E S A)	12	
(7) Pipe lines for conveying brine if constructed of masonry, concrete, cement asphalt, or similar materials (N E S A)	12	
C Electrical Machinery—		
(1) Batteries	20	
(2) Other electrical machinery, including electrical generators, motors (other than tramway motors)	10	
(3) Switchgear and instruments, transformers and other stationary plant and wiring and fittings of electric light and fan installations (N E S A)	10	
(4) Underground cables and wires (N E S A.)	7½	
(5) Overhead cables and wires (N E S A.)	5	
(6) X Ray and Electro-therapeutic apparatus and accessories thereto (N E S A)	20	
D Machinery used in the production of cine matograph films (N E S A.)		
(1) Recording equipment, Reproducing equipment, Developing machines, Printing machines Editing machines, Synchronisers and studio lights	20	Renewals of bulbs or studio lights will be allowed as Revenue expenditure
(2) Projecting equipment of film exhibiting concerns	20	
E Electric Supply undertakings		
(1) Electric plant, machinery, boilers.	10	
(2) Hydro-electric concerns, Hydraulic works, pipe-lines and sluices (N E S A.)	2½	
F. Electric Tramways		
(1) Permanent way (N E S A.)—		
(a) Not exceeding 50 000 car miles per mile of track per annum.	9	
(b) Exceeding 50,000 and not exceeding 75 000 car miles per mile of track per annum	10	
(c) Exceeding 75,000 and not exceeding 1,25 000 car miles per mile of track per annum	12	
(2) Cars—car tracks, car bodies, electrical equipment and motors	10	
(3) General plant, machinery and tools	9	
G. Tramways run by internal combustion engines (N E S A.)		
(1) Permanent way—The same rates as have been prescribed for the permanent way of electric tramways		
(2) Tramecars including engines and gears	10	
H Mineral Oil concerns (N E S A.)—		
Refineries—		

Class of buildings, machinery plant or furniture.	Rate	Remarks.
(1) Boilers	Percentage on written down value	
(2) Prime movers	10	
Distribution	10	
1 Returnable packages.		Cost of packages actually used up will be allowed as revenue expenditure
2 Kerbside pumps including underground tanks and fittings	15	
(3) Process plant	12	
B Field operations—		
(1) Boilers	10	
(2) Prime movers	10	
(3) Process plant	12	
C Except for the following items—		
(1) Below ground	100	
(2) Above ground—		
(a) Portable boilers, drilling tools, well head tank, rigs, etc	30	
(b) Storage tanks	10	
(c) Pipe lines—		
(i) Fixed boilers	10	
(ii) Prime movers.	12	
(iii) Pipe line	10	
Distribution		Cost of packages actually used up will be allowed as revenue expenditure
(1) Returnable packages		
(2) Kerbside pumps including underground tank and fittings	15	
I. Ships (N E S A)—		
(1) Ocean—		
(a) Steamers and Motor vessels	5 }	These rates are percentages on the original cost For further modifications, see Appendix to this rule based on Notification 46, dated 15 8-42
(b) Sail or tug	4 }	
(2) Inland—		
(a) Steamers and motor vessels	10	* "Speed Boats" means a motor-driven boat with a high speed internal combustion engine capable of propelling the boat at a speed exceeding 15 miles per hour in still water and so designed that when running at speed it will plane—i.e., its bow will rise from the water
(b) Tug boats	12½	
(c) Iron or steel flats for cargo	10	
(d) Wooden cargo boats up to 50 tons capacity	10	
(e) Wooden cargo boats over 50 tons capacity	10	
(f) Motor launches	12½	
(g) Speed boats*	20	
J Mines and Quarries (N E S.A.)—		
(1) Machinery—		
(a) Surface and underground machinery (except electrical machinery), head gear, moving parts and rails	15	
(b) boilers and head gears (excluding moving parts)	8	

Class of buildings, machinery, plant & furniture	Rate	Remarks.
	Percentage on written down value	
(2) Coat tubs, winding ropes, haulage ropes and san-lifting pipes		* Renewals will be allowed as revenue expenditure
(3) Shafts and Inclines	7	
(4) Portable underground machinery	25	† Cost of lamps actually used up will be allowed as revenue expenditure.
(5) Safety lamps	7	
(6) Tramways on the surface	10	
K. Aeroplanes (N.E.S.A.)—		
(1) Aircraft	30	
(2) Aero-engines	40	
(3) Aerial photographic apparatus	25	
L. (1) Textile machinery, excluding silk manufacturing machinery—		
(a) Cotton	10	
(b) Jute, excluding generating plant	9	
(c) Woollen and worsted	10	
(d) carpet	10	
(2) Ginning and Pressing machinery	9	
M (1) Air compressors and Pneumatic machinery		
(2) Electroplating and Electro-welding plant		
(3) Newspaper production plant and machinery		
(4) Air Conditioning machinery	10	
(5) Locomotives, rolling stock, tramways and railways used by concerns excluding railway concerns (N.F.S.A.)		
N (1) Tube well boring plant		
(2) Concrete pile driving machines		
(3) Weighing machines (N.E.S.A.)		
(4) Works Instruments	12	
(5) Automatic and Semi automatic machine tools		
(6) Precision machine tools e.g. Grinding machines		
O (1) Calculating machines (N.E.S.A.)	15	
(2) Typewriters (N.E.S.A.)		
(3) Neo-post franking machines (N.E.S.A.)		
(4) Accounting machines (N.E.S.A.)		
(5) Other Office machinery (N.E.S.A.)		
(6) Sewing and Knitting machines employed in the manufacture of hosiery and woollen goods		
(7) Sewing and Stitching machines for canvas or leather		
(8) Hand or automatic embroidery machines and their accessories (N.E.S.A.)		
(9) Refrigeration plant, containers etc., (N.E.S.A.)		
(10) Road making plant and machinery		
(11) Artificial Silk manufacturing plant and machinery *		* Replacement of wooden parts of plant and machinery will be allowed as revenue expenditure
(12) Surgical instruments (N.E.S.A.)		
(13) Wireless apparatus and gear, wireless appliances and accessories (N.E.S.A.)		
(14) Building contractors' machinery (N.E.S.A.)		
P Indigenous sugar cane crushers (Kohlus and Belans) N.E.S.A.	18	
K Motor cars, (N.E.S.A.)	20	
Cycles N.E.S.A.	20	
R (1) Moulds used in the manufacture of concrete pipes (N.E.S.A.)	15	
(2) Motor taxis, motor lorries, motor buses and motor tractors (N.E.S.A.)	25	
S Railway Sidings (N.E.S.A.)	7	

APPENDIX

Notification No 46, dated 15th August, 1942

(1) *Increased rate of depreciation on ocean going steamers and motor vessels due to war time conditions*—The rate of depreciation allowable on ocean going steamers and motor vessels will be increased from 5 per cent. to $6\frac{1}{4}$ per cent per annum for this period commencing from 1st September, 1939 and ending six months after the cessation of the present hostilities—the date whereof will be notified. The increase will affect years of assessment 1940-41 onwards. In order to secure that all shipping concerns receive the increased allowance for the same length of time, the allowance for the year of assessment 1940-41 will have reference to the proportions, falling before and after the end of August, 1939, of the trading year which is the 'previous year' for income-tax purposes for that year of assessment.

Example 1 If the previous year was the calendar year 1939 the depreciation allowable for the year of assessment 1940-41 will be exempted at the rate of 5 per cent for 8 months and $6\frac{1}{4}$ per cent for 4 months.

Example 2—If the previous year were the year ending 31st March, 1940, this allowance will be computed at 5 per cent for 5 months and $6\frac{1}{4}$ per cent for 7 months.

If the assessment for the year 1940-41 has been closed then where the assessment has been made at 'nil' due to the depreciation allowance not being entirely wiped off, the additional allowance due for that year under this paragraph will be deducted from the profit assessable for the year 1941-42 and in any other case an adjustment will be made in the tax demand for 1941-42 equal to the difference in the tax demand which would have resulted if the additional allowance had been given in the assessment for 1940-41.

(2) *The rate of depreciation on second hand ocean going steamers and motor vessels*—In the case of a steamer or motor vessel purchased secondhand the normal allowance will be computed by reference to the actual cost of the steamer or the motor vessel concerned to the new owner and its reasonable expectation of life at the date of purchase. The new rate and the method of computation will have effect from the assessment for 1941-42 and not from any earlier assessment.

The following scale is to be used to determine the fractional part of the cost of a steamer or motor vessel that is to be allowed year by year as depreciation for income tax purposes except when at the date of purchase the steamer or the motor vessel concerned is more than 21 years old. In such a case the rate of depreciation to be allowed will be decided by the Central Board of Revenue on the facts of each case.

Age at date of purchase		Expectation of life.	Fractional part of costs to be allowed as depreciation each year
Over years	Under years		
0	1	20	$\frac{1}{\text{number in the previous column.}}$
1	2	19	
10	11	10	
11	12	9	
12	13	8	
13	14	8	
14	15	8	
	and so on		
21	22	4	
22	23	4	

The scale given above having been applied to find the normal allowance, the extra allowance for war time conditions will be given on the lines laid down in paragraph (1) above. As the increased allowance for a new vessel is one fourth of the normal 5% of cost, the addition in the case of second hand steamers is to be taken as $\frac{3}{4}$ th of the normal allowance computed by application of the scale.

Example—A vessel, 12 years old, was purchased at the commencement of the 'previous year' to year of assessment 1937-38 for Rs 5,00,000. According to the scale the expectation of life at the date of its purchase second hand was 9 years. For the years of assessment 1941-42 onwards the depreciation allowance would be $\frac{1}{9}$ of Rs 5,00,000 Rs 55,555.

For the years of assessment corresponding to previous years that are chargeable accounting periods for Excess Profits Tax purposes, the wartime addition of $\frac{3}{4}$ th referred to in paragraph (1) will be added.

(3) *Depreciation on additions to ocean-going steamers and motor vessels which are treated as of a capital nature for income-tax purposes*—Any expenditure which has been treated as capital for income tax purposes (e.g., installation of refrigerator plant or renewal of engines or boilers) will be added to the prime cost of the steamer or motor vessel concerned for the purpose of computing depreciation allowance.

The annual allowance in respect of such expenditure will be calculated as follows—

(a) if the expenditure is or was made before the expiration of the 20 years estimated life of the steamer or the motor vessel, the normal allowance for it will be increased by such a sum as will exhaust or would have exhausted the expenditure over the remaining years of the 20 years' estimated life.

Example—An addition of Rs 60,000 was made to a vessel at the expiration of 17 years of its life. The normal allowance for the addition will be $\frac{1}{3}$ of Rs 60,000 = Rs 20,000 for each of the remaining three years of the vessel's 20 years estimated life.

(b) If the expenditure is or was incurred when the vessel is 20 years old or more the allowances will be such a sum as will exhaust or would have exhausted the expenditure over the further estimated years of life that would be given by applying the table on paragraph (2) above, if for 'age at date of purchase' there were substituted 'age at date of the capital expenditure'.

Example—An addition of Rs 60,000 was made to a vessel 22 years old. The further estimated life, according to the table in paragraph (2) is 4 years. The normal allowance for the addition will therefore be $\frac{1}{4}$ of Rs 60,000 = Rs 15,000 for each year of the further estimated life of the vessel.

(c) in respect a vessel purchased secondhand the normal allowance for the expenditure on additions to such a vessel will be increased by such a sum as will exhaust or would have exhausted the expenditure over the remaining years of the estimated life of the vessel given in the table in paragraph (2) above.

Example—A vessel was over 8 years and below 9 years old when purchased secondhand so that its expectation of life at the date of purchase secondhand was 12 years. After the lapse of 7 years of this expectation of life, an addition of Rs. 60,000 was made to it. The normal allowance

for this addition will be $\frac{1}{5}$ of Rs 60 000=Rs 12 000 for each of the remaining five years of the expected life of the vessel

The increased allowances so calculated will be allowed for the years of assessment 1941-42 onwards. The extra allowance for wartime conditions will also be given on the lines laid down in paragraph (1) above but the aggregate allowances on the additions shall not exceed the cost thereof

Rr 8 A 9 and 9 A—Omitted in 1939

R 10 All sums deducted in accordance with the provisions of section 18 of the Act shall be paid—

(a) in the case of deduction by or on behalf of Government on the same day and

(b) in all other cases within one week from the date of such deduction or the date of receipt of the chalan by the person making the deduction, as the case may be

Provided that in cases falling under (b) the Income tax Officer may in special cases and with the approval of the Inspecting Assistant Commissioner permit an employer to pay the income-tax and super tax deducted from any income chargeable under the head Salaries quarterly on June 15th September 15th December 15th and March 15th.

R. 10 A The prescribed rate of exchange for the calculation of the value in rupees of any income chargeable under the head Salaries which is payable to the assessee out of India in sterling by or on behalf of Government shall be 1s 6d per rupee

R 11 (1) In the case of income chargeable under the head Salaries where deduction is not made by or on behalf of Government the person making the deduction shall forthwith send to the Income tax Officer within whose jurisdiction the deduction is made (or where there is more than one Income tax Officer having jurisdiction in the same area to the Income tax Officer specified by the Commissioner of Income tax) a statement in the following form —

List of persons to whom salaries pensions annuities gratuities commissions bonuses or any other sums chargeable to income tax under section 7 of the Income tax Act 1922 have been paid during the month ended 19 with particulars of the amounts paid the amounts due but not paid and the income-tax and super tax deducted

Name of employer	Address
Name of person responsible for paying	
the salary, etc (if not the employer)	Address

Name of employee.	Amount of salary or wages paid during the month.	Leave allowance paid outside British India	Date of payment	Period for which the salary (or wages) was paid	House rent allowance paid	Value of rent free quarters	Bonus, gratuity, fees, commissions, perquisites or other allowances profits in lieu of or in addition to salary, payments from an unrecognised provident fund, advances of salary, etc., and all other sums paid which are chargeable to income-tax full details showing amount, date of payment, period for which due, etc., are to be given for each item separately).	8	9	Total of columns 2, 3, 5, 7, 8, and 9		Up to and including the month	For the month	10	11	12	Estimated total yearly income under the head 'Salaries'	Average rate of	
										Income tax.	Super-tax.							13	14
1	2	3	4	5	6	7	Rs.	Rs.	Rs.	Rs.	Rs.	Rs.	Rs.	Rs.	Rs.	Rs.			

[illegible]

I being the person responsible for paying the above salaries etc, do hereby declare that the above particulars are correct

Signature

Date

NOTES—1 Columns 11 16 18 20 22 24 26 and 28 The total amount of salaries received the amounts paid or deducted in respect of Provident Superannuation or other funds insurance premiums and the amounts of tax deducted from the beginning of the financial year or from such month after the 1st day of April as the employee entered the service of the employer should be shown

2 In the case of an employee who has left the service of the employer progressive totals of the amounts paid rebate allowed and tax deducted should be shown up to the last month of the year

3 The address of the former employer of a new employee and the address of the new employer of an outgoing employee should be given in the remarks column wherever practicable

(2) In cases where the trustees of an approved Superannuation Fund repay any contributions to an employee during his lifetime but not at or in connection with the termination of his employment they shall forthwith send to the Income tax Officer specified in sub rule (1) a statement giving the following particulars —

1 Name and address of the employee

2 The period for which the employee has contributed to the Superannuation Fund

3 The amount of contributions re paid—

(a) Principal

(b) Interest

4 The average rate of deduction of income tax during the preceding three years

5 Amount of income tax deducted on re payment

(3) The statements referred to in sub rules (1) and (2) shall be drawn up in separate sections one for each place where the employees are stationed and an additional extract of those sections relating to employees who are residing outside the jurisdiction of the Income tax Officer referred to above shall also be sent with the statement

(4) The person responsible for making the deduction or the trustees as the case may be shall pay the amount of tax so deducted to the credit of the Central Government by remitting it within the time prescribed in Rule 10 into the Government Treasury or office of the Reserve Bank of India or of the Imperial Bank of India accompanied by an Income-tax challan blank copies of which shall be supplied by the Income-tax Officer for the purpose provided that on receipt of the above-mentioned statement the Income tax Officer may if so expressly requested and if satisfied that there is sufficient ground for the request himself have the necessary challan prepared and forwarded to the person concerned who shall thereupon pay the amount to the credit of the Central Government in the manner above described.

R 11 A In the case of income chargeable under the head 'salaries' where deduction is not made by or on behalf of Government the Commis-

tioner of Income tax may, in his discretion notwithstanding anything contained in rule 10 and sub rule (1) of rule 11, permit an employer to pay income tax and super tax on the income of his employees chargeable under the head 'salaries' in a lump sum every month based on the average amount of income tax and super tax deduction every month from such income and to submit at the end of the year to the income-tax officer within whose jurisdiction the deduction is made (or where there is more than one Income tax Officer having jurisdiction in the same area to the Income tax Officer specified by the Commissioner of Income tax) a statement giving the following particulars

1 Name of employee 2 Amount of salary (or wages) paid during the year 3 Leave salary or allowance if any paid outside British India 4 Period for which the salary (or wages) was paid 5 House rent allowance paid during the year 6 Value of rent free quarters for the year 7 Bonus gratuity fee commissions perquisites or other allowances profits in lieu of or in addition to salary payments made at or in connection with the termination of employment advances of salary etc and all other sums paid which are chargeable to income tax (Full details showing the total amount paid during the year persons for which the payment were made are to be given separately for each item) 8 Salary, bonus and all other sums which are due to be paid during the year but which were not actually paid (Full details showing the amount the due date and the period for which the amount was payable are to be given for each item separately) 9 Total of items 2 3 5 6 7 and 8 above 10 Yearly amounts paid or deducted in respect of provident or superannuation or other funds and life insurance premiums (give details) 11 Net amount upon which tax has been deducted during the year 12 Total amount of income tax deducted during the year (surcharge to be shown separately) 13 Total amount of super tax deducted during the year (surcharge to be shown separately) Such permission which will hold good till it is withdrawn will be granted by the Commissioner of Income tax subject to the following conditions and any other condition which he may prescribe

(a) The employer shall at the end of each year calculate the income tax and super tax due on the income under the head 'salaries' paid to his employees during the year and adjust any excess or deficiency in the month of March such adjustment being made within the terms of the proviso to sub-section (2) of section 18 of the Act i.e. adjustments should be made in each individual case and any excess recovered from one employee should not be adjusted against any short recovery from another (b) In the case of an employee leaving service the particulars mentioned above should be sent forthwith to the Income tax Officer

R 12 In the case of income chargeable under the head 'Interest on Securities' where the deduction is not made by or on behalf of Government the person responsible for paying the interest shall at the time of deduction send to the Income tax Officer concerned a statement showing the following particulars —

- (i) Description of securities
- (ii) Numbers of securities
- (iii) Dates of securities
- (iv) Amounts of securities.
- (v) Period for which interest is drawn
- (vi) Amount of interest

(vii) Amount of tax and

(viii) Date on which tax was deducted

R 12 A The person making deductions in accordance with sub-sections (3 A), (3 B), (3 C) (3 D) and (3 E) of section 18 shall at the time of deduction send to the Income-tax Officer concerned a statement showing the following particulars —

1 Name and address of the non resident on whose behalf the tax is deducted,

2 The date of payment and in the case of dividend the date of the declaration of the dividend by the company

3 The nature of payment

4 The amount paid —

(i) in the case of interest the rate per cent per annum the period for which the interest has been paid and the amount on which the interest has been computed

(ii) in the case of dividend the gross amount before deducting income tax along with the basis of the computation of the gross amount

5 The amount of income-tax deducted

6 The amount of super tax deducted

R 12 B The person responsible for making deductions under sub sections (3) (3 A) (3 B) (3 C), (3 D) and (3 E) of section 18 shall pay the amount of tax so deducted to the credit of the Central Government by remitting it within the time prescribed in Rule 10 into the Government Treasury, or Office of the Reserve Bank of India or of the Imperial Bank of India accompanied by an income tax chalan blank copies of which will be supplied by the Income tax Office provided that where deduction is made by or on behalf of Government the amount shall be credited within the time and in the manner aforesaid without the production of a chalan

R 13 The certificate to be furnished under section 18 (9) of the Act by any person paying interest chargeable to income tax on any security of the Central Government or of a Provincial Government shall be in the following form —

Certificate of deduction of income tax from the interest on
bearer bonds

promissory notes | stock certificates | Subsidiary General Ledger Account
balance

Dividend No of coupon

Draft No ¹

Number of receipt for interest

Certified that Rs _____ being income tax at
the rate of _____ pies per rupee has been deducted from the interest
by the draft

coupons for Rs _____ presented for payment _____

of this date from Rupees _____ in the interest receipt
being the amount of interest on
bearer bonds

Government promissory notes | Stock Certificates | Subsidiary General Ledger

1 This number should also appear in the interest cages on the back of the Government Promissory notes

_____ for R _____ of the per cent loan of
 Account balance
 Rs _____ said to be the property _____ of
 _____ standing in the name
 (Name of the office paying interest)

Signature
 (Designation of the Official paying interest)
 To be signed by claimant.

bearer bonds

I hereby declare that the _____
 Government promissory notes | Stock

_____ on which in-
 Certificates | Subsidiary General Ledger Account balance
 terest as above specified has been received were my own property and were
 in the possession of _____ at the time when income-
 tax was deducted

Signature
Date

N B—(1) The inappropriate words to be struck out

(2) The securities or in the case of a Subsidiary General Account
 Balance a certificate from the Public Debt Office or Office of the Reserve
 Bank of India concerned to be produced when required in support of
 any claim.

NOTE.—This certificate should not be returned to the Public Debt Office
 In case you desire to claim a refund of the whole or any part of the tax
 deducted as shown above on the ground that your total annual income is
 below the taxable limit or is less than that to which the maximum rate of
 income tax applied you should send this certificate to the Income-tax Office
 direct with an application in the prescribed form obtainable from that
 office

R. 13 A The certificate¹ to be furnished under section 18 (9) of the
 Act by the person paying any interest on debentures or other securities
 for money issued by or on behalf of a local authority or a company shall
 be in the following form —

Name of Local Authority | Company
 Address
 To²

Name and address of payee³

I | We hereby certify that Rs _____ being income tax at the rate
 of _____ pies per rupee has been deducted from Rs _____ being the
 amount of interest at the rate of _____ per cent per annum
 due⁴ _____ on debentures Nos _____ of

1 In the case of bearer debentures or bonds a certificate under sect on 18 (9)
 shall only be given if the recipient of the interest declares the name and address of
 the real owner of the security at the time of receiving the interest

2 Name and address of the owner of security should be given here In the case
 of bearer debentures or bonds these particulars are to be given as declared by the
 payee concerned

3 To be completed only in the case of bearer debentures or bonds

4 The date on which interest is payable

Rs. each of the¹ and that it has been or will, within the prescribed period, be paid by me/us to the Central Government at Superintendent, Public Debt Office, or Principal Officer or Managing Agents.

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(To be signed by claimant.)

I hereby declare that the securities on which interest as above specified has been received, were my own property and were in the possession of at the time when income-tax was deducted

Signature

Date

(N.B.—The securities to be produced when required in support of any claim.)

R. 13-B. The certificate to be furnished under section 18 (9) of the Act by the person paying any interest not being "interest on securities" or any other sum chargeable under the provisions of the Act shall be in the following form:—

Name of person making payment

Nature of payment.

Address:—

To.

Name and address of payee.

I/We hereby certify that Rupees being income-tax at the rate of pies per rupee and Rupees being super-tax at the rate applicable have been deducted from Rupees being the amount paid on at the rate of per cent. per annum for the period² * computed on the amount of Rupees³

Signature of person making payment.

NOTE.—In the case of payers other than the Reserve Bank of India and the Banks scheduled under the Reserve Bank of India Act, the receipt for payment of the tax to the credit of the Central Government (i.e. counterfoil of the income-tax chalan) shall be furnished along with the certificate; in the case of the Banks referred to above, a certificate by the Bank specifying the number and date of the chalan with which the tax has been credited to the Central Government and the amount which included the particular sum shall be furnished.

R. 13-C. The certificate to be furnished under section 18 (9) of the Act by the person paying any dividend on shares registered in the Reserve Bank of India shall be in the following form:—

Name of person paying dividend.

Address.

To

Name of payee.

1 Here enter the name of the local authority or the company.

2 This applies to payment of interest only.

2-a Here specify the period for which interest has been paid

3 Here state the amount on which interest has been computed.

I hereby certify that Rs _____ being income tax at the rate of _____ pias per rupee has been deducted from Rs _____ being the amount of dividend at the rate of _____ per cent per annum due* on _____ shares of Rs _____ and that it has been or will, within the prescribed period, be paid by the Bank to the Central Government at _____.

Governor,
Reserve Bank of India.

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(To be signed by claimant)

I hereby declare that the shares on which dividend as above specified has been received were my own property and were in the possession of _____ at the time when income tax was deducted

Signature

Date

(N.B.—The share certificates to be produced when required in support of any claim)

R 14 The certificate to be furnished by the principal officer of a company under section 20 shall be in the following form—

(Name of Company)

(Address of Company)

Date

Warrant for Rs (in words and figures or if the certificate is crossed by an entry in word stating that the amount of dividend is under the next multiple of Rs 50 above that amount in figures only) _____, being dividend¹ at the rate of Rs (in words and figures) _____ per share for the² _____ the period from _____ to _____ during the year ending on the _____ day of _____ 19 _____ on³ _____ shares in this Company, registered during the said period on (Date) _____ in the name of _____ This dividend was declared _____ at the⁴ _____ meeting held on the⁵ _____ 193 _____

I/We hereby certify that income-tax on the entire/such part as is liable to be charged to Indian Income tax of the profits and gains of the Company, of which this dividend forms a part, has been or will be duly paid by me/us to the Government of India

Signature

Date

(To be signed by the claimant)

I hereby certify that the dividend above mentioned relates to shares which were my own property at the time when the dividend was declared during the period from _____ to _____ on (Date) _____ and were in the possession of _____

Signature

Date

* Here specify the date on which dividend is payable

1 Or dividend and bonus.

2 Year or half year as the case may be

3 Here enter in the case of preference shares, whether paid without deduction of tax or not. Where tax is deducted give the gross amount dividend tax deducted and the net dividend paid.

4 Here enter number and description of shares

5 Here specify number and nature of meeting

6. Here enter date

R. 15. The returns for Government officers under section 21 of the Act shall be prepared and submitted to the Income-tax Officer by —

- (a) Civil Audit Officers for all gazetted officers and others who draw their pay from audit offices on separate bills, and also for all pensioners who draw their pensions from audit offices.
- (b) Treasury officers for all gazetted officers and others who draw their pay from treasuries on separate bills without counter-signature; and also for all pensioners who draw their pensions from treasuries
- (c) Heads of Civil or Military offices for all non-gazetted officers whose pay is drawn on establishment bills or on bills counter-signed by the head of office.
- (d) Forest disbursing officers and Public Works Department disbursing officers in cases where direct payment from treasuries is not made, for themselves and their establishments
- (e) Head postmasters for (i) themselves, their gazetted subordinates and the establishments of which the establishment pay bills are prepared by them and (ii) gazetted supervising and controlling officers of whose headquarters post office they are in charge and (iii) pensioners drawing their pensions through post offices; Head Record Clerks, Railway Mail Service, for themselves and all the staff whose pay is drawn in their establishment pay bills; the Disbursing Officers in the case of the Administrative and the Audit offices
- (f) Controllers of Military Accounts (including Divisional Military Supply, Marine, Field and War Controllers) for all gazetted military officers under their audit.
- (g) Disbursing officers in the Military Works Department for themselves and their establishments.
- (h) Chief Accounts officers or Chief Auditors of Railways concerned for all railway employees under their audit.

R. 16. The minimum income under the head "Salaries" referred to in section 21 (a), shall be Rs. 1,600 per annum.

R. 17. The return to be delivered to the Income-tax Officer under section 21 of the Indian Income-tax Act, 1922, to be made within thirty days from the 31st day of March in each year by the prescribed person in the case of every Government office, and the principal officer or the prescribed person in the case of every local authority, company or other public body or association and every private employer shall be made and verified in the following form:—

THE INCOME-TAX ACT.

1	2	3	4	5	6	7	8	9	10	11	12	13	14	15
Serial Number	Name of employee.	Postal address of residence	Appointment or nature of employment.	Total amount of salary, wages, annuity or pension paid during the year ending on 31st March 19	Period for which items in column 5 were paid.	House allowance paid during the year.	Value of rent free quarters for the year.	Bonus, gratuity, fees, commission, perquisites or other allowances, profits in lieu of salary, payments made at or in connection with the termination of employment, advances of salary, etc., and all other sums paid which are chargeable to income-tax. (Full details showing the total amount paid during year, period for which the payments were made are to be given separately for each distinct class of payment.)	Salary, bonus, and all other sums which were due to be paid during the year but which were not actually paid. (Full details showing the amount, the due date, and the period for which the amount was payable are to be given.)	Total of columns 5, 7, 8, 9 and 10	Yearly amounts paid in respect of Provident Fund Contributions and Life Insurance premiums (give details)	Net amount upon which tax has been deducted during the year	Total amount of income-tax deducted during the year.	Remarks

Designation of

Government office

Local authority

Company

Public body

Association

Private employer

I certify that the above statement contains a complete list of the total amounts paid by..... to all persons who were receiving or to whom was due income on the 31st day of March 19 at the rate of Rs. 1,600 per annum or have received or to whom was due during the year ended on that day not less than Rs. 1,600 in respect of salary, wages, annuity, pensions, gratuity, fees, commission, perquisites or profits in lieu of in addition to salary or wages, advances of salary, payments at or in connection with retirement or any other sum chargeable to income-tax under the head "salaries" and that all the particulars stated are correct.

Dated.....
at

..... Signature of person by whom the return is delivered.
..... Designation

R. 18 The manner of publication under sub-section (1) of section 22 other than publication in the press shall be as follows —

On or before the 1st May in each year, a notice, in the form set out in rule 18 A, or as near thereto as may be, requiring every person whose income exceeds the maximum amount which is not chargeable to income tax, to furnish a return of his total income and total world income during the previous year in the prescribed form and verified in the prescribed manner shall be affixed to the notice board of the Income tax Officer's office and (with the consent of the Provincial Government where such consent is necessary and has been obtained) of as many of the following offices or Courts situated within the Income-tax Officer's jurisdiction as may be practicable —

1 All Head Post Offices and Sub Post Offices

2 Courts of the District Judges Subordinate Judges, Civil Judges and District Munsiffs

3 Offices of the District Collectors, Deputy Commissioners Divisional and Sub Divisional Officers, Tahsildars Mamlatdars and Mukhtars

R. 18-A The notice referred to in sub section (1) of section 22 shall be in the following form —

NOTICE

INCOME TAX

Return of total income and of total world income of the previous year for assessment in the year commencing on the 1st April 194

In pursuance of sub section (1) of section 22 of the Indian Income tax Act 1922 (XI of 1922), notice is hereby given to EVERY PERSON whose total income during the previous year exceeded the maximum amount not chargeable to Income tax to furnish within sixty five days from the date of this Notice a return in the prescribed form and verified in the prescribed manner setting forth (along with such other particulars as are required by the said form) his total income and total world income during that year

A copy of the prescribed form will be supplied free of charge to any person who for the purpose of complying with this notice applies at any office

Penalty—Any person who fails without reasonable cause to furnish the return required by this notice or fails without reasonable cause to furnish it within the time allowed or in the manner required is liable under section 28 of the said Act to a penalty not exceeding one and a half times any tax payable by him

Income-tax Officer

Address

Date of publication of the notice

NOTE.—For the year commencing on 1st April 1939 the maximum amount which is not chargeable to income tax is as follows —

In the case of—

(i) Any Court of Wards, Administrator General Official Trustee, any Receiver or Manager appointed under any order of a Court or any trustee or trustees appointed under a duly executed trust deed where the income profits or gains or any part thereof are not specifically receivable on behalf of any one person or where the individual shares of the persons on whose behalf they are receivable are indeterminate or unknown

Rs nil

- (ii) Any company or local authority Rs nil
 (iii) Any person being a British subject or the subject of a State in India or Burma who is not resident in British India and whose total world income exceeds Rs 2000 Rs nil
 (iv) Any other non resident person Rs nil
 (v) Any other individual Hindu undivided family firm or association of persons Rs 2000

R 19 (1) The return of total income and total world income for individuals Hindu undivided families companies local authorities firms and other associations of persons required under sub-section (1) or sub-section (2) of section 22 shall be in the following form and shall be verified in the manner indicated therein—

FORM OF RETURN OF TOTAL INCOME AND TOTAL WORLD INCOME FOR
 INDIVIDUALS HINDU UNDIVIDED FAMILIES COMPANIES, LOCAL
 AUTHORITIES FIRMS AND OTHER ASSOCIATIONS OF
 PERSONS UNDER SUB SECTION (1) OR (2) OF
 SECTION 22 OF THE INDIAN INCOME
 TAX ACT 1922 (See NOTE 1)
 Income tax year 19 19

Name

*Status

Address

PART I

Statement of total income and total world income during the
 previous year ended—See note 2

Sources of Income —See also note 3	Amount of Income Pro- fits or Gains. (See note 4) 2	Tax already charged or deducted at source (See note 5) 3
1		
SECTION A —INCOME WHICH ACCRUED AROSE OR WAS RECEIVED OR IS DEEMED TO HAVE ACCRUED AROSE OR BEEN RECEIVED IN BRITISH INDIA (and unless the assessee is not resident in British India income arising abroad excluding income accruing or arising in an Indian State from a business controlled in or a profession or vocation set up in India include Indian States)	Rs.	Rs As
1 SALARIES.—(The value of rent free quarters and contributions by your employer to a recognised Provident Fund with interest on such contributions and on accumulations thereof should be shown separately —See note 6)		
2 INTEREST ON SECURITIES.—See note 7 Interest from which tax has been deducted Interest which is tax-free		
3 PROPERTY.—See note 8 Total amount as detailed in PART VI of this Return		

* Please state here whether the assessee is individual Hindu Undivided Family Firm, Company, Local Authority or an Association of persons.

4	BUSINESS, PROFESSION OR VOCATION — <i>See note 9</i> (a) Profits and gains as detailed in PART IV of this Return (b) Share of profits in a registered firm (c) Share of profits in an unregistered firm	
5	OTHER SOURCES. Dividends from companies (gross amount) — <i>See note 10</i> Interest on Mortgages, Loans, Fixed Deposits, Current Accounts, etc Ground Rents Sources other than those mentioned above (give details) — <i>See note 11</i>	

TOTAL OF SECTION A

SECTION B—INCOME NOT INCLUDED IN SECTION A WHICH ACCRUED OR AROSE OUTSIDE BRITISH INDIA AND WAS BROUGHT INTO BRITISH INDIA DURING THE PREVIOUS YEAR (Persons not resident in British India should write "not applicable" in this section)		
1	Out of income which accrued or arose during such previous year (give details)— (a) In an Indian State (b) Elsewhere	
2	Out of income which accrued or arose prior to such previous year but after 1st April, 1933 (give details) excluding such part of it as has suffered tax after the commencement of the Income tax Amendment Act, 1939 — <i>See note 13</i>	
3	Out of income accruing or arising in an Indian State which has been included as part of the total income in any preceding assessment but not actually charged to tax (Not to be included in the total at the foot of the page)	

SECTION C.—INCOME WHICH ACCRUED OR AROSE OUTSIDE BRITISH INDIA DURING THE PREVIOUS YEAR AND IS NOT INCLUDED IN SECTION 'A' OR 'B' —<i>See note 13</i>		
(a)	Non-residents should show the full amount in column 2	
(b)	Persons resident and ordinarily resident should show here their income accruing or arising abroad other than that in an Indian State—(give details)	
(c)	Income accruing or arising in an Indian State from a business controlled in or a profession or vocation set up in India including Indian States [Applicable to person resident whether ordinarily resident or not]	
(d)	Income accruing or arising in an Indian State not included in (c) above [Not applicable to persons resident but not ordinarily resident]	
Notes —For deduction of Rs. 4,500 under the third proviso to section 4 (1) (c), <i>see note 9</i> Income under (c) and (d) is to be included in 'total income' but is exempt from tax for any assessment for 1942-43 and subsequent years		

TOTAL OF SECTIONS 4 B AND C—*see note 12* Rs

* Please state here whether the assessee is individual Hindu Undivided Family Firm, Company, Local Authority or an Association of persons

PART II.

Income tax is not payable—*See note 14*

Statement of sums included in total income in respect of which

1	Sums deducted from salary payable by the Crown and to which the proviso to sub-section (1) of section 7 of the Act applies — <i>See note 15</i>	Rs
---	---	----

- (ii) Any company or local authority Rs. n/
 (iii) Any person being a British subject or the subject of a State in India or Burma who is not resident in British India and whose total world income exceeds Rs. 2000 Rs. n/
 (iv) Any other non resident person Rs. n/
 (v) Any other individual Hindu undivided family firm or association of persons Rs. 2000

R. 19 (1) The return of total income and total world income for individuals Hindu undivided families companies local authorities firms and other associations of persons required under sub-section (1) or sub-section (2) of section 22 shall be in the following form and shall be verified in the manner indicated therein —

**FORM OF RETURN OF TOTAL INCOME AND TOTAL WORLD INCOME FOR
INDIVIDUALS HINDU UNDIVIDED FAMILIES, COMPANIES, LOCAL
AUTHORITIES FIRMS AND OTHER ASSOCIATIONS OF
PERSONS UNDER SUB SECTION (1) OR (2) OF
SECTION 22 OF THE INDIAN INCOME
TAX ACT 1922 (See NOTE 1)
Income tax year 19 19**

Name
 *Status
 Address

PART I

Statement of total income and total world income during the
previous year ended—See note 2

Sources of Income —See also note 3 1	Amount of Income Pro- fits or Gains. (See note 4) 2	Tax already charged or deducted at source. (See note 5) 3
SECTION A —INCOME WHICH ACCRUED AROSE OR WAS RECEIVED OR IS DEEMED TO HAVE ACCRUED AROSE OR BEEN RECEIVED IN BRITISH INDIA (and unless the assessee is not resident in British India income arising abroad excluding income accruing or arising in an Indian State from a business controlled or, or a profession or vocation set up in India including Indian States)	Rs.	Rs. As
1 SALARIES.—(The value of rent free quarters and contributions by your employer to a recognised Provident Fund with interest on such contributions and on accumulations thereof should be shown separately —See note 6)		
2 INTEREST ON SECURITIES.—See note 7 Interest from which tax has been deducted Interest which is tax free		
3 PROPERTY.—See note 8 Total amount as detailed in PART VI of this Return		

* Please state here whether the assessee is individual, Hindu Undivided Family Firm Company Local Authority or an Association of persons

Entries under this head should be accompanied by the certificate issued by the person paying the interest under section 18 (9) of the Act.

Deductions are allowable in respect of—

(a) commission charged by a banker for collecting the interest

(b) interest payable on money borrowed for the purpose of investment in the securities except certain interest payable to persons abroad from which tax has not been deducted (*see* section 8 of the Act for details). Full particulars (in a separate statement if necessary) should be given of any deduction claimed.

8. *Property*.—The tax is payable, under this head in respect of the *bona fide* annual value of all buildings or lands appurtenant thereto, of which you are the owner, other than such portions of such buildings and lands as you occupy for the purpose of your business, profession or vocation the profits of which are assessable to tax. In arriving at the *bona fide* annual value add to the full rent payable by the tenant to the owner such rates and taxes paid by him as are leviable on property and are to be borne by the owner and deduct such taxes for services as are payable by the tenant but for convenience are borne by the owner.

9. *Business, Profession or Vocation*.—You should complete item 4 (a) of Part I, and Parts IV and V of the Return in respect of any business, profession or vocation if you are the sole proprietor, or if you are making the Return on behalf of your firm. If you are a partner in a registered firm or if your firm has applied for registration you must complete item (4) (b) of Part I and if you are a partner in an unregistered firm you must complete item 4 (c) of Part I.

For the purpose of completing items 4 (b) and 4 (c) of Part I, the share of a Partner is to be determined as follows —

(1) *The share is the share to which he was actually entitled during the previous year and not the share to which he was entitled on the date on which the assessment is to be made*

(ii) It includes all interest (whether on loan or capital account, and whether actually paid or not) and all salary commission or other remuneration paid, payable or credited to him.

Losses are to be computed in like manner as profits, and the balance of any loss made in the previous year for assessment for the year 1939-40 which cannot be set off wholly against other income of the same year, can be carried forward and set against the profits of the same business, profession or vocation of the following year.

Under the third proviso to Section 4 (1) persons resident (whether ordinarily resident or not ordinarily resident) are entitled to an allowance of Rs. 4500 from the income accruing or arising abroad but not remitted to British India. This amount should be deducted as follows —

(i) in the first instance from the income accruing or arising abroad which is to be shown in section A of the Return,

(ii) the balance, if any, from the income to be shown in item (b) of section C,

(iii) the remainder, if any, from the income to be shown in items (c) and (d) of section C.

1. *Local authorities*.—The income of local authorities which is chargeable to Income tax is the profits and gains from a trade or business carried on

by those authorities other than income arising from the supply of a commodity or service within its own jurisdictional area

10 *Dividends from companies*—The gross amount should be entered after adding to the net sum received Income-tax computed as explained in Note 5 above. Where the exact tax is not known, the estimated tax should be added and the figure of net dividend put in column 1 followed by the word "net"

11. (a) *Income from Agriculture* from land not paying land revenue or local rates to an authority in British India, and all agricultural income arising abroad (including Indian States and Burma) should be included under this head if received in British India.

(b) *Remittances received by a wife resident in British India from her non resident husband* are deemed to be income accruing in British India and must be included in her Return if they are not paid out of income included in her husband's total income.

12 *Non residents*—Income tax is payable by a non resident on the total of section A. If he is a British subject or the subject of a State in India or Burma or a native of a Tribal Area the Income tax is computed by reference to the average of rates appropriate to the total of sections A and C. The income of other non-residents is chargeable at the full company rate. The income of all non residents is chargeable to super tax on the total of section A at the average of the rates appropriate to the total of sections A and C. A dividend paid without British India is deemed to be income accruing and arising in British India to the extent to which it has been paid out of profits subjected to Income-tax in British India.

13 *For the Income tax year 1939-40 only* tax is not chargeable in respect of both the income accruing or arising outside India in the previous year and the income brought into British India during that year out of income accruing or arising in earlier years but only in respect of the greater of these two amounts. If the former sum is the greater, section B (2) should be marked 'covered by section C,' and if the latter is the greater, section C should be marked 'covered by section B (2)'

14 Sums entered in Part II cannot be deducted from total income, but, subject to the limits laid down in the Act, a deduction will be made in respect of such sums from the income-tax payable at the average rate for the total income. No deduction from super tax is given in respect of these sums, except in certain special cases of members of unregistered firms and other associations of persons as provided for in the second proviso to section 55

15. The proviso to section 7 (1) of the Act, applies to sums deducted in accordance with the conditions of service for the purpose of securing a deferred annuity or of making provision for the employee's wife or children.

16 Details of the amounts to be entered in respect of a recognised Provident Fund should be obtained from the trustees of the fund or from your employer

17. *Part IV*—(a) In computing the profits or gains of a partnership all sums paid or credited to a partner must be disallowed. These sums will be taken into account in allocating the gross income of the business between the partners to ascertain the individual share of each partner. All sums of interest, salary or commission will thus be included in the partners' share of the firm's income and will not be again assessed on that partner as interest, salary or commission respectively.

(b) Attention is particularly drawn to the provisions of section 10 (2) (iii) and section 10 (4) (a) of the Act which prohibits the deduction of any payment of interest chargeable under the Act which is payable without British India except interest on which tax has been paid or from which tax has been deducted, or in respect of which there is an agent who may be assessed under section 43, or any payment chargeable under the head "Salaries" if it is payable without British India and tax has not been deducted. An exception is made in the case of interest on a loan issued for public subscription before 1st April, 1938. These provisions do not apply to interest or salary which is not chargeable to Income tax under the Act (i.e., interest on money borrowed abroad from a non-resident and not brought into British India in any form whatever, or salary or services rendered wholly abroad by a non-resident.)

(c) *Depreciation*—For the assessment years 1940-41 and 1941-42, depreciation allowance is to be calculated at prescribed rates on the basis of "written down" value instead of on the basis of "original cost". The "written down" value is to be computed as follows—

- (a) In the case of assets acquired in the previous year, the actual cost represents the "written down" value.
- (b) In the case of assets acquired before the previous year but after the commencement of the Amendment Act, 1939 the actual cost less all depreciation allowable under section 10 of the Act
- (c) In the case of assets acquired before the commencement of the Income-tax (Amendment) Act, 1939, the actual cost less for each financial year since acquisition the amount of depreciation applicable to the assets at the rates in force for each year since 1st April, 1922, and at the rates in force on the 1st April, 1922, for each such year prior to date, but so much of the unabsorbed depreciation allowance as has been carried forward up to and including the assessment year 1938-39 to which full effect has not been given in the assessment for the year 1939-40 is not to be deducted in arriving at the "written down" value

With effect from the assessment for the year 1942-43 and subsequent years the 'written down' value is to be computed as follows—

- (a) in the case of assets acquired in the previous year, the actual cost represents the "written down" value.
- (b) in the case of assets acquired before the previous year, the actual cost to the assessee less all depreciation actually allowed under the Act or any Act repealed thereby or under executive orders issued when the Indian Income-tax Act, 1886, was in force

18 General Directions—

- (a) The form must be filled in and signed in ink. Losses may be shown in red ink.
- (b) Figures only are to be inserted in columns (2) and (3) of Part I and should not be modified by words such as "about" or "approximately," except as stated in Note 5. The word "nil" must be entered in column (2) in Part I against each source from which you did not derive any income.
- (c) If you spoil this form you should ask your Income-tax Officer for another. Erasures should not be made. You should sign your name in full against any alteration.

Form of return of particulars to be furnished under Section 38 of the Indian Income-tax Act, 1922 (see paragraph 4 of notice).

(a) To be filled up in the case of firms only. If this information is already given in Part III of the Return under Section 22 of the Indian Income-tax Act, 1922, write "see Part III" in this section.

Firm's Name

Address

Names of Partners.	Addresses.

Date *Representative's Signature*
Designation

(b) To be filled up in the case of Hindu Undivided Families only.

Name of family

Address

Serial No.	Names of Adult members of family.	Address.
1	(Manager or Karta).	
2		
3		
4		
5		
6		

Date *Representative's Signature*
Designation

(c) To be filled up by Trustees, Guardians or Agents only.

Names and addresses of persons for whom the assessee is the trustee, guardian or agent.		Whether Trustee, Guardian or Agent.
Names.	Addresses	

Date *Signature*
Designation
Address

(d) Statement of the names and addresses of all persons to whom assessee has paid in the previous year rent, interest, commission, royalty or brokerage or any annuity (not being an annuity taxable under the head "Salaries") amounting to more than four hundred rupees and particulars of all such payments.

Serial Number.	Name and address of the person to whom the payment was made.	Nature of payment.	Amount paid.	Date of payment.	Whether paid in cash or by book adjustment.
1					
2					
3					

Signature

Date

Address

(2) The declaration appended to the form by sub-rule (1) shall be signed—

- (a) in the case of an individual by the individual himself;
- (b) in the case of a Hindu undivided family by the Manager or Karta;
- (c) in the case of a company or local authority by the principal officer;
- (d) in the case of a firm by a partner, and
- (e) in the case of any other association by a member of the association.

R. 19-A. Notwithstanding anything contained in Rule 19, the return of total income, in respect of any income, profits or gains liable to be assessed in any year ending before the 1st April, 1939, shall—

- (i) in the case of individuals, firms, Hindu undivided families and other associations of persons, but not companies, be in form A annexed to this notification; and
- (ii) in the case of companies be in the form B annexed to this notification.

FORM A.

FORM OF RETURN OF TOTAL INCOME FOR INDIVIDUALS, FIRMS, HINDU UNDIVIDED FAMILIES AND OTHER ASSOCIATIONS OF INDIVIDUALS.

INCOME-TAX YEAR, 19 -19

Name of Assessee

Designation

Address

Statement of Total Income during the previous year.

1	2	3
Sources of Income	Amount of profits or gains or income during the previous year	Tax already charged on the income
	Rs	Rs As
1 Salaries (including wages, annuity pension, gratuity, fees, commission allowances, perquisites, including rent free quarters) or profits received in lieu of, or in addition to, salary or wages { See note (1) }		
1 A The contributions made by an employer to the accounts in a recognised provident fund of the person making the return		
1 B The interest accruing to the account mentioned in 1 A which is not exempt from income tax [Section 58-F (2)]		
1 C Interest accruing to the account mentioned in 1 A which is exempt from Income tax [Section 58 F (2)]		
2 Interest on securities (including debentures) already taxed [See note (2)]		
3 Interest on securities of the Government of India or of local Governments declared to be income tax free " (3)		
4 Property as shown in detail in Schedule A " (4)		
5 Business, trade, commerce, manufacture or dealing in property, shares or securities (details as in note 5) " (5)		
6 Profession " (6)		
7 Dividends from companies (Net) " (7)		
8 Interest on mortgages, loans, fixed deposits, current accounts, etc., not being income from business		
9 Ground rent		
9-A Income of wife, minor child and association of individuals [Section 16 (3)—See Note 10]		
10 Any source other than those mentioned above including any income earned in partnership with others " (8)		
TOTAL		
Deductions claimed—		
(a) on account of insurance premia		
(b) on account of contributions to a provident fund to which the Provident Funds Act applies		
(c) on account of contributions to a recognised provident fund [Section 58-A (a)]		
(d) on account of interest on contributions to a recognised provident fund and accumulations thereof which is exempt from income-tax [Section 58-F (2)]		
(e) others		

I declare that to the best of my knowledge and belief, the information given in the above statement is correct and complete, that the amounts

of income shown are truly stated and relate to the year ended _____

and that no other income accrued or arose or was received by the family
the association

one

the firm

the family

the association

during the said year and that the firm had during the said year no
the family
 other sources of income the association

I

the firm

the family

the associat on

Signature_____

Date-----

NB—(a) Income accruing to you outside British India received in British India is liable to taxation and must be entered by you in the form

(b) All income, from whatever source derived must be entered in the form including income received by you as a partner of a firm.

NOTE 1.—In column 2 should be shown the gross amount of salary and not the net amount after deductions on account of income tax provident funds etc.

NOTE 2—Interest on securities means the interest on promissory notes or bonds issued by the Government of India or a Local Government or the interest on debentures or other securities for money issued by or on behalf of a local authority or Company. Where income tax has been deducted from the interest, or where the interest has been paid income tax free, the amount of tax so deducted or paid should be added to the amount of interest actually received and the gross amount so arrived at should be entered in column 2 of the statement. The term interest on securities does not include interest on fixed deposits or mortgages or other loans which have to be shown under heading 8.

The interest on securities of the Government of India or of Local Governments declared to be income tax free should be shown under head 3. Those which are not declared to be income tax free should be included under this head.

Entries under this head must be supported by the certificate issued by the person or Company paying the interest under section 18 (9) of the Act

NOTE 3 — (a) The income tax payable on the interest receivable on a security of a Local Government issued income tax free is payable by the Local Government and not by the holder of the security.

(b) Only the interest on securities of the Government of India or of a Local Government declared to be income tax free should be entered against this head. Such interest will not be charged to income tax but it must be included in the statement of total income in order to ascertain the rate of income tax chargeable on other income. *It is chargeable to super tax*

(c) Particulars of any interest on securities issued by other authorities, and stated to be free of income tax should be entered against head 2, as income-tax on such interest is actually paid by these authorities on behalf of the recipients.

NOTE 4—The tax is payable under this head in respect of the *bona fide* annual value of any buildings or lands appurtenant thereto of which you are the owner, other than such portions of such buildings and lands as you may occupy for the purpose of your business

NOTE 5—(a) Where you keep your accounts on the mercantile accountancy or book profits system, you must file a return in the following form—

Income, profits or gains from business, trade, commerce

	Rs.	As
Income, profits or gains as per Profit and Loss Account for the year ended—193		
Add any amount debited in the accounts in respect of—		
1 Reserve for bad debts		
2 Sums carried to reserve for provident or other funds		
3 Expenditure of the nature of charity or presents		
4 Expenditure of the nature of capital		
5 Income-tax or super tax		
6 Drawings or salary of proprietor, drawing of partners and salary of partners		
7 Rental value of property owned and occupied		
8 Cost of additions to, or alterations, extensions, improvements of, any of the assets of the business		
9 Interest on the proprietor's or partner's capital including interest on reserve or other funds		
10 Losses sustained in former years		
11 Losses recoverable under an insurance or contract of indemnity		
12 Depreciation of any of the assets of the business		
13 Private or personal expenses and expenses not incurred solely for the purpose of earning the profits		
TOTAL	Rs	As
Deduct any profits included in the account already charged to Indian Income tax and the interest on securities of the Government of India or of Local Governments declared to be income-tax free.		
BALANCE		

(Signature of the person making return)_____

(Date)_____193

State here amount of salary paid to a partner and not added back on the ground that it is not an appropriation of profits Rs

(b) Where you do not keep your accounts on the mercantile accountancy or book profits system but on a cash basis, you must file a statement showing how you arrive at the taxable profits, i.e., showing details of the gross receipts and of the expenditure you propose to set against those receipts specifying separately salary paid to partners and deducted from gross receipts as not being an appropriation of profits. No deductions are permissible on account of—

- (i) Property owned and occupied by the owner of a business for the purposes of a business,
- (ii) Additions to, or alterations, extensions, or improvements of, any of the assets of the business,
- (iii) Interest on the capital of the proprietors or partners of the business,
- (iv) Bad debts not actually written off in the accounts,
- (v) Losses sustained in previous years;
- (vi) Reserves of any kind,

(vii) Sums paid on account of the income tax or super tax or any tax levied by a local authority other than local rates or municipal taxes in respect of the portion of the premises used for the purpose of the business,

(viii) Any expenditure of the nature of charity or a present,

(ix) Any expenditure of the nature of capital

(x) Any loss recoverable under an insurance or a contract of indemnity,

(xi) Depreciation of any kind other than that specified in the Act,

(xii) Drawings or salary of proprietor, drawings of partners and salary of partners if it be an appropriation of profits,

(xiii) Private or personal expenses of the assessee,

(xiv) Any expenditure of any kind which is not incurred solely for the purpose of earning the profits

If you have included any such sums in your expenditure in your books you must exclude them from the expenditure permissible for the purpose of arriving at your taxable profits

(c) You are also required to attach a statement showing the sums charged in your accounts under the provisions of section 58-K (2)

NOTE 6—The income profits or gains shall be computed after making allowance for any expenditure (not being in the nature of capital expenditure) incurred *solely* for the purpose of such profession or vocation, provided that no allowance is made on account of any of your personal expenses Professional fees received by you in any part of India (whether within British India or not) must be included by you in your receipts

NOTE 7—Income-tax chargeable on the profits of companies is paid by the Companies so that the dividends received by the shareholders represent the net amount remaining after any Income tax due by the company has been paid This amount should be entered in column 2 of the statement The proportionate tax will be added in the Income tax Office

If the rate of tax applicable to your total income is less than the rate of tax applicable to the profits or gains of the Company at the time of the declaration of such dividends you may, by attaching the Company's certificate received with the dividends have the excess collected on your dividends from the Company set against the tax payable by you on your other income instead of having to apply separately for a refund

NOTE 8—Agricultural income from land not paying land revenue or local rates to an authority in British India should be included under this head or under income from business according to circumstances.

NOTE 9—Deductions from total income can only be made for insurance premia in respect of insurance on your own life or on the life of your wife, or in respect of a contract for a deferred annuity on your own life or on the life of your wife. No deduction is permissible in the case of any other form of insurance except in the case of Hindu undivided families where deductions are permissible on account of premia paid in respect of insurance on the life of any male member of the family or of his wife The original receipt or the certificate of the insurance company to which the premium was paid, must be attached to the return

NOTE 10—(a) Under the Head 9-A you should enter so much of the income of your wife or minor child as arose directly or indirectly—

- (i) from the membership of your wife in a firm of which you are a partner,
 - (ii) from the admission of your minor child to the benefits of partnership in a firm of which you are a partner
 - (iii) from any assets transferred by you directly or indirectly to your wife otherwise than for adequate consideration or in connection with an agreement to live apart and
 - (iv) from any assets transferred by you directly or indirectly to your minor child not being a married daughter
- (b) Under this head you should also enter so much of the income of any association of individuals consisting of yourself and your wife as arises from any assets transferred by you to such association

SCHEDULE A

[illegible]

FORM B

FORM OF RETURN OF TOTAL INCOME OF A COMPANY
INCOME TAX YEAR 19 19

Name of Company

Its principal place of business

Total income of the Company

Income, profits or gains as per profit and loss account for the year ended 19		Rs	A
<i>Add any amount debited in the accounts in respect of—</i>			
1	Reserve for bad debts		
2	Sums carried to reserve for provident or other funds		
3	Expenditure of the nature of charity or presents		
4	Expenditure of the nature of capital		
5	Income-tax or Super tax		
6	Rental value of property owned and occupied		
7	Cost of additions to or alterations extensions improvements of, any of the assets of the business		
8	Interest on reserve or other funds		
9	Losses sustained in former years		
10	Losses recoverable under an insurance or contract of indemnity		
11	Depreciation of any of the assets of the company		
12	Expenses not incurred solely for the purpose of earning the profits		
TOTAL			
<i>Deduct any profits or income included in the accounts on account of—</i>			
(a)	Interest (net amount) on securities taxed at source		
(b)	Interest on securities tax free		
(c)	Dividends (net amount) from companies taxed in British India		
(d)	Other items already taxed at source (specify details)		
BALANCE			

*If any other deduction is to be claimed please give particulars thereof in a separate letter to be forwarded with the return

If the company owns any property not occupied for the purposes of the business, a statement in the form prescribed in Schedule overleaf should be attached with particulars of the credit and debit on account of such property entered in the accounts

Declaration

I, the _____ [Secretary, etc. (see section 2 (12) of the Act)] of the _____ (name of Company) declare that the information against each head in this return is correctly given as shown in the books of the Company as also in the accounts which have been duly audited by the auditors of the Company, and which have been adopted by the shareholders of the Company

(Signature) _____

(Designation) _____

Dated _____ 19

(2) The Company shall also attach return a statement showing the sums charged in the accounts under the provisions of section 58-k (2)

N.B.—This return must be accompanied by a copy of the profits and loss account referred to above

2. Whereas you have not paid the sum of for the year being the instalment(s) due on 194 , under section 18-A of the Act on the prescribed date in accordance with the Notice of Demand served on you on you are hereby informed that a penalty of Rs has been imposed upon you under section 46 (1) of the Indian Income-tax Act, 1922.

3. You are required to pay the amount on or before the.....to the Treasury Officer,

Sub-Treasury Officer,

Agent, Imperial Bank of India,

at

Reserve Bank of India,

when you will be granted a receipt. A chalan is enclosed for the purpose.

4. If you do not pay the amount on or before the date specified above you will be liable under section 46 (1) to a penalty which may be as great as the tax due from you.

5. You are further warned that unless the total amount due, including this penalty, is paid on or before 19 , a further penalty will be imposed, on you (and a warrant of distress will be issued for the recovery of the whole amount due with cost).

6. The assessment has been made under sub-section (4) of section 23 of the Indian Income-tax Act, 1922, because you failed, to make a return of your income under section 22 (2);

to comply with a notice under sub-section (4) of section 22;

to comply with a notice under sub-section (2) of section 23, but if you were prevented by sufficient cause from making the return or did not receive the notice (s) aforesaid or had not a reasonable opportunity to comply, or were prevented by sufficient cause from complying, with the terms of the notice (s) you may apply to me, within one month from the receipt of this notice, under section 27, to cancel the assessment and proceed to make a fresh assessment.

7. If you intend to appeal against the assessment you may present an appeal under sub-section (1) of section 30 of the Indian Income-tax Act, 1922, to the Appellate Assistant Commissioner of Income-tax at within 30 days of the receipt of this notice, in the form prescribed under sub-section (3) of section 30, duly stamped and verified as laid down in that form but no appeal will lie against an order under section 46 (1) unless the tax has been paid.

Income-tax Officer

Address

Dated 19 .

Place

Delete inappropriate paragraphs and words.

ASSESSMENT FORM.

Assessment for 19 -19 under Sec. of the Income-tax Act, 1922

Name of assessee ... District or Area

Status Number in General Index

Address

Number of Miscellaneous Record..

Detailed sources of income	Amount of income	Tax already deducted or otherwise paid at source.			
		Income-tax.		Super-tax	
		Rs	As	Rs	As
Total income --					
Salaries					
Interest on securities					
Property					
Business, Profession or Vocation					
Other sources (In the case of dividends the gross amount liable to tax and the tax appropriate should be shown)					
1					
2.					
3					
Total income					
Deduct-earned income allowance					
Adjustments to total income to arrive at total world income ¹ (give details).					
Total world income ¹					
Gross income-tax and super-tax chargeable on Total income					
Gross income-tax and super-tax computed on Total World Income ¹					
Income-tax					
Average rate of $\frac{\text{Income-tax}}{\text{Super-tax}}$ paise in the rupee					
Sums included in total income in respect of which income-tax and/or super-tax is not payable --					
(a) under section 7 (1) or on account of a Provident Fund to which the Provident Funds Act, 1925, applied					
(b) On account of recognised Provident and Superannuation Funds					
(c) On account of Insurance Premium					
(d) Share from association of persons or from unregistered firm on the profits of which tax has already been paid or partnership profits from registered firm charged to tax in the hands of the firm under the second proviso to sec. 23 (5) (a)					
(e) Interest from tax-free securities of the Central Government or of a Provincial Government and/or portion of a dividend paid out of tax-free income and any other income exempted from income-tax					
(f) Income accruing or arising in an Indian State					

¹ To be completed in the case of non-residents only.

Detailed sources of income	Amount of income	Tax already deducted or otherwise paid at source			
		Income tax		Super tax	
(g) Profits of Co-operative Societies or dividends or other payments received out of such profits					
Total amount upon which relief is due and income tax and/or super tax thereon		Rs	As	Rs	As
For income tax relief					
For super tax relief					
Deduct income tax and super tax deducted or otherwise paid at source as above					
Double income tax relief					
Net amount of income tax and super tax	payable ¹ refundable ¹				
Penalties under sections 18 A (9), 25 (2), 28 44 E 44 F and 46 (1) ¹					
Deduct — Interest payable by the Central Government under section 18 (A) 5					
Add — (1) Interest payable under section 18 A (6) or (8) 80 per cent of the tax determined on the income to which section 18 A applies at the rates applicable in 194 — 194 Tax paid under sub section (2) or (3) of section 18 A Difference					
(1) Interest payable under section 18 A (7)					

¹ Delete inappropriate words or figures

TOTAL SUM PAYABLE (IN FIGURES AS WELL AS IN WORDS)
 REFUNDABLE
 Rs as (figures) Rupees annas (words)
 Date

R 20-A Notwithstanding anything contained in Rule 20, the notice of demand under Section 29 to be served on the assessee in pursuance of an order under sub section (1) of section 18 A shall be in the following form

Notice of Demand under section 29 of the Indian Income tax Act, 1922 for advance payment of tax under section 18 A (1) of the Act

To

Take notice that under sub-section (1) of section 18 A of the Indian Income tax Act 1922 the sum of Rs _____ as specified below has been determined to be payable by you during the financial year 194 — 194

*2 Whereas after issue of the previous notice of demand served on you on _____ your assessment

_____ an assessment of the registered firm in which you are a partner for a previous year later than that referred to in the notice of demand has been completed the sum payable

* Delete inappropriate paragraphs or words

by you has been re determined to be Rs.
as specified below

3 You are required to pay the amount in
equal instalment(s) on or before the 15th June, 15th September 15th De-
cember 194 and 15th March 194 respectively to the

Treasury Officer

S. b. Treasury Officer

Agent Imperial Bank of India

Reserve Bank of India

at when
you will be granted a receipt Chalan(s) is/are
enclosed for the purpose in which you should enter the amount of each
instalment at the time of payment

If this notice of demand is served on you after any of the dates on
which the instalments specified herein are payable the whole tax is payable
in equal instalments on the dates which fall after the service of the notice
or in one instalment if the notice is served after the 15th day of December
194

4 If at any time before the last instalment as aforesaid is due you
estimate that your income (other than the income on which tax is deductible
at source under section 18) for the previous year for assessment for the
year ending on the 31st day of March 194 is less than the income on
which you have been required to pay tax as above you may send to the
Income tax Officer an estimate of the tax so payable on such estimated
income and should pay such amount (less any instalments already paid in
accordance with paragraph 3 of this notice) as accords with your estimate
in equal instalments on such of the dates specified above as have not expired
or in one sum only if the last of such date has not expired For this
purpose you should enter in the appropriate chalan(s) the amount payable
according to your estimate You may revise your estimate at any time
before the last instalment is due and may adjust any excess or deficiency
in respect of any instalment already paid in a subsequent instalment or
instalments

5 If your income of the previous year for assessment for the year
ending on the 31st day of March 194 includes any income of the nature
of commission which is payable periodically and is not received or adjusted
by the payer in your account before any of the quarterly instalments of tax
become due you may defer the payment of tax on that part of your income
to the date when such income is normally receivable or adjustable and if
you do so you should inform the Income tax Officer of the date to which
the payment is so deferred If however you do not pay the tax so deferred
within 15 days of the receipt or adjustment in your account of such income,
you will be liable to pay interest thereon at 6% per annum from the date
of receipt or adjustment to the date of payment of tax.

6 If not having made an estimate of the tax payable by you under
section 18-A (2) you do not pay any instalment of tax on or before the
date on which as specified in para 3 of this notice it becomes due you will
be treated as in default in respect of such instalment and will be liable under
section 46 (1) to a penalty which may be as great as the amount of the
instalment due If, however you have under sub-section (4) of
section 18-A deferred the payment of a part of the tax and have informed
the Income tax Officer accordingly you will not be treated as in default in
respect of such tax until the date of deferment

7. If under sub section (2) of section 18-A you send to the Income-tax Officer an estimate of the tax payable by you, but do not pay any instalment of tax in accordance therewith on or before the appropriate date, you will be treated as in default in respect of such instalment and will be liable under section 46 (1) to a penalty which may be as great as the amount of the instalment.

Dated

194

Place

Income tax Officer

Address

Order under section 18 1 (1) of the income tax act, 1922

Name of assessee

District or Area

Status

Number in General Index

Address

Total income determined in the latest completed assessment being that for the year 194 194	Rs
Less share of income if any from a registered firm where the assessment of the firm has been completed for a year later than that referred to above	
Add share of income if any from a registered firm according to the latest completed assessment of the firm	
Total income	
Less earned income allowance for purposes of determining income tax payable (but not for Super tax)	
Adjustments to total income to arrive at total world income in the case of a non resident	
Total world income	
Gross income tax and super tax chargeable on 'total world income' (in the case of a non resident only)	
Gross income tax and super tax chargeable on total income	
Sums included in total income in respect of which income-tax and/or super tax is not payable	Rs
(i) income to which the provisions of sec 18 apply	
(ii) income which is exempt from tax e.g. share of income from an association of persons or an unregistered firm on the profits of which tax has already been paid	
(iii) income accruing or arising within an Indian state	
(iv) Interest on tax free Securities	
(v) Life Insurance premia.	
Total amount on which tax is not payable and proportionate tax thereon	
for income tax	
for super tax,	

Deduct amount by which the net dividend income has increased and any excess tax on income on which income tax is deductible under section 18 at the maximum rate

Net amount of income tax and super tax

Less amount on account of estimated double income tax relief if any

Balance payable

Less tax already paid in the financial year under section 18A in compliance with the previous notice of demand served on 194

Net amount of tax payable refundable

PAYABLE

TOTAL (IN FIGURES AS WELL AS IN WORDS)

REFUNDABLE

Rs As (Rupees Annas)

Date

Income tax Officer

Address

R. 21 An appeal under section 30 shall in the case of an appeal against a refusal of an Income-tax Officer to make a fresh assessment under section 27 be in Form A in the case of an appeal by a person denying his liability to deduct tax under section 18 (3 A), (3-B) or (3 C) in Form B I in the case of an appeal against an order of an Income tax Officer under section 25 (2) in Form C, in the case of an appeal against the order of an Income tax Officer under section 25 A in Form C (1), in the case of an appeal against an order of an Income-tax Officer under section 28 in Form D in the case of an appeal against a refusal of an Income tax Officer to register a firm under section 26-A in Form D 1 in the case of an appeal against a refusal of an Income-tax Officer to register a firm or the cancellation of the registration of a firm under sub-section (4) of section 23 in Form D II in the case of an appeal against an order of an Income tax Officer under section 23 A in Form F in the case of an appeal against an order of an Income tax Officer under section 26 (2) in Form G in the case of an appeal against an order of an Income tax Officer under section 44-E (6) or 44-F (5) in Form H in the case of an appeal against an order of an Income tax Officer under section 46 (1) in Form I, in the case of an appeal against an order under section 48 49 or 49 F refusing to grant a refund in Form J and in other cases in Form B

FORM A

Form of appeal against an order refusing to re-open an assessment under Section 27

To

The Appellate Assistant Commissioner of

The day of

The petition of

District sheweth as follows —

19
post office.

income

loss

1 Under the Indian Income-tax Act, 1922, your petitioner's

has been computed at Rs _____ for the year commencing 1st day of April, 19 ____.

2. Your petitioner was prevented by sufficient cause from making the return required by section 22 (2) or did not receive the notice issued under sub-section (4) of section 22, or sub section (2) of section 23, or had not a reasonable opportunity to comply or was prevented by sufficient cause from complying with the terms of the notice under sub-section (4) of section 22 or sub section (2) of section 23, as more particularly specified in the statement attached

3. Your petitioner therefore presented a petition to the Income tax Officer under section 27, requesting him to cancel the assessment. This petition, the Income-tax Officer, by his order dated _____ of _____ which a copy is attached, has rejected

4 Your petitioner therefore requests that the order of the Income-tax Officer may be set aside and that he may be directed to make a fresh assessment in accordance with the law

Signed *

STATEMENT OF FACTS

Form of Verification.

I, _____, the petitioner, named in the above petition, do declare that what is stated therein and in the above statement of facts is true to the best of my information and belief

Signed *

FORM B.

Form of Appeal against Assessment to Income-tax.

To

The Appellate Assistant Commissioner of _____ 19 ____
The _____ day of _____
The petition of _____ of _____ post office,

District sheweth as follows —

1. Under the Indian Income-tax Act, 1922, for the year commencing the 1st day of April, 19 ____,

your petitioner's total income has been assessed at _____
your petitioner's total world income has been assessed at
the amount of tax payable by your petitioner has been determined at... ..
the amount of loss incurred by your petitioner has been computed at... ..
your petitioner has been granted a refund of

The notice of demand/order under section 23 (6)

†2. Intimation of the amount of loss attached hereto was served upon

Intimation of the order of refund
your petitioner on

* The form of appeal and the form of verification appended thereto shall be signed—

- (a) In the case of an individual by the individual himself
 - (b) In the case of a Hindu undivided family by the Manager or karta.
 - (c) In the case of a company or local authority, by the principal officer
 - (d) In the case of a firm, by a partner, and
 - (e) In the case of any other association, by a member of the association.
- †Delete the inappropriate words.

†3	During the previous year ending	† your
petitioner's	total income was	
	total world income was	
	total tax works out at†	
	loss amounted to	

refund allowable to your petitioner was†
and that during the said previous year your petitioner had no other income

4 Your petitioner has made a return of his income to the Income tax Officer under section 22 sub section (1)†(2) of the Act and has complied with all the terms of the notice served on him by the Income tax Officer under section 23 (2) and/or [section 22 (4)]

5 Your petitioner therefore prays that
he may be assessed accordingly

he may be declared not to be chargeable under the Act

his loss may be determined at

he may be granted a refund accordingly

Signed.*

_____ GROUNDS OF APPEAL

Form of Verification

I, _____, the petitioner, named in the above petition,
do declare that what is stated therein is true to the best of my information
and belief

Signed *

_____ FORM B I

*Form of appeal in the case of a person denying his liability to deduct
tax under section 18 (3 A), (3 B) or (3 C)*

To

The Appellate Assistant Commissioner of Income tax.

The _____ day of _____ 19 _____
 The petition of _____ of _____ post office _____ District,
 sheweth as follows —

1 Under the provisions of sub sections (3 A), (3 B) or (3 C), of
 section 18 of the Indian Income tax Act 1922 read with sub section (6)
 of that section your petitioner has been held liable to deduct and pay tax

† De cte the in appropriate words

‡ The tax or the refund need not be entered by the appellant if the grounds of
 appeal indicate clearly the objections to the tax or the refund as the case may be
 determined by the Income tax Officer

* The form of appeal and the form of verification appended thereto shall be
 signed—

- In the case of an individual by the individual himself
- In the case of a Hindu undivided family by the Manager or karta.
- In the case of a company or local authority by the principal officer
- In the case of a firm, by a partner and
- In the case of any other association, by a member of the association.

in respect of the sum of Rs other than interest paid by him to the non resident

2 The tax of Rs was paid by your petitioner on 194

3 On the grounds(s) set out below, your petitioner denies his liability to make such deduction and prays that he may be declared not liable to make such deduction

*Signed **

GROUND OF APPEAL

Form of Verification

I, the petitioner named in the above petition do declare that what is stated therein is true to the best of my information and belief

*Signed **

FORM C

Form of appeal against an order under section 25 (2)

To

The Appellate Assistant Commissioner of Income tax,
The day of 19 post office,
The petition of of District sheweth as follows —

1 Under section 25 (2) of the Indian Income tax Act, 1922, a penalty of Rs has been imposed on your petitioner. The notice of demand attached hereto was served upon him on

2 Your petitioner was prevented by sufficient cause as more particularly explained below from giving notice within the time prescribed by section 25 (2) to the Income tax Officer of the discontinuance of his business, profession or vocation

3 Your petitioner therefore requests that the order of the Income-tax Officer imposing a penalty of Rs upon your petitioner may be set aside

*Signed **

STATEMENT OF FACTS

Form of Verification

I , the petitioner, named in the above petition, do declare that what is stated therein and in the above statement of facts is true to the best of my information and belief

*Signed **

FORM C (1)

Form of Appeal against an Order under section 25 A

To

The Appellate Assistant Commissioner of Income tax,
The day of 19 post office,
The petition of of District sheweth as follows —

* The form of appeal and the form of verification appended thereto shall be signed—

- In the case of an individual by the individual himself
- In the case of a Hindu undivided family by the Manager or karta.
- In the case of a company or local authority by the principal officer
- In the case of a firm, by a partner, and
- In the case of any other association, by a member of the association

Under section 25 A of the Indian Income tax Act 1922, your petitioner|petitioners who belonged to a Hindu Family, hitherto assessed as undivided claimed before the Income tax Officer

at the time of assessment that a partition had taken place among the members of the family and that the joint family property had been partitioned among the various members (or group of members) in definite portions and prayed that an order might be passed to this effect as laid down in section 25 A (1) and that an assessment be levied as laid down in section 25 A (2)

2 By his order dated the _____ a copy of which is herewith attached the Income tax Officer has refused to pass the order referred to above and make assessments accordingly as laid down in section 25 A (2) Your petitioner|petitioners therefore request(s) that the Income tax Officer may be directed to pass such an order under section 25 A (1) and to levy an assessment as laid down in section 25 A (2)

Signed

_____ GROUNDS OF APPEAL

Form of Verification

I|We _____ the petitioner|petitioners named in the above petition do hereby declare that what is stated therein is true to the best of my|our information and belief

The form of appeal and the form of verification appended thereto shall be signed personally by the appellant or appellants

Signed

_____ FORM D

Form of Appeal to the Appellate Assistant Commissioner against an Order under section 28.

To

The Appellate Assistant Commissioner of Income-tax

The _____ day of _____ 19

The petition of _____ of _____ post office,

District sheweth as follows —

1 Under section 28 of the Indian Income tax Act 1922 a penalty of Rs _____ has been imposed on your petitioner by the Income-tax Officer The notice of demand attached hereto was received by your petitioner on _____

2 Your petitioner had reasonable cause for not furnishing the return of his total income which he was required to furnish under sub section (1) or sub-section (2) of section 22 or section 34 or for not furnishing it within the time allowed and in the manner required by such notice.

Your petitioner had reasonable cause for not complying with the notice under sub section (1) of section 22 or sub section (2) of section 23

Your petitioner did not conceal the particulars of his income or deliberately furnish inaccurate particulars of such income.

3 For the reasons given in the grounds of appeal your petitioner therefore prays that the order of the Income tax Officer may be set aside.

Signed

GROUNDS OF APPEAL

Form of Verification

I, _____, the petitioner, named in the above petition, do declare that what is stated therein is true to the best of my information and belief

Signed *

FORM D I

Form of appeal against an order refusing to register a firm under section 26 A

To
 The Appellate Assistant Commissioner of
 The _____ day of _____ 19 ____
 The petition of _____ of _____ post office,
 District sheweth as follows —

Under section 26-A of the Indian Income tax Act, 1922, your petitioner applied to the _____ Income tax Officer for the registration of the firm,

By his order, dated the _____ a copy of which is herewith attached and of which the intimation was received by your petitioner on _____ the Income tax Officer has refused to register the said firm

Your petitioner therefore requests that the order of the Income-tax Officer may be set aside and that he may be directed to register the firm.
 Signed **

GROUNDS OF APPEAL

Form of verification

I, _____, the petitioner, named in the above petition do hereby declare that what is stated therein is true to the best of my information and belief

Signed **

FORM D II

Form of an appeal against an order refusing to register a firm or cancelling its registration under section 23 (4)

To
 The Appellate Assistant Commissioner of Income tax
 The _____ day of _____ of 19 ____
 The petition of _____ of _____ post office _____ District,
 sheweth as follows —

* The form of appeal and the form of verification appended thereto shall be signed—

- (a) In the case of an individual by the individual himself,
- (b) In the case of a Hindu undivided family by the Manager or karta,
- (c) In the case of a company or local authority by the principal officer
- (d) In the case of a firm by a partner, and
- (e) In the case of any other association by a member of the association.

** The form of appeal and the form verification appended thereto shall be signed by a partner of this firm.

1 In making an assessment on the petitioner firm under sub-section (4) of section 23 of the Indian Income tax Act, 1922, the Income-tax Office has referred to register†/has cancelled the registration of the firm

2 The intimation regarding the refusal†/cancellation of the registration was received by the petitioner on 194 when the notice of demand attached herewith was served on your petitioner

3 As will be seen from the ground(s) of appeal, there was no justification for the Income tax Officer to have refused† cancelled the registration of the firm

4 Your petitioner therefrom requests that the orders of the income-tax officer refusing† cancelling the registration may set aside and that he may be directed to register the firm† treat the firm as registered.

*Signed **

GROUND(S) OF APPEAL

Form of Verification

I, the petitioner, named in the above petition do hereby declare that what is stated therein is true to the best of my information and belief

*Signed **

FORM F

Form of appeal against an Order under section 23 A

To
The Appellate Assistant Commissioner,
The day of 19
The petition of of post office,
District sheweth as follows —

1 The Income-tax Officer of with the approval of the Inspecting Assistant Commissioner of has passed an order dated (of which a copy is attached) under sub-section (1) of section 23 A of the Indian Income tax Act, 1922 that the undistributed portion of the assessable income of the company for the year as computed for income-tax purposes shall be deemed to have been distributed as dividends amongst the shareholders as at the date of the general meeting held on

2 Your petitioner being of opinion, on the grounds set out below, that the order of the Income-tax Officer should not have been passed prays that the said order may be set aside

*Signed **

STATEMENT OF GROUNDS OF APPEAL

Form of verification

I, the petitioner, named in the above petition, do declare that what is stated therein and in the statement of grounds of appeal is true to the best of my information and belief

*Signed **

† Delete the inappropriate words.

* The form of appeal and the form of verification appended thereto shall be signed by a partner of the firm

1 The form of appeal and the form of verification appended thereto shall be signed by principal officer of the Company

FORM G

Form of appeal against an order under proviso to sub section (2) of section 26

To

The Appellate Assistant Commissioner

The day of

19 .

The petition of of

post office,

District sheweth as follows —

1 Under the proviso to sub section (2) of section 26 of the Indian Income-tax Act, 1922, your petitioner has been held liable in respect of the tax of Rs The Notice of Demand attached hereto was served upon him on

2 As will be seen from the grounds of appeal attached hereto this tax should be recovered from whom your petitioner has succeeded

3 Your petitioner therefore requests that the order of the Income-tax Officer imposing tax of Rs upon your petitioner be set aside.

*Signed*¹

GROUND OF APPEAL

Form of Verification

I, , the petitioner named in the above petition, do declare that what is stated therein and in the above grounds of appeal is true to the best of my information and belief

*Signed*¹

FORM H

Form of Appeal against an order under section 44-E (6) or 44-F (5)

To

The Appellate Assistant Commissioner,

The day of

19

The petition of of

post office,

District sheweth as follows —

1 Under section 44-E (6) | 44-F (5) a (further) penalty of Rs has been imposed on your petitioner by the Income-tax Officer The Notice of Demand attached hereto was served upon him on

2 As will be seen from the grounds of appeal attached hereto your petitioner had reasonable excuse for failure to comply with the notice of

to furnish statement of particulars required by the Income tax Officer

¹ The form of appeal and the form of verification appended thereto shall be signed—

- (a) in the case of an individual by the individual himself,
- (b) in the case of a Hindu undivided family by the manager or karta
- (c) in the case of a company or local authority by the principal officer
- (d) in the case of a firm by a partner and
- (e) in the case of any other association, by a member of the association.

3 Your petitioner therefore requests that the order of the Income tax Officer imposing a (further) penalty of Rs. _____ upon your petitioner may be set aside.

Signed¹

GROUND'S OF APPEAL

Form of Verification

I, _____, the petitioner, named in the above petition, do declare that what is stated therein and in the above grounds of appeal is true to the best of my information and belief

Signed¹

FORM I

Form of appeal against an order under section 46 (1)

To
The Appellate Assistant Commissioner,
The _____ day of _____ 19____
The petition of _____ of _____ post office,
_____ District sheweth as follows —

1 Under sub section (1) of section 46 of the Indian Income tax Act, 1922, a (further) penalty of Rs _____, has been imposed on your petitioner. The notice of demand attached hereto was served on him on _____

2 As will be seen from the grounds of appeal your petitioner had no intention to default.

3 The tax due in respect of the assessment for the assessment year _____ has already been paid

4 Your petitioner therefore requests that the order of the Income tax Officer imposing a penalty of Rs _____ upon your petitioner may be set aside

Signed¹

GROUND'S OF APPEAL

Form of Verification

I, _____, the petitioner, named in the above petition do declare that what is stated therein and in the above grounds of appeal is true to the best of my information and belief

Signed¹

FORM J

Form of appeal against an order refusing to grant a refund under section 48, 49 or 49-F

To
The Appellate Assistant Commissioner of
The _____ day of _____ 19____
The petition of _____ of _____ post office,
_____ District sheweth as follows —

Your petitioner applied to the Income-tax Officer for a refund under section 48, 49 or 49-I of the Indian Income-tax Act, 1922, of Rs _____.

1 The form of appeal and the form of verification appended thereto shall be signed—(as in footnote of Form H.)

The Income tax Officer has by his order dated the _____ of _____
 rejected the application
 which a copy is attached, _____, Intimation of this
 granted a refund of only Rs. _____
 order was received by your petitioner on _____.

Your petitioner therefore requests that the order of the Income tax Officer may be set aside and the refund asked for may be granted
*Signed*¹

_____ GROUNDS OF APPEAL

Form of Verification.

I, _____, the petitioner named in the above petition do declare that what is stated therein is true to the best of my information and belief

*Signed*¹

R. 21-A The form of appeal prescribed in Rules 21 and 40-B and by the notifications of the Government of India in the Finance Department (Central Revenues) No 14, Income tax, dated the 2nd April, 1932, No 21, Income tax, dated the 5th June, 1937, No 69, Income-tax, dated the 16th September, 1939 and No 1, Income-tax, dated the 4th January, 1941 and the forms of Verification appended thereto shall be signed—

(a) in the case of an individual, by the individual himself,

(b) in the case of a Hindu undivided family, by the manager or Karta,

(c) in the case of a company or local authority, by the principal officer,

(d) in the case of a firm by a partner, and

(e) in the case of any other association, by a member of the association

R. 22 An appeal under section 33 shall in the case of an appeal against—

(a) an order under clause (a) or (b) or (g) of sub section (3) of section 31, be in form B (T)

(b) an order under clause (c) of sub section (3) of section 31, confirming an order under section 26-A, refusing to register a firm or cancelling such order and directing the Income tax Officer to register the firm, be in form D (1) (T)

(c) an order under clause (d) of sub section (3) of section 31, confirming, cancelling or varying an order imposing a penalty under sub section (2) of section 25 be in form C (T)

(d) an order under section 28 imposing a penalty or under clause (f) of sub section (3) of section 31, confirming, cancelling, enhancing or reducing a penalty imposed under section 28, be in form D/E (T),

(e) an order under clause (f) of sub section (3) of section 31, confirming, cancelling enhancing or reducing a penalty imposed under sub section (6) of section 44 E, be in form H (T),

(f) an order under clause (f) of sub-section (3) of section 31, confirming, cancelling, enhancing or reducing a penalty imposed under sub section (5) of section 44-F, be in form H (1) (T),

(g) an order under clause (f) of sub section (3) of section 31, confirming, cancelling, enhancing or reducing a penalty imposed under sub-section (1) of section 46 be in form I (T),

¹ The form of appeal and the form of verification appended thereto shall be signed—(as in footnote of Form H.)

(h) an order under clause (d) of sub-section (3) of section 31, confirming, cancelling or varying an order refusing to allow a claim to a refund under section 48, be in form J (T),

(i) an order under clause (d) of sub-section (3) of section 31, confirming, cancelling or varying an order refusing to allow a claim to a refund under section 49, be in form J (1) (T),

(j) an order under clause (d) of sub-section (3) of section 31, confirming, cancelling or varying an order refusing to allow a claim to a refund under section 49-F, be in form J (T) or J (1) (T), according as the original claim to refund arose under section 48 or 49,

(k) an order under clause (c) of sub-section (3) of section 31, confirming an order refusing to cancel an assessment under section 27 or cancelling such order and directing the Income-tax Officer to make a fresh assessment, be in form A (T),

(l) an order under clause (e) of sub-section (3) of section 31, confirming an order under sub-section (1) of section 25-A or cancelling such order and directing the Income-tax Officer to make a further inquiry and pass a fresh order or to make an assessment in the manner laid down in sub-section (2) of section 25-A, be in form C (1) (T),

(m) an order under clause (d) of sub-section (3) of section 31, confirming, cancelling or varying an order under sub-section (2) of section 26, be in form G (T), and

(n) an order under clause (d) of sub-section (3) of section 31, confirming, cancelling or varying an order under sub-section (1) of section 23-A, be in form F (T),

(o) an order under clause (c) of sub-section (3) of section 31, confirming an order cancelling the registration of, or refusing to register, a firm under sub-section (4) of section 23 or cancelling such order and directing the Income tax Officer to register the firm, be in form L (T),

(p) an order under clause (h) of sub-section (3) of section 31, be in form K (T)

FORM A (T)

Form of Section 27 Cancellation of Assessment Appeal IN THE (INCOME-TAX) APPELLATE TRIBUNAL, DELHI.

27 C.A.A. No.

of 19 *

Versus.

Appellant

Respondent.

Province from which the appeal is filed			
Assessment year and in the case of an assessment under section 34 the year in which the income should have been assessed			
Previous year	Commencing the and ending the	day of	19
Grounds on which cancellation was applied for.			
Income-tax officer making the original order			
Date of the refusal to make a fresh assessment			

*To be filled in by the office

Appellate Assistant Commissioner determining the appeal	
Whether the original order was confirmed or cancelled and the Income-tax Officer directed to make a fresh assessment	
Date of the Appellate Order	
If the appeal is by the assessee, the date on which the assessee was served with notice of the Appellate Order	
Postal address on which the appellant undertakes to receive notices	
Postal address on which notices should be issued to the respondent	
Relief claimed in appeal.	

Grounds of Appeal.

Signed

(Appellant.)

Signed

(Authorised representative, if any)

Verification.

I, _____, the appellant, do hereby declare that what is stated above is true to the best of my information and belief. Verified to-day the _____ at _____ day of _____ 19 ____.

Signed (_____)

N.B.—1 Strike out the unnecessary columns

2 The appeal must be accompanied by a certified copy of the order appealed from and a copy of the grounds of appeal to the Tribunal

3 The appeal must be accompanied by a Treasury receipt for Rs 100

FORM B (T).

Form of Regular Assessment Appeal.

In

THE (INCOME-TAX) APPELLATE TRIBUNAL, DELHI

R. A A No _____

of 19 ____ *

versus

Appellant.

Respondent.

*(To be filled in by the office)

Province from which the appeal is filed.	
Assessment year, and in the case of an assessment under section 34 the year in which the income should have been assessed	
Previous year.	
Income-tax Officer making the original order	
Total income assessed by the Income-tax Officer.	
Total world income assessed by the Income-tax Officer.	
Amount of loss computed by the Income-tax Officer.	
Amount of net tax determined by the Income-tax Officer.	
Amount of refund, if any, granted by the Income-tax Officer.	
Date of receipt of notice of demand	
Date of intimation of the order of refund.	
Date of service of the order of the Income-tax Officer computing loss	
Appellate Assistant Commissioner determining the appeal	
Date of the order of the Appellate Assistant Commissioner.	
Date of service of notice of the Appellate Assistant Commissioner's order.	
Total income as found by the Appellate Assistant Commissioner	
Total world income as found by the Appellate Assistant Commissioner.	
Amount of loss as found by the Appellate Assistant Commissioner.	
Postal address on which the appellant undertakes to receive notices.	
Postal address on which notice should be issued to the respondent.	
Relief claimed in appeal	

Grounds of Appeal.

Signed.
(Appellant.)
Signed.

(Authorised representative if any.)

Verification.

I, _____, the appellant, do hereby declare that what is stated above is true to the best of my information and belief. Verified to-day the _____ day of _____ 19 at _____

Signed (_____)

NB—1 Strike out unnecessary columns

2 The appeal must be accompanied by a certified copy of the order appealed from and a copy of the grounds of appeal to the Tribunal

3. The appeal must be accompanied by a Treasury receipt for Rs 100

FORM C (T).

Form of Section 25 (2)—Penalty Appeal

In

THE (INCOME-TAX) APPELLATE TRIBUNAL, DELHI

25 (2) P A No _____

of 19 * _____

versus

Appellant.

Respondent.

Province from which the appeal is filed		
Description of the business, profession or vocation discontinued		
Assessment year, and in the case of an assessment under section 34 the year in which income should have been assessed		
Previous year		Commencing the day of 19 and ending the day of 19
Income tax Officer making the original order		
Date of receipt of notice of demand		
Amount of penalty imposed		
Amount of tax assessed for the period between the end of the previous year and the date of discontinuance		
Appellate Assistant Commissioner determining the appeal	}	
Whether the original order was confirmed or cancelled or varied on appeal, and if varied, in what respect		
Date of the appellate order		
If the appeal is by the assessee, the date on which the assessee was served with notice of the appellate order		
Postal address on which the appellant undertakes to receive notices		
Postal address on which notices should be issued to the respondent		
Relief claimed in appeal		

*(To be filled in by the office)

Grounds of Appeal

Signed

(Appellant)

Signed

(Authorised representative if any)

Verification

I, _____, the appellant do hereby declare that what is stated above is true to the best of my information and belief Verified to-day _____ day of _____ 19 _____ at _____ Signed (_____)

NB—1 Strike out unnecessary columns

- 2 The appeal must be accompanied by a certified copy of the order appealed from and a copy of the grounds of appeal to the Tribunal
- 3 The appeal must be accompanied by a Treasury receipt for Rs 100

FORM C (1) (T)

Form of Section 25 A Assessment after Partition Appeal

IN

THE (INCOME TAX) APPELLATE TRIBUNAL DELHI

25 A A P A No _____

of 19 _____ *

versus

Appellant.

Respondent.

Province from which the appeal is filed	
Income-tax Officer making the original order	
Date of intimation of the refusal to pass an order under sub-section (1) of section 25 A	
Appellate Assistant Commissioner determining the appeal	
Whether the original order was confirmed on appeal or cancelled and the Income tax Officer directed to make an assessment in the manner laid down in sub-section (2) of section 25 A	
Date of the Appellate Order	
If the appeal is by the assessee the date on which the assessee was served with notice of the appellate order	
Postal address on which the appellant undertakes to receive notices	
Postal address on which notices should be issued to the respondent	
Relief claimed in appeal	

* (To be filled in by the office)

Grounds of Appeal.

Signed.
(Appellant.)

Signed.
(Authorised representative if any)

Verification.

I, _____, the appellant, do hereby declare that what is stated above is true to the best of my information and belief. Verified to-day the _____ day of _____ 19 _____ at _____.

Signed (_____)

N.B.—1. Strike out unnecessary columns.

2 The appeal must be accompanied by a certified copy of the order appealed from and a copy of the grounds of appeal to the Tribunal.

3 The appeal must be accompanied by a Treasury Receipt for Rs 100

FORM D|E (T).

Form of Section 28 Penalty Appeal

IN

THE (INCOME-TAX) APPELLATE TRIBUNAL, DELHI.

28 P. A. No.

of 19 ____.*

Appellant.

DEFENSE

Respondent.

Province from which the appeal is filed.

Assessment year, and in the case of an assessment under section 34 the year in which income should have been assessed

Officer making the original order.

Date of receipt of notice of demand.

Amount of the penalty.

Reason for imposing the penalty.

Appellate Assistant Commissioner determining the appeal.

Whether the original order was confirmed or cancelled or varied on appeal and if varied in what respect.

Date of the order of the Appellate Assistant Commissioner.

*(To be filled in by the office.)

If the appeal is by the assessee, the date on which the assessee was served with notice of the Appellate Assistant Commissioner's order

Postal address on which the appellant undertakes to receive notices

Postal address on which notices should be issued to the respondent

Relief claimed in appeal

Grounds of Appeal

Signed.

(Appellant)

Signed

(Authorised representative if any)

Verification

I, _____ the appellant do hereby declare that what is stated above is true to the best of my information and belief. Verified to-day the _____ day of _____ 19____ at _____

Signed (_____)

N.B.—1 Strike out unnecessary columns

2 The appeal must be accompanied by a certified copy of the order appealed from and a copy of the grounds of appeal to the Tribunal

3 The appeal must be accompanied by a Treasury Receipt for Rs. 100

FORM D (I) (T)

Form of Section 26-A—Registration Appeal

IN THE (INCOME TAX) APPELLATE TRIBUNAL, DELHI
26-A. Reg. A. No _____ of 19 ____ *

Appellant

versus

Respondent

Province from which the appeal is filed

Date of the application to Income tax Officer

Name of the firm registration of which was applied for

Income tax Officer making the original order

Date of intimation of the order refusing to register the firm

Appellate Assistant Commissioner determining the appeal

* (To be filled in by the office.)

Whether the original order was confirmed on appeal or cancelled and the Income tax Officer directed to register the firm	
Date of the appellate order	
If the appeal is by the assessee, the date on which the assessee was served with notice of the appellate order	
Postal address on which the appellant undertakes to receive notices.	
Postal address on which notices should be issued to the respondent	
Relief claimed in appeal	

Grounds of Appeal.

Signed
(Appellant)
Signed
(Authorised representative if any)

Verification

I, _____, the appellant, do hereby declare that what is stated above is true to the best of my information and belief. Verified to-day the _____ day of _____ 19____ at _____ Signed (_____).

A B — 1 Strike out unnecessary columns

- 2 The appeal must be accompanied by a certified copy of the order appealed from and a copy of the grounds of appeal to the Tribunal
- 3 The appeal must be accompanied by a Treasury Receipt for Rs 100

FORM F (T)

Form of Section 23-A (1) Company Appeal

IN

THE (INCOME-TAX) APPELLATE TRIBUNAL, DELHI

23-A (1) C.A No _____

of 194 ____ *

Appellant

versus

Respondent

Province from which the appeal is filed

Previous year

Commencing the		day
of	194	and
ending the		day
of	194	

* (To be filled in by the office)

Total assessable income of the company as found by the Income-tax Officer	
Proportion of the assessable income (as determined by the Income-tax Officer) distributed as dividends by the company	
Income-tax Officer making the original order	
Date of the intimation of the original order under sub-section (1) of section 23 A	
Appellate Assistant Commissioner determining the appeal	
Whether the original order was confirmed, cancelled or varied on appeal, and if varied, in what respect	
Date of the appellate order	
If the appeal is by the assessee, the date on which the assessee was served with notice of the appellate order	
Postal address on which the appellant undertakes to receive notices	
Postal address on which notice should be issued to the respondent	
Relief claimed in appeal	

Grounds of Appeal.

Signed.

(Appellant)

Signed

(Authorised representative if any)

Verification.

I, _____, the appellant, do hereby declare that what is stated above is true to the best of my information and belief. Verified to-day the _____ day of _____ 19 _____ at _____.

Signed (_____).

A B — 1 Strike out unnecessary columns

2 The appeal must be accompanied by a certified copy of the order appealed from and a copy of the grounds of appeal to the Tribunal

3 The appeal must be accompanied by a Treasury Receipt for Rs 100

FORM G (T).

Form of Section 26 (2) Succession Appeal

IN

THE (INCOME-TAX) APPELLATE TRIBUNAL, DELHI
26 (2) S A. No _____ of 19 ____.*

*(To be filled in by the office.)

Appellant.	VERSUS	Respondent
Province from which the appeal is filed		
Assessment year, and in the case of assessment under section 34 the year in which income should have been assessed		
Previous year	Commencing the 19 day of	day of 19
Income-tax Officer making the original order		
Date of receipt of notice of demand		
Amount of tax assessed for the previous year and the period between the end of the previous year and the date of succession		
Appellate Assistant Commissioner determining the appeal		
Whether the original order was confirmed on appeal or cancelled or varied, and if varied in what respect		
Date of the appellate order		
If the appeal is by the assessee, the date on which the assessee was served with notice of the Appellate order		
Postal address on which the appellant undertakes to receive notices		
Postal address on which notices should be issued to the respondent		
Relief claimed in appeal		

Grounds of Appeal

Signed
(Appellant)

Signed
(Authorised representative if any)

Verification

I, _____, the appellant do hereby declare that what is stated above is true to the best of my information and belief. Verified to-day the _____ day of _____ 19 _____ at _____)
Signed (_____)

- A B — 1 Strike out unnecessary columns
2 The appeal must be accompanied by a certified copy of the order appealed from and a copy of the grounds of appeal to the Tribunal
3 The appeal must be accompanied by a Treasury Receipt for Rs 100

FORM H (T)

Form of Section 44-E (6) Penalty Appeal

IN

THE (INCOME-TAX) APPELLATE TRIBUNAL DELHI

44 E (6) P A No

of 19 *

Appellant

versus

Respondent

Province from which the appeal is filed	
Period specified in the notice	
Particulars required by the Income-tax Officer	
Income-tax Officer making the Original order	
Amount of the original penalty	
Amount of further penalty if any	
Date of receipt of notice of demand	
Appellate Assistant Commissioner determining the appeal	
Whether the original order was confirmed cancelled or varied on appeal and if varied in what respect	
Date of the order of the Appellate Assistant Commissioner	
If the appeal is by the assessee the date on which the assessee was served with notice of the appellate order	
Postal address on which the appellant undertakes to receive notices	
Postal address on which notices should be issued to the respondent	
Relief claimed in appeal	

Grounds of Appeal

Signed
(Appellant)
Signed
(Authorised representative if any)

Verification.

I, _____, the appellant, do hereby declare that what is stated above is true to the best of my information and belief. Verified to-day the _____ day of _____ 19____ at _____ Signed (_____)

- A B — 1 Strike out unnecessary columns
 2 The appeal must be accompanied by a certified copy of the order appealed from and a copy of the grounds of appeal to the Tribunal.
 3 The appeal must be accompanied by a Treasury Receipt for Rs 100

FORM H (1) (T).

Form of Section 44-F (5)—Penalty Appeal

IN

THE (INCOME-TAX) APPELLATE TRIBUNAL, DELHI
 44-F (5) P. A No _____ of 19 ____.*

Appellant

VERSUS

Respondent

Province from which the appeal is filed	
Period specified in the notice	
Particulars required by the Income-tax Officer	
Income-tax Officer making the Original order	
Amount of the original penalty	
Amount of further penalty if any	
Date of receipt of notice of demand	
Appellate Assistant Commissioner determining the appeal	
Whether the original order was confirmed, cancelled or varied on appeal, and if varied, in what respect.	
Date of the order of the Appellate Assistant Commissioner	
If the appeal is by the assessee, the date on which the assessee was served with notice of the appellate order	
Postal address on which the appellant undertakes to receive notices	
Postal address on which notices should be issued to the respondent	
Relief claimed in appeal	

Grounds of Appeal

Signed
 (Appellant)

Signed.
 (Authorised representative if any).

*(To be filled in by the office).

Verification.

I, _____, the appellant, do hereby declare that what is stated above is true to the best of my information and belief Verified to-day the _____ day of _____ 19____ at _____ Signed (_____)

NB—1 Strike out unnecessary columns

- 2 The appeal must be accompanied by a certified copy of the order appealed from and a copy of the grounds of appeal to the Tribunal
- 3 The appeal must be accompanied by a Treasury Receipt for Rs 100

FORM I (T).

Form of Section 46 (1)—Penalty Appeal

IN

THE (INCOME-TAX) APPELLATE TRIBUNAL, DELHI

46 (1) P A No _____

of 19 ____ *

Appellant	versus	Respondent
Province from which the appeal is filed		
Assessment year, and in the case of an assessment under section 34 the year in which income should have been assessed		
Income-tax Officer making the original order		
Amount of tax determined,		
Amount of tax in arrears		
Period during which default continued		
Amount of the penalty		
Date of receipt of notice of demand		
Appellate Assistant Commissioner determining the appeal.		
Whether the original order was confirmed, or cancelled or varied on appeal, and if varied in what respect.		
Date of the appellate order.		
If the appeal is by the assessee, the date on which the assessee was served with notice of the Appellate order		
Date of filing appeal in the Tribunal.		
Postal address on which the appellant undertakes to receive notices		
Postal address on which notices should be issued to the respondent		
Relief claimed in appeal.		

*(To be filled in by the office)

Grounds of Appeal.

Signed.
(Appellant.)

Signed.

(Authorised representative, if any).

Verification.

I, _____, the appellant, do hereby declare that what is stated above is true to the best of my information and belief. Verified to-day the _____ day of _____ 19____ at _____ Signed (_____).

N.B.—1. Strike out unnecessary columns

2. The appeal must be accompanied by a certified copy of the order appealed from and a copy of the grounds of appeal to the Tribunal.

3. The appeal must be accompanied by a Treasury Receipt for Rs. 100.

FORM J (T).

Form of Section 48—Refund Appeal and Section 49—Refund Appeal.
[This form is to be used for section 49-F Refund Appeal only when the original claim to refund arose under section 48]

IN

THE (INCOME-TAX) APPELLATE TRIBUNAL, DELHI.
48 R.A | 49-F.R.A. No _____ of 19 ____.*

Appellant.

versus

Respondent.

Province from which the appeal is filed	
Income-tax Officer making the original order	
Date of intimation of the original order.	
Amount of refund claimed if ascertainable.	
Amount ordered to be refunded	
Appellate Assistant Commissioner determining the appeal.	
Whether the original order was confirmed, cancelled or varied on appeal, and if varied in what respect.	
Date of the appellate order	
If the appeal is by the assessee, the date on which the assessee was served with notice of the appellate order.	
Postal address on which the appellant undertakes to receive notices	

*(To be filled in by the office).

Whether the appellant claims in his own right or in a representative capacity, and in the latter case the nature of the representative capacity.

Postal address on which notices should be issued to the respondent

Relief claimed in appeal.

Grounds of Appeal.

Signed
(Appellant)

Signed.
(Authorised representative, if any).

Verification.

I, _____, the appellant, do hereby declare that what is stated above is true to the best of my information and belief. Verified to-day the _____ day of _____ 19 _____ at _____.

Signed (_____).

N.B.—1. Strike out unnecessary columns

2. The appeal must be accompanied by a certified copy of the order appealed from and a copy of the grounds of appeal to the Tribunal.

3. The appeal must be accompanied by a Treasury Receipt for Rs. 100.

FORM J (1) (T).

Form of Section 49—Refund Appeal and Section 49-F—Refund Appeal
[This form is to be used for Section 49-F Refund Appeal only when the original claim to refund arose under Section 49]

IN
THE (INCOME-TAX) APPELLATE TRIBUNAL, DELHI.

49 R.A./49-F. R. A. No. _____ of 19 ____.*

Appellant.

versus

Respondent.

Province from which the appeal is filed

Income-tax Officer making the original order

Date of intimation of the original order

Relief obtained under section 27 of the Finance Act, 1927.

Amount of refund claimed if ascertainable

Amount ordered to be refunded.

* (To be filled in by the office).

Appellate Assistant Commissioner determining the appeal.	
Date of the appellate order	
If the appeal is by the assessee, the date on which the assessee was served with notice of the appellate order.	
Postal address on which the appellant undertakes to receive notices.	
Whether the appellant claims in his own right or in a representative capacity, and in the latter case the nature of the representative capacity.	
Postal address on which notices should be issued to the respondent.	
Relief claimed in appeal.	

Grounds of Appeal.

Signed.

(Appellant.)

Signed.

(Authorised representative if any).

Verification.

I, _____, the appellant, do hereby declare that what is stated above is true to the best of my information and belief. Verified to-day the _____ day of _____ 19____ at _____.

Signed (_____).

N.B.—1. Strike out unnecessary columns.

2. The appeal must be accompanied by a certified copy of the order appealed from and a copy of the grounds of appeal to the Tribunal.

3. The appeal must be accompanied by a Treasury Receipt for Rs. 100.

FORM K (T)

Form of Section 18 (3 A), (3-B) or (3-C)—Denying Liability to deduct tax Appeal

IN

THE (INCOME-TAX) APPELLATE TRIBUNAL BOMBAY
18 (-A, (3 B) or (3 C)—DLAT No of 19 *

IN THE (INCOME TAX) APPELLATE TRIBUNAL,

Appellant

VERSUS

Respondent

Province from which the appeal is filed	
Income tax Officer making the original order	
Date of Income-tax Officer's order holding the appellant liable to deduct and pay tax under sub-section (3A), (3B) or (3C) of Section 18 of the Indian Income tax Act, 1922 read with sub-section (9) of that section	
Amount (other than interest paid by him to the non resident) in respect of which the Appellant has been held liable to deduct and pay tax under the provisions of sub-section (3 A), (3 B) or (3 C) of Section 18 of the Indian Income tax Act, 1922, read with sub-section (6) of that section	
Amount of tax paid under sub-section (3 A), (3 B) or (3 C) of Section 18 of the Indian Income tax Act 1922	
Date of payment	
Appellate Assistant Commissioner determining the Appeal	
Date of the order of the Appellate Assistant Commissioner	
Date on which the appellant was served with notice of the Appellate order	
Postal address at which the appellant undertakes to receive notices	
Postal address at which notices should be issued to the respondent	
Relief claimed in appeal	

Grounds of Appeal .

Signed
(Appellant)

Signed.
(Authorised representative if any)

Verification.

I, _____, the appellant, do hereby declare that what is stated above is true to the best of my information and belief. Verified to-day the day of _____ at _____.

Signed (_____).

N.B. — 1. Strike out unnecessary columns.

2. The appeal must be accompanied by a certified copy of the order appealed from and two copies of the grounds of appeal to the Tribunal.

3. If the appellant is the assessee, the appeal form must be accompanied by Treasury Receipt for Rs. 100

FORM L (T).

Form of Section 23 (4) Registration Appeal

IN

THE (INCOME-TAX) APPELLATE TRIBUNAL, BOMBAY
23 (4) Reg A. No _____ of 19 .*

VERSUS

Appellant

Respondent

Province from which the appeal is filed	
Date of the application to Income-tax Officer	
Name of the firm registration of which was applied for	
Income-tax Officer making the original order	
Date of intimation of the order refusing to register the firm or cancelling the registration under Section 23 (4).	
Appellate Assistant Commissioner determining the appeal	
Whether the original order was confirmed on appeal or cancelled and the Income tax Officer directed to register the firm.	
Date of the appellate order.	
If the appeal is by the assessee, the date on which the assessee was served with notice of the appeal order.	
Postal address on which the appellant undertakes to receive notice	
Postal address at which notices should be issued to the Respondent.	
Relief claimed in appeal	

Grounds of Appeal.

Signed.
(Appellant.)

Signed.
(Authorised representative, if any)

*(To be filled in by the office).

Verification

I, _____, the appellant, do hereby declare that what is stated above is true to the best of my information and belief Verified to-day the day of _____ at _____

Signed (_____)

A B —1 Strike out unnecessary columns

2 The appeal must be accompanied by a certified copy of the order appealed from and two copies of the grounds of appeal to the tribunal

3 If the appellant is the assessee the appeal form must be accompanied by Treasury Receipt for Rs 100

22 A An application under sub-section (1) of section 66 requiring the Tribunal to refer to the High Court any question of law shall be the following form

FORM R (T)

Form of Section 66 (1) Reference Application.

IN

THE (INCOME TAX) APPELLATE TRIBUNAL BOMBAY

In the matter of the assessment of (*)

66 R.A No _____ of 194 †

Versus

Applicant

Respondent

Province from which the application is filed

Name and number of the appeal which gives rise to the reference.

The applicant states as follows —

1 That the appeal noted above was decided by the Bench of the Tribunal on

2 That notice of the order under sub section (4) of section 33 was served on the applicant on

3 That the Bench has arrived at the following finding in its order —
(here state in serial and appropriate order the relevant findings arrived at by the Bench.)

(1)

(2)

(3)

(4)

4 That in arriving at the findings mentioned at No _____ in paragraph 3 of this application the Bench committed an error of law namely (here state concisely the error of law)

5 That on the findings recorded by the Bench the following questions of law arise —

(here formulate concisely the questions of law)

6 That the applicant therefore prays that as required by section 66 of the Income tax Act a statement of the case be drawn up and referred to the High Court, and

* Here give the name of the assessee

† To be filled in by the office

7 That the documents a list of which giving particulars is appended, be forwarded to the High Court

(Signed)

Applicant

(Signed)

(Authorised representative if any)

N B—The applicant must be accompanied by a Treasury Receipt for Rs. 100

R. 23 (1) In the case of income which is partially agricultural in come as defined in section 2 and partially income chargeable to income tax under the head Business in determining that part which is chargeable to income-tax the market value of any agricultural produce which has been raised by the assessee or received by him as rent in kind and which has been utilized as raw material in such business or the sale receipts of which are included in the accounts of the business shall be deducted and no further deduction shall be made in respect of any expenditure incurred by the assessee as a cultivator or receiver of rent in kind

(2) For the purposes of sub rule (1) market value shall be deemed to be —

(a) Where agricultural produce is originally sold in the market in its raw state or after application to it of any process ordinarily employed by a cultivator or receiver of rent in kind to render it fit to be taken to market the value calculated according to the average price at which it has been so sold during the year previous to that in which the assessment is made.

(b) Where agricultural produce is not ordinarily sold in the market in its raw state the aggregate of—

(1) the expenses of cultivation

(2) the land revenue or rent paid for the area in which it was grown, and

(3) such amount as the Income tax Officer finds having regard to all the circumstances in each case to represent a reasonable rate of profit on the sale of the produce in question as agricultural produce

R. 24 Income derived from the sale of tea grown and manufactured by the seller in British India shall be computed as if it were income derived from business and 40 per cent of such income shall be deemed to be income profits and gains liable to tax

Provided that in computing such income an allowance shall be made in respect of the cost of planting bushes in replacement of bushes that have died or become permanently useless in an area already planted unless such area has previously been abandoned

Rr 25 to 32 Omitted

R. 33 In any case in which the Income tax Officer is of opinion that the actual amount of the income profits or gains accruing or arising to any person residing out of British India whether directly or indirectly through or from any business connection in British India or through or from any property in British India or through or from any money lent at interest and brought into British India in cash or in kind cannot be ascertained the

amount of such income, profits or gains for the purposes of assessment to income-tax may be calculated on such percentage of the turnover so accruing or arising as the Income-tax Officer may consider to be reasonable or on an amount which bears the same proportion to the total profits of the business of such person (such profits being computed in accordance with the provisions of the Indian Income tax Act) as the receipts so accruing or arising bear to the total receipts of the business or in such other manner as the Income tax Officer may deem suitable

R. 34 The profits derived from any business carried on in the manner referred to in section 42 (2) of the Act may be determined for the purposes of assessment to income tax according to the preceding rule

R. 35 *Omitted*

R 36 In the case of a person residing in British India an application for a refund of tax under section 48 of the Act shall be made in the following form —

Application for refund of income tax | super tax

I _____ of _____ do hereby declare that my total income computed in accordance with the provisions of the Indian Income tax Act VI of 1922 during the year ending on _____ being the previous year for the assessment for the year ending on the 31st March 19 _____ amounted to Rs. _____ that the total income-tax and super tax chargeable in respect of such total income is Rs _____ and that the total amount of income tax and super tax paid or treated as paid under sub-section (5) of section 18 is Rs _____

I therefore pray for a refund of Rs _____

Signature

¹resident and ordinarily resident

I hereby declare that I am _____ in

resident but not ordinarily resident

British India and that what is stated in this application is correct

Dated _____ 19 _____

Signature

R. 36-A. (a) In the case of a person not resident in British India an application for a refund of tax under section 48 of the Act shall be made in the following form —

Application for refund of income tax | super tax

I _____ of _____ residing at _____ in _____ (country) do hereby state that my total income and total world income computed in accordance with the provisions of the Indian Income tax Act 1922 (VI of 1922), during the year ending on _____ being the previous year for the assessment for the year ending on the 31st March 19 _____ amounted to Rs _____ and Rs _____ respectively that the total income tax and super tax chargeable in respect of such total income is Rs _____ and that the total amount of income tax and super tax paid or treated as paid under sub-section (5) of section 18, is Rs _____

I therefore pray for a refund of Rs _____

Signature

I hereby declare that I am a British subject (*see note 2*) | subject of
State being a State in India or Burma (*see note 3*)
I also declare that what is stated in this application is correct.
Dated 19

Signature

Sworn before me (Name) _____
Designation _____ Signature _____ at _____ on _____
Seal _____

NOTE 1—The above declaration shall be sworn (a) before a Justice of the Peace a Notary Public or Commissioner of Oaths if the applicant for refund resides in any part of His Majesty's Dominions outside British India (b) before a Magistrate or other official of the State or a Political Officer if he resides in a State in India (c) before a British Consul if he resides elsewhere

NOTE 2—British subject means a person who is a natural born British subject or a person to whom a certificate of naturalization has been granted

NOTE 3—If the applicant is neither a British subject nor a subject of a State in India or in Burma he should delete the first sentence in the above verification

NOTE 4—The application should be accompanied by a return of total income and total world income in the prescribed form.

NOTE 5—Where the application is made in respect of interest on securities or dividends from companies the application should be accompanied by the certificate prescribed under section 18 (9) or section 20 as the case may be.

NOTE 6—The application for a refund should be made to the Income-tax Officer Non residents Refund Circle Bombay if the total income of the applicant is made up of income wholly taxed at source or dividends or both. Otherwise the application should be made to the Income tax Officer who made the assessment

NOTE 7—The application may be presented through a duly authorised agent or may be sent by post.

(b) An application for such a refund from a person not resident in British India who has made a similar application as a non resident in the preceding year shall unless the Income tax Officer directs in any particular case that the application be made in the form prescribed in sub rule (a) be made in the following form—

Application for refund of income tax | super tax

I _____ of _____ residing at _____ in _____ (country) do hereby state that my total income and total world income computed in accordance with the provisions of the Indian Income tax Act 1922 (XI of 1922) during the year ending on _____ being the previous year for the assessment for the year ending on the 31st March 19 _____ amounted to Rs _____ and Rs _____ respectively that the total income tax and super tax chargeable in respect of such total income is Rs _____ and that the total amount of income tax and super tax paid or treated as paid under sub section (5) of section 18 is Rs _____

I therefore pray for a refund of Rs _____

Signature

I hereby declare that I am a British subject (*see note 1*) [subject of
 State being a State in India or Burma (*see note 2*) I also
 declare that what is stated in this application is correct and that I duly
 applied for a similar refund as a non resident last year
 Dated .19

Signature

NOTES 1 to 6—Same as Notes 2 to 7 in the form in sub rule (a)

R. 37. The application under rule 36 shall be accompanied by a return of total income and under Rule 36-A by a return of total income and total world income in the form prescribed under section 22 unless the applicant has already made such a return to the Income tax Officer

R. 37-A Omitted

R. 38 Where any part of the total income of a person making an application under section 48 for refund of income-tax or super tax (or both) consists of dividends from companies, or income from which income tax or super tax (or both) has been deducted under the provisions of section 18, the application shall be accompanied by the certificates prescribed under section 18 (9) or under section 20 as the case may be

R. 39 The application under rule 36 or rule 36 A shall be made as follows —

(a) If the applicant is resident in British India, to the Income-tax Officer of the District in which the applicant is chargeable directly to income tax, or if he is not chargeable directly, to the Income-tax Officer of the district in which he ordinarily resides,

(b) If the applicant is resident outside British India, to the Income-tax Officer appointed by the Central Board of Revenue.

R. 39-A Omitted.

R. 40 An application for refund of income-tax under section 49 of the Act shall be made in the following form —

Application for relief from double income tax under section 49 of the Indian Income-tax Act, 1922

I, _____ of _____, do hereby state that I have paid (or under the provisions of section 49 B of the Act must be deemed to have paid) United Kingdom income-tax and super tax amount to £ _____ for the year ending 19____, on an income of £ _____ and that Indian income tax [income tax and super-tax of Rs _____ has also been paid (or under the provisions of section 49 B of the Act must be deemed to have been paid) on the same income] income from the same source amounting to Rs _____. I have obtained relief under the provisions of section 27 of the Finance Act, 1920, at the rate of _____ in accordance with the attached certificate from His Majesty's Inspector of Taxes.

I now pray for a further relief at the rate of _____ amounting to Rs _____ under section 49 of the Indian Income-tax Act, 1922, to which I am entitled. My income from all sources to which this Act applies during the 'previous year' ending on the _____ 19____, amounted to Rs _____

only—See Return of income attached/already submitted

Signature

I hereby declare that what is stated herein is correct.

Signature

Dated. _____ 19____

R. 40-A An application for refund of income tax under the India and Burma (Income tax Relief) Order, 1936 shall be made in the following form —

Application for relief from double triple income tax under the India and Burma (Income tax Relief) Order 1936

I of do hereby state that I have paid¹ Burma Income tax/income tax and super tax amounting to Rs / Burma Income tax/income tax and super tax and United Kingdom income-tax/income tax and super tax amounting to Rs and £ respectively ending

for the year—

ended²
31st March, 19 on an income of Rs

Rs and £ respectively and that Indian income-tax/income tax and super tax of Rs has also been paid on the same income/part of the same income amounting to Rs I am therefore entitled to relief under the provisions of the India and Burma (Income tax Relief) Order 1936 at the rate of ³(I have obtained relief under provisions of section 27 of the Finance Act 1920 at the rate of in accordance with the attached certificate from His Majesty's Inspector of Taxes)

I now pray for relief amounting to Rs under the India and Burma (Income tax relief) Order 1936 My income from all sources to which the Indian Income tax Act 1922 applies during the previous year ending on the 19 amounted to Rs only—See return of income attached/already submitted I attach the official receipt of the Burma income tax paid and the notice of assessment* showing the basis on which the liability has been computed* as also copies of the appellate order of the Assistant Commissioner and of the Order on revision by the Commissioner

Signature

I hereby declare that what is stated herein is correct* I further declare that as regards my Burma assessment I have no intention to appeal to the Assistant Commissioner or to approach the Commissioner to revise it

Signature

Dated 19

R 40 B An appeal under the India and Burma (Income tax Relief) Order, 1936 shall be in the following form —

Form of Appeal against an order refusing to grant a refund under the India and Burma (Income tax Relief) Order 1936

To

The Appellate Assistant Commissioner of

The day of 19

The petition of of post office.

¹ For claimants for the relief from triple income tax only

² Where the income on which income tax has been charged differs from that on which super tax has been charged both amounts must be specified

³ In cases in which no appeal to the Assistant Commissioner or petition to revise the assessment to the Commissioner has been made these words or the appropriate part thereof may be struck off

⁴ In case an appeal and a revision petition have been made or only an appeal has been made these words or the appropriate part thereof may be struck off

District sheweth as follows —

Your petitioner applied to the Income tax Officer for a refund under the India and Burma (Income-tax Relief) Order 1936 of Rs

The Income-tax Officer has by his Order dated the _____ of which a copy is attached rejected the application/granted a refund of only Rs

Intimation of this Order was received by your petitioner on _____

Your petitioner therefore requests that the order of the Income tax Officer may be set aside and the refund asked for may be granted.

Signed.*

GROUND OF APPEAL

Form of verification

I _____ the petitioner named in the above petition do declare that what is stated therein is true to the best of my information and belief

Signed *

R. 41 The application under Rules 36 36-A or Rule 40 may be presented by the applicant in person or through a duly authorised agent or may be sent by post

R. 42 A return shall be furnished by the principal officer of a Company under section 19 A in respect of a dividend or aggregate dividends if the amount thereof exceeds one rupee in the case of a shareholder which is a company and in respect of a dividend or aggregate dividends if the amount thereof exceeds Rs 5000 in the case of any other shareholder

R. 42 A A return shall be furnished by the person responsible for paying interest not being interest on securities in respect of amounts of interest or aggregate interest exceeding Rs 400

R. 43 The return by the principal officer of a Company under section 19 A shall be in the following form and shall be delivered to the Income tax Officer who assesses the company —

Return under Section 19 A of the Indian Income tax Act 1922 for the year 1st April 19—31st March 19

Name of Company

Address of Company

(1) Resident Shareholders/Non Resident Shareholders.

Serial number	Name of shareholder	Address of shareholder	Date of declaration of dividends.	(2) Amount of dividends.	
				Net.	Gross.
1	2	3	4	5	6

*The form of appeal and the form of verification appended hereto shall be signed—

- In the case of an individual by the individual himself
- In the case of a Hindu undivided family by the Manager or Larta.
- In the case of a company or local authority by the principal officer
- In the case of a firm, by a partner and
- In the case of any other association, by a member of the association.

I, _____, the principal officer of the _____ Company hereby certify that the above statement contains a complete list of (1) the resident/non resident shareholders which are companies and to whom a dividend was distributed in the period from the 1st April, 19____ to 31st March, 19____ and (2) other resident/non resident shareholders of the Company to whom a dividend or aggregate dividends exceeding Rs 5000 was or were distributed in the period from the 1st April, 19____ to the 31st March, 19____

Signature

Dated _____ 19____

“NOTE 1 —Separate forms should be used for resident and non resident share-holders.
NOTE 2 —Where dividends are issued ‘ free of income tax ’, the figure to be entered in column 5 is the sum actually paid and the figure to be entered in column 6 is the aggregate of the sum paid and the amount of income tax payable by the Company in respect of the dividends

R. 43-A The return under section 20 A shall be in the following form and shall be delivered to the Income tax Officer in whose jurisdiction the person responsible for paying interest resides —

Return under section 20-A of the Indian Income tax Act, 1922, for the year 1st April 19____ to 31st March, 19____

Name of payer
Address of payer

Serial No	Name of payee	Address of payee	Date of payment	Amount of interest or aggregate interest.

I hereby certify that the above statement contains a complete list of persons to whom interest or aggregate interest exceeding Rs 400 was paid during the period 1st April 19____ to 31st March 19____

Signature

Dated _____ 19____

R 44 The following bodies are recognised by the Central Board of Revenue as associations of accountants for the purposes of clause (iii) of sub section (2) of section 61 of the Indian Income tax Act 1922 —

- 1 The Institute of Chartered Accountants in England and Wales
- 2 The Society of Accountants in Edinburgh
- 3 The Institute of Accountants and Actuaries in Glasgow,
- 4 The Society of Accountants in Aberdeen
- 5 The Institute of Chartered Accountants in Ireland,
- 6 The Society of Incorporated Accountants and Auditors London

R. 45 The following accountancy examinations are recognised by the Central Board of Revenue for the purpose of sub-clause (b) of clause (iv) of sub section (2) of section 61 of the Indian Income-tax Act 1922 —

- 1 Government Diploma in accountancy examination conducted by the Accountancy Diploma Board, Bombay
- 2 Diploma in Commerce issued under the authority of the Provincial Governments in Madras, Bengal, Punjab and Delhi,
- 3 The First Examination conducted by the Central Government under the Auditor's Certificate Rules, 1932,
- 4 Final examination conducted by the Association of Certified and Corporate Accountants, London,
- 5 The Bombay Government Diploma in Commerce provided that the diploma holder took 'Accountancy' as his optional subject for the diploma course and has also passed the Matriculation examination of a recognised University or an equivalent examination
- 6 The Diploma in Accountancy awarded by the Sydenham College of Commerce and Economics, Bombay, provided that the diploma holder has passed the Matriculation examination of a recognised university or equivalent examination,
- 7 Senior All India Diploma in Commerce awarded by the All India Board of Technical Studies in Commerce, Business Administration and Economics of the All India Council of Technical Education provided that the diploma holder took 'Advanced' Accountancy and 'Auditing' as his optional subject for the diploma course

R. 46 The following educational qualifications are prescribed by the Central Board of Revenue for the purposes of sub-clause (c) of clause (iv) of sub-section (2) of section 61 of the Indian Income tax Act 1922 —

A degree in Commerce, Law, Economics, or Banking including Higher Auditing conferred by any of the following Universities —

I *Indian Universities*—Any Indian University incorporated by any law for the time being in force

II *Rangoon University*

III *English and Welsh Universities*—The Universities of Birmingham, Bristol, Cambridge, Durham, Leeds, Liverpool, London, Manchester, Oxford, Reading, Sheffield and Wales

IV *Scottish Universities*—The Universities of Aberdeen, Edinburgh, Glasgow and St. Andrews

V *Irish Universities*—The Universities of Dublin (Trinity College) and the Queen's University Belfast

R. 47 For the purpose of clauses (xiii) and (xiv) of sub-section (2) of section 10 of the Act the 'prescribed authority' shall be the Council of Scientific and Industrial Research, the Imperial Council of Agricultural Research or the Indian Research Fund Association as may be appropriate to the nature of the scientific research in question

INDIAN INCOME TAX (PROVIDENT FUNDS RELIEF) RULES

R. 1 (1) These rules may be called the Indian Income-tax (Provident Funds Relief) Rules

They extend to the whole of British India including Berar, and every reference therein to British India shall be construed by including a reference to Berar

R. 2 In these rules 'section' means a section of the Indian Income-Act, 1922 (XI of 1922)

R. 3 (1) Where the employer is not a company as defined in clause (2) of section 2 of the Indian Companies Act, 1913, the contributions made by employees after the date of recognition of a provident fund and the interest on the accumulated balances of such contributions shall be wholly invested either in securities of the nature specified in clause (a), (b), (c) (d) or (e) of section 20 of the Indian Trusts Act, 1882, or in clause (a) (b) (c) (d) or (e) of section 20 of the Burma Trust Act and payable both in respect of capital and of interest in British India or in British Burma or in a Post Office Savings Bank Account in British India

(2) Where the employer is a company as defined in clause (2) of section 2 of the Indian Companies Act 1913 all moneys contributed to Provident Fund (whether by the Company or by the employees) or accruing way of interest or otherwise to such fund shall be wholly invested in accordance with the provisions of sub-section (2) of section 282 B of the Indian Companies Act 1913 so however that the securities in which the contributions made by employees after the date of recognition of a Provident Fund and the interest on the accumulated balance of such contributions are invested are payable both in respect of capital and of interest in British India

R. 4 (1) Withdrawals by employees shall not be allowed by the trustees except on special grounds in the following circumstances or circumstances of a similar nature—

- (a) to pay expenses incurred in connection with the illness of a subscriber or a member of his family
- (b) to pay for the passage over the sea of a subscriber or any member of his family
- (c) to pay expenses in connection with marriages funerals or ceremonies which by the religion of the subscriber it is incumbent upon him to perform and in connection with which it is obligatory that expenditure should be incurred
- (d) to meet the expenditure on building or purchasing a house or a site for a house provided that such house or site is assigned to the trustees of the fund,

Provided however that at the discretion of the trustees of the fund the condition of such house or site being assigned to the trustees of the fund may be waived in the case of an employee whose income under the head salaries does not exceed Rs 1,500 per annum

- (e) to pay premia on policies of insurance on the life of the subscriber or of his wife provided that the policy is assigned to the trustees of the fund or at their discretion deposited with them and that the receipts granted by the insurance company for the premia are from time to time handed over to the trustees for inspection by the Income tax Officer

(2) For the purposes of sub rule (1) 'Family' means any of the following persons who reside with and are wholly dependent on the employee namely—the employee's wife, legitimate children step children, parents, sisters and minor brothers

(3) (a) No such withdrawal shall exceed (1) the pay of the employee for three months or in the case of a withdrawal for the purpose specified in clause (d) or clause (e) of sub rule (1) six months at the time

when the advance is granted or (2) the total of the accumulation of exempted contributions and exempted interest contained in the balance to the credit of the employee whichever is less

(b) In the case of withdrawal for the purpose specified in clause (e) of sub-rule (1) the restriction imposed by clause (a) of sub-rule (3) shall apply to each withdrawal and not to total withdrawals.

(c) In the case of withdrawal by an employee falling within the proviso to clause (b) of sub-section (1) of section 58 C the pay referred to in clause (a) of sub-rule (3) shall mean the pay (including increments if any) which the employee would have received had he not entered His Majesty's Forces or been taken into or employed in the National Service

(4) (a) Save as in clauses (b) (c) (d) and (e), a second withdrawal shall not be permitted until the sum first withdrawn has been fully repaid

(b) A withdrawal may be permitted for the purpose specified in clause (e) of sub-rule (1) notwithstanding that the sum withdrawn for any other purpose has not been repaid

(c) Subsequent withdrawals for the purpose specified in clause (e) of sub-rule (1) may be permitted notwithstanding that the sums previously withdrawn for the same purpose have not been repaid

(d) A withdrawal for any one of the purposes of sub-rule (1) other than that specified in clause (e) of that sub-rule may be permitted notwithstanding that the sums drawn for the purpose of clause (e) of the same sub-rule have not been repaid

(e) A withdrawal for any one of the purposes of sub-rule (1) other than those specified in clauses (d) and (e) of that sub-rule shall be permitted notwithstanding that the sums withdrawn for the purpose of clause (d) of the same sub-rule has not been repaid

R 5 (1) Where a withdrawal is allowed for a purpose specified in clause (d) or clause (e) of sub-rule (1) of rule 4 the amount withdrawn need not be repaid

(2) Where a withdrawal is allowed for any other purpose the amount withdrawn shall be repaid in not more than twenty four equal monthly instalments and shall bear interest in accordance with rule 6 and subject to the provisions of sub-rule (4) of rule 4 no further withdrawal shall be permitted until repayment has been effected in full

R 6 In respect of withdrawals which are repaid in not more than 12 monthly instalments, an additional instalment of 4 per cent of the amount withdrawn shall be paid on account of interest and in respect of withdrawals which are repaid in more than 12 monthly instalments two such instalments of 4 per cent of the amount withdrawn shall be paid on account of interest

Provided, however that at the discretion of the Trustees of the Fund interest may be recovered on the amount withdrawn or the balance thereof outstanding from time to time at 1 per cent above the rate which is payable for the time being on the balance in the fund at the credit of the member

R 7 The employer shall deduct such instalments from the employee's salary and pay them to the Trustees. The deductions shall commence from the second monthly payment made after the withdrawal or in the case of an employee on leave without pay from the second monthly payment made after his return to duty

R. 8 In case of default of repayment of instalments under rules 6 and 7, the Commissioner of Income-tax may at his discretion order that the

amount of the withdrawal or the amount outstanding shall be added to the total income of the employee for the year in which the default occurs and the Income-tax Officer shall assess the employee accordingly

R 9 Notwithstanding anything contained in rules 4 to 8, it shall be open to the trustees of a recognised provident fund to permit the withdrawal of ninety per cent of the amount standing at the credit of an employee if the employee takes leave preparatory to retirement, provided that if he rejoins duty on the expiry of his leave he shall refund the amount drawn together with interest at the rate allowed by the fund

R. 9-A Where the accounts of a recognised provident fund are kept outside British India certified copies of the accounts shall be supplied not later than the 15th June in each year to a local representative of the employer in British India

Provided that the Income-tax Officer may in any year appoint a date later than the 15th June as the date by which the certified copies shall be supplied

R 10 (1) An application for recognition shall be made by the employer maintaining the fund for which recognition is sought and shall be accompanied by the following documents —

- (a) the trust deed if any in original with one copy thereof, the latter to be retained by the Commissioner, and
- (b) the rules of the fund

Provided that if the original of the trust deed cannot conveniently be produced, it shall be open to the Commissioner of Income tax to accept in lieu of the original a copy certified either by a Magistrate or in any manner specified in rule 7 of the Indian Companies Rules, 1914, in which case an additional copy shall be furnished for retention by the Commissioner

(2) The application shall be submitted through the Income-tax Officer of the area in which the accounts of the funds are kept, or, if the accounts are kept outside India, through the Income tax Officer of the area in which the local headquarters of the employer are situate

(3) The application shall contain the following information —

- (a) Name of employer and address, his business, profession, etc., also his principal place of business
- (b) Number of employees subscribing to the fund—
 - (i) in British India,
 - (ii) in Indian States,
 - (iii) outside India
- (c) Place where the accounts of the fund are or will be maintained
- (d) If the fund is already in existence—
 - (i) a copy of the last balance sheet of the fund, where such is maintained,
 - (ii) details of investments of the fund

(4) A verification in the following form shall be annexed to the application —

FORM OF VERIFICATION

We/I, the trustee (s) of the abovenamed fund, do declare that what is stated in the above application is true to the best of our information and belief, and that the documents sent herewith are the originals or true copies thereof

R. 11. Where an employee of a company owns shares in the company with a voting power exceeding ten per cent. of the whole of such power the sum of the exempted contributions of the employee and employer to the recognised provident fund maintained by the company shall not exceed Rs 250 in any month

R. 12. If an employee assigns or creates a charge upon his beneficial interest in a recognised provident fund, the Income tax Officer shall, on the fact of the assignment or charge coming to his knowledge give notice to the employee that if he does not secure the cancellation of the assignment or charge within two months of the date of receipt of the notice the consideration received for such assignment or charge shall be deemed to be income received by him in the year in which the fact became known to the Income tax Officer and shall be assessed accordingly

R. 13. If the Commissioner withdraws recognition from a recognised provident fund, the balance to the credit of each employee at the end of the financial year prior to the date of the withdrawal of recognition shall be paid to him free of income-tax and super tax at the time when such employee receives the accumulated balance due to him. The remainder of the accumulated balance due to him shall be liable to income tax and super tax as if the fund had never been recognised

R. 14. Before withdrawing recognition, the Commissioner of Income-tax shall give an opportunity to the employer and the trustees of the fund to show cause why recognition should not be withdrawn

R. 15 (1) For the purpose of clause (a) of section 58-D the employer's aggregate contribution in any year, including the normal contribution, to the individual account of any one employee whose salary does not exceed five hundred rupees per mensem, shall not exceed double the amount of the contribution of the employee in that year

(2) The amount of the periodical bonuses and other contributions of a contingent nature which may be credited by an employer in any year under clause (b) of section 58-D to the individual account of any one employee shall not exceed the amount of the contribution of the employee in that year

NOTIFICATION No 10

Dated 15—3—1930

In pursuance of sub section (2) of section 58-F of the Indian Income tax Act, 1922 (XI of 1922), the Governor General in Council is pleased to fix six per cent as the rate referred to in that sub section. This notification shall apply to the whole of British India, including Berar

THE INDIAN INCOME-TAX (PROVIDENT FUNDS RELIEF) (CENTRAL BOARD OF REVENUE) RULES

R. 1 (1) These rules may be called the Indian Income-tax (Provident Funds Relief) (Central Board of Revenue) Rules

(2) They extend to the whole of British India including Berar and every reference therein to British India shall be construed as including a reference to Berar

R. 2. In these rules "section" means a section of the Indian Income-tax Act, 1922 (XI of 1922).

R 3 An order according recognition to a provident fund shall take effect from the last day of the month in which the application for recognition is received by the Income tax authority concerned unless at the request of the employer the last day of any later month in the same *from a Provident Fund*

R 4 An appeal under sub section (4) of section 58 B shall be in the following form and shall be verified in the manner indicated therein —

Form of appeal against refusal to recognise or withdrawal of recognition from a Provident Fund

To

The Central Board of Revenue

The petition of _____ employer(s) carrying on business
profession or vocation at _____

Your petitioner(s) *applied to (obtained sanction from)* the Commissioner of Income tax under section 58-B of the Indian Income tax Act 1922 for the recognition of the provident fund maintained by him (them) for the benefit of his (their) employees. The Commissioner of Income tax has *refused recognition (withdrawn recognition)* for the reasons stated in his order dated _____ of which a copy is attached

For the reasons set out below your petitioner(s) submit(s) that the fund should *be (continue to be)* recognised and pray(s) that the Central Board of Revenue may be pleased to accord recognition|continue the recognition

Grounds of appeal

We|I _____ the petitioner(s) named in the above petition do declare that what is stated therein is true to the best of our|my information and belief

Signature

Address of the appellant

Date

N B—Unnecessary words or letters should be scored out

R 5 The accounts of a recognised provident fund shall be prepared at intervals of not more than twelve months

R 6 An account shall be maintained for each subscriber to the fund and it shall include the particulars shown in the following form

Account closed
Date
Paid to employee
Lapsed to employer or to fund
Recovery by employer

Name..... Date of joining Fund

Year and month	Salary.	Contributions.				Exempt.		Not exempt.			Remarks.	
		Contribution by employee	Regular contributions by employer.	Employer's contributions of a contingent nature	Total of columns 3, 4 and 5	Total interest on column 6 (See footnote)	Contributions not exceeding 1/6th of salary for the year or Rs 6,000 whichever is less	Interest on sums in column 6, at per cent. p. a but not exceeding 1/3rd of the salary for the year.	Column 8 minus column 6 minus column 8.	Interest column 7 minus column 9		
1	2	3	4	5	6	7	8	9	10	11	12	13
Balance brought forward,												
April												
May												
March												
Total												
Adjustment on account of temporary withdrawals account (columns 8 and 9 only).												
Adjustment on account of non-repayable withdrawals account (columns 10 and 11).												
Total carried over.												

NOTE.—If desired column 7 may be divided into sub-columns to show separately the interest on columns 3 and columns 4 and 5, respectively.

NON REPAYABLE WITH DRAWALS ACCOUNT			TEMPORARY WITHDRAWALS ACCOUNT		
	Amount.		Advance	Repay ment	Interest
April					
May					
June					
July					
March					
Total		Balance brought forward April May June July March			Balance carried over

R. 7 An abstract for the financial year or other applicable accounting period of the individual account of each employee participating in a recognised provident fund whose income under the head salaries is Rs 1500 or over per annum shall be furnished by the trustees to the Income-tax Officer of the area in which the employer conducts his business profession or vocations or to such other Income tax Officer as the Commissioner, may, in each case direct not later than the fifteenth day of June in each year, or any other subsequent date fixed by the Income tax Officer. It shall be in the form prescribed in rule 6 but shall show only the totals of the various columns thereof for the financial year or other accounting period. It shall also give an account of any temporary withdrawals by the employee during the year and of the repayment thereof. Similar abstract shall also be furnished in respect of other employees participating in a recognised provident fund who were allowed withdrawals under rule 4 of the Indian Income tax (Provident Funds Relief) Rules or who come within the purview of rule 11 of these rules.

R. 8 The account to be made under the provisions of sub section (1) of section 58 J shall show in respect of each employee (i) the total salary paid to the employee during the period of his participation in the provident fund (ii) the total contributions, (iii) the total interest which has accrued thereon and (iv) so far as may be the percentage of the employee's salary in accordance with which contributions have been made by the employer and employee.

EXTRACTS FROM THE APPELLATE TRIBUNAL RULES

2 In these rules unless there is anything repugnant in the subject or context—

(i) Act means the Indian Income tax Act 1922 (XI of 1922)

(ii) Authorised Representative means—

(a) a person duly authorised by the assessee to attend before the Tribunal under section 61 of the Act

(b) Omitted

(c) In relation to an Income tax authority who is a party to any proceeding before the Tribunal a person duly appointed by the Central Government by notification in the Official Gazette as authorised representative to appear plead and act for such authority in any such proceeding and any other person acting under the directions of such authorised representative

(iii) "Bench" means a Bench of the Tribunal constituted under sub section (5) of section 5-A of the Act,

(iv) "Chief Ministerial Officer" at the Headquarters of the Tribunal means the Superintendent, and at the headquarters of a Bench the Head Clerk,

(v) "Full Bench" means a Bench of more than two members of the Tribunal,

(vi) "Member" means a member of the Tribunal

(vii) "President" means the President of the Tribunal

(viii) 'Province' means a Governor's Province or a Chief Commissioner's Province as defined by the Government of India Act, 1935, or any territorial jurisdiction treated as a separate entity for Income tax statistical purposes, and the expression "provincial" shall be construed accordingly,

(ix) "Registrar" means the person who is for the time being discharging the functions of the Registrar of the Tribunal,

(x) "Section 66 Reference Application" means an application under sub section (1) of section 66 of the Act, requiring the Tribunal to refer to the High Court any question of law

(xi) "Signed" has the same meaning as in the General Clauses Act 1897 (X of 1897),

(xii) "Third Member Case" means a case referred by the President to a third member under sub section (7) of section 5-A of the Act on difference of opinion between the members of the original Bench

(xiii) "Tribunal" means the Appellate Tribunal constituted by the Central Government under section 5-A of the Act

PART II

Meetings of the Tribunal

3 The President, whenever he thinks fit, may require the Registrar to call a meeting of the members of the Tribunal

4 The Registrar shall maintain a record of the proceedings of every meeting of the members of the Tribunal

5 The President shall preside at the meetings of the members. In the absence of the President, the senior member present shall be the Chairman of the meeting

6 All matters directed by the President, or desired by any member to be placed before a meeting of the members shall be decided according to the opinion of the majority of the members present, but where the members are equally divided in their opinion, the Chairman shall be entitled to a casting vote

7 The President may, instead of directing the Registrar to call a meeting of the members, ascertain the opinion of the members on any matter by an office note, and in that case, the matter shall be decided in accordance with the opinion of the majority of the members voting. If however, the opinion of the members is equally divided, the President shall be entitled to a casting vote

PART III

Headquarters and Place and Times of Sitting

8 The Headquarters of the Tribunal shall be at Bombay

9 (1) Each bench shall have its headquarters at such place and hold its sittings at such place or places as the President may direct

and shall hear and determine such appeals as are assigned to it by the President by a general or special order

(2) Nothing in this Rule shall preclude a Bench from entertaining and determining any *interim* application that may be made direct to it

10 The President may by a general order direct that all appeals from a particular area shall be heard and determined by a particular Bench, and on the making of any such order all appeals from that area shall in the absence of a special order to the contrary which may be made at any stage of the proceedings be heard and determined by that Bench

11 * * * * *

12 The officers of the Tribunal shall observe the same office hours and holidays other than vacation as are observed by the Civil Court of the highest jurisdiction at the headquarters of the respective Benches except as otherwise ordered by the President or Benches concerned

13 *Omitted*

PART III A

Language

13 A The Language of the Tribunal shall be English

PART IV

PRESENTATION FORM REGISTRATION AND NOTICES OF APPEALS.

Presentation

14 An appeal to the Tribunal shall be presented in person or by a representative to the Registrar at Bombay or some officer authorized in this behalf by the Registrar

Provided that an appeal which is received in the office of the Registrar by post within the prescribed period of limitation shall be deemed to have been validly presented

15 The Registrar or some officer authorized by him in this behalf shall endorse on the memorandum of appeal the date on which an appeal is received in the office

Form

16 The Forms prescribed by the Central Board of Revenue when applicable and where they are not applicable forms of the like character as nearly as may be shall be used for all appeals referred to the Tribunal

17 Every appeal shall be preferred in the form of a memorandum signed by the appellant and his authorised representative if any and verified by the appellant

18 The memorandum shall be written in English and shall set forth concisely and under distinct heads the grounds of appeal without any argument or narrative and such grounds shall be numbered consecutively

19 The memorandum shall be accompanied by a certified copy of the order appealed from unless the Tribunal dispenses therewith and two copies of the grounds of appeal to the Tribunal

20 Where a fact which cannot be borne out by or is contrary to the record is alleged it shall be stated clearly and concisely and supported by a duly sworn affidavit.

21 The appellant shall not, except by leave of the Tribunal, urge or be heard in support of any ground of objection not set forth in the grounds of appeal, but the Tribunal, in deciding the appeal, shall not be confined to the grounds of objection set forth in the grounds of appeal or taken by leave of the Tribunal under this rule

Provided that the Tribunal shall not rest its decision on any other ground unless the party who may be affected thereby has had a sufficient opportunity of contesting the case on that ground

22. (1) Where the memorandum of appeal is not drawn up in the prescribed manner, it may be rejected or, on such terms as the Tribunal may think fit, be returned to the appellant for the purpose of being amended within a time to be fixed by the Tribunal or be amended then and there

(2) Where the Tribunal rejects any memorandum, it shall record the reasons for such rejection

(3) Where a memorandum of appeal is amended the Tribunal or such officer as Tribunal appoints in this behalf, shall sign or initial the amendment

23 In an appeal by the assessee under sub-section (1) of section 33 of the Act, the officer or authority making the original order shall be made a respondent to the appeal

24 In an appeal under sub section (2) of section 33 of the Act the party who was the appellant before the Appellate Assistant Commissioner shall be made a respondent to the appeal

25 Where the memorandum of appeal is signed by an authorised representative, such representative shall annex to the memorandum of appeal the writing constituting his authority and his acceptance of it. The acceptance shall be signed and dated by the representative and shall state whether he is a lawyer, an accountant or an income tax practitioner or is a person who is a relative of, or regularly employed by, the assessee. If the representative is a person regularly employed by the assessee he shall state the capacity in which he is at the time employed, if he is a relative of the assessee, he shall state his relationship with the assessee, and if he is an income-tax practitioner, he shall state his qualifications under clause (iv) of sub-section (2) of section 61 of the Act.

Provided that in the case of an appeal under sub section (2) of section 33, the memorandum of appeal need not be accompanied by a letter of authority

26 In the case of an appeal under sub-section (2) of section 33, the Income tax Officer shall append a certificate to the memorandum of appeal that the appeal has been preferred under the direction of the Commissioner

27 An authorised representative appearing for a party at the hearing of an appeal shall, unless he has already filed his authority and his acceptance of it under rule 25 before the commencement of the hearing file his authority and his acceptance of the authority containing the particulars required by rule 25

Registration.

28 The appeal shall be registered in the Register of appeal, and marked by the President to one of the Benches constituted by him in exercise of the powers vested in him under sub-section (5) of section 5 A of the Act

Notice

29 The chief ministerial officer of the Bench receiving an appeal for disposal under rule 28 shall, issue a notice under his signature and the seal of the Tribunal notifying to the parties the date and place of hearing of the appeal. A copy of the grounds of appeal shall be sent to the respondent either with such notice or before it.

30. The date and place of hearing of the appeal shall be fixed with reference to the current business of the Bench, the place of residence of the parties, and the time necessary for the service of the notice of appeal so as to allow the parties sufficient time to appear and be heard in support of or against the appeal.

31. Where the appeal is under sub-section (1) of section 33 of the Act, the chief ministerial officer in fixing the date for the respondent to appear and answer to the appeal shall allow a reasonable time for the necessary communication with the Commissioner, through the proper channel and for the issue of instructions to an authorised representative to appear and answer on behalf of the respondent.

32 The notice of the day of hearing of the appeal shall declare that if the party does not appear before the Bench in person or by an authorised representative on the day so fixed, the appeal will be heard *ex-parte*.

* * * * *

33 (1) A notice under these rules may be served on the person therein named either by post or, as if it were a summons issued by a Court, under the Code of Civil Procedure, 1908 (Act V of 1908).

(2) Any such notice may, in the case of a firm or a Hindu undivided family, be addressed to any member of the firm or to the manager, or any adult male member of the family and in the case of any other association of persons be addressed to the principal officer thereof.

Provided that where a memorandum of appeal states that a Hindu undivided family, firm or other association of persons has appealed through a particular person, notice of the hearing of the appeal shall be served on that person, and where the appeal is against such family, firm or association and a particular person is mentioned in the memorandum of appeal as the person representing the respondent family, firm or association, the notice shall also be served on that person.

34 The notice of the hearing of the appeal may be served on an authorised representative of a party provided that in the case of an assessee the notice may be so served only if such representative has filed his authority in the appeal.

PART V

Hearing, Adjournment and Judgment

35 On the day fixed, or on any other day to which the hearing may be adjourned the appellant shall be heard in support of the appeal. The Bench shall then if it does not dismiss the appeal at once, hear the respondent against the appeal and in such case the appellant shall be entitled to reply.

36 (1) Where on the day fixed for hearing or any other day to which the hearing may be adjourned, the appellant does not appear when the appeal is called on for hearing the appeal unless adjourned to some other day, may notwithstanding such default be decided on merits.

(2) Where the appellant applies for the withdrawal of the appeal, the appeal shall be dismissed.

37 Where the appellant appears, and the respondent does not appear when the appeal is called on for hearing, the appeal shall be heard *ex parte*

37-A .Where the appeal has been heard in the absence of a party the party may apply for a re-hearing of the appeal and if he satisfies the Bench that the notice of the hearing of the appeal was not duly served on him or that he was prevented by any sufficient cause from appearing when the appeal was called on for hearing the Bench shall re hear the appeal on such terms as it thinks fit.

An application under this rule shall be made to the Bench which heard the original appeal within 30 days of the date of the order in appeal or where the notice of the appeal was not duly served within 30 days of the date when the party had knowledge of the order

37-B (1) Where an assessee whether he be the appellant or the respondent to an appeal, dies or is adjudicated insolvent the appeal shall not abate and may if the assessee was the appellant be continued by and if he was the respondent be continued against, the executor administrator, or other legal representative of the assessee or by or against the official receiver

(2) Where an appeal has been heard in the absence of such executor, administrator, legal representative or receiver he may within a reasonable time apply for the re hearing of the appeal and if he satisfies the Tribunal that the appellant had no notice of the date of hearing of the appeal or that he was prevented by any sufficient cause from appearing on the day when the appeal was called on for hearing the Tribunal shall on such terms as it thinks fit, re-hear the appeal

Adjournment

38 The Bench may (on such terms as it thinks fit) and at any stage adjourn the hearing of the appeal

*	*	*	*	*	*	*
*	*	*	*	*	*	*

Judgment

39 Deleted

40 The judgment of the Bench shall be in writing and shall—

(i) in the case of a unanimous judgment be signed and dated by all the members of the bench

(ii) in the case of a judgment of the majority be signed and dated by the members of the majority, and

(iii) in the case of a third member case be signed and dated by the member Provided that nothing in this rule shall preclude the members of a unanimous bench or the members of a concurring majority of the bench from writing separate judgments or absolve a dissenting member or members from the obligation of recording his or their opinion on the point or points on which he or they dissent.

41 Deleted

42 The bench determining an appeal shall as soon as the judgment is signed communicate the result of the appeal to the parties and the Commissioner in the manner in which notice of the date of hearing of an appeal may be served on the parties

Provided that where the Central Government has appointed a representative at the headquarters of the bench duly empowered to receive such communications the result of the appeal may be communicated to such representative instead of to the Commissioner

43 Deleted

PART VI

Applications for Reference

44 Section 66 Reference application shall be in the prescribed form and shall be accompanied by a copy thereof

45 Subject to the special provisions of this Part the provisions of Parts III and IV of these rules shall apply to the presentation, notices and hearing of a Reference Application as if it were an appeal

Provided that an authorised representative need not comply with the provisions of rule 25 if he has already filed his authority and its acceptance in the appeal which gives rise to the application

46 Where the application is by the assessee the Commissioner of Income tax to whom the opposite party to the appeal which gives rise to the application is subordinate shall be made a respondent

47 Where the application is by the Commissioner of Income tax, the assessee shall be made a respondent.

48 The application shall comply with the following —

(a) The findings arrived at in the order under sub section (4) of section 33 and relevant to the questions of law required to be referred to the High Court shall be stated therein

(b) Each such question shall be concisely formulated therein

(c) A list of documents giving particulars thereof which the applicant desire to be forwarded to the High Court shall be appended to it

49 Where the correctness of a finding arrived at in the order under sub section (4) of section 33 is questioned on the ground that in arriving at the finding the Bench determining the appeal committed an error of law, the application shall state the precise error of law

50 Where the application is in order it shall be registered in the Register of Reference applications and sent with the relevant record for disposal by the Bench which decided the appeal or to such other Bench as the President may direct

51 The Chief Ministerial Officer of the Bench receiving the application under rule 50 shall send for the connected records and fix a day for the hearing of the application of which notice shall be given to the applicant

52 On the day fixed or any other day to which the hearing may be adjourned, the Bench shall hear the applicant or his authorised representative in support of the application and may, without sending notice to the respondent dismiss the application if it is of the opinion that no question

of law arises out of the order under sub-section (4) of section 33 or if no question of law has been formulated in the application

53 Where the Bench does not dismiss the application under rule 52, it shall send notice of the date of hearing the application to the respondent accompanied by a copy of such application and require him to submit, within such time as it may fix, a reply in writing to the application

54 The reply to the application shall specifically admit or deny whether the question formulated by the applicant arises out of the order under sub-section (4) of section 33 or not and whether it is a question of law or not. If the question formulated by the applicant is defective, the reply shall state in what particular the question is defective and what is the exact question of law which arises out of the said order. The reply shall be accompanied by a copy thereof. A list of documents giving full particulars thereof which the respondent desires to be forwarded to the High Court appended to the reply

55-58 *Omitted*

59. After giving the parties an opportunity to be heard the Bench shall dismiss the application if no question for reference to the High Court has been formulated in the application, or when it is of opinion that the question formulated by the applicant is not one of law or does not arise from the order under sub-section (4) of section 33

59-A Where the Bench considers that a question of law arises out of the order under sub section (4) of section 33 it shall draw up a statement of the case and send it together with the records to the Headquarters of the Tribunal

60 *Deleted*

61. *Deleted*

62 *Deleted*

63 The Bench drawing up a statement of the case shall append to the statement a list of the documents to which reference may be necessary at the hearing of the Reference in the High Court

64 *Deleted*

65 The result of every application for Reference shall be notified to the parties

66 Where a case has been received from the High Court under sub-section (2) or sub-section (4) of section 66 of the Act, the case shall ordinarily be sent to the Bench which refused to state the case, and the Bench receiving it shall state the case in the light of the order of the High Court

67. A statement of the case under rule 66 shall, as far as possible, comply with all the requirements of this Part

68 When the reply to a reference has been received by the Tribunal under sub-section (5) of section 66 it shall ordinarily be sent to the Bench which originally dealt with the application for Reference and final orders in the case shall be passed by the Bench

PART VII

Miscellaneous

69 (1) The scale of copying fees, where chargeable, shall be as under —

- | | |
|---|--------|
| (a) For the first 200 Words or less | |
| English | 12 as. |
| Vernacular | 6 as. |
| (b) For every additional 100 words or fraction thereof: | |
| English | 6 as. |
| Vernacular | 3 as. |

A uniform extra fee of Re. 1 shall be charged on an application for urgent copies.

(2) The Tribunal may supply to both parties free of cost and without application one copy of its order under sub-section (4) of section 33 or of any order passed or statement drawn up by it under section 66 of the Act

70. The scales of inspection fee shall be as under:

(a) For each hour or part of an hour for ordinary inspection

Re. 1 Court-fee Stamp

(b) For each hour or part of an hour for urgent inspection Rs. 2

Court-Fee Stamp

71. Applications to the Tribunal for the inspection of documents or for the grant of certified copies of documents shall be on the forms prescribed by the President

THE INDIAN INCOME-TAX ACT (XI OF 1922).

An Act to consolidate and amend the law relating to Income-tax and Super-tax.

WHEREAS it is expedient to consolidate and amend the law relating to Income tax and Super-tax; it is hereby enacted as follows:—

Short title, extent and commencement 1 (1) This Act may be called THE
INDIAN INCOME-TAX ACT, 1922.

(2) It extends to the whole of British India, including British Baluchistan and the Sonthal Parganas, and applies also, within the Indian States and tribal areas, to British subjects who are in the service of the Crown or of a local authority established in the exercise of the powers of the Crown representative or the Central Government in that behalf, and to all other servants of the Crown in the said States and areas.

(3) It shall come into force on the first day of April, 1922.

Preamble—As regards the construction of titles, preambles, etc., *see* Rules of Construction in the Introduction. The present Act consolidated the previous Income-tax and Super-tax Acts and amended them in the light chiefly of the recommendations of the All-India Income tax Committee of 1921. There have been over twenty five amending Acts since 1922 of which the most important and extensive was the one of 1939 on the result of an enquiry by a committee of three experts in 1936—37.

British India.—Under section 3 (7) of the General Clauses Act (X of 1897), as substituted by the Government of India (Adaptation of Indian Laws) Order, 1937, "British India" shall mean, "as respects the period before the commencement of Part III of the Government of India Act, 1935, all territories and places within His Majesty's Dominions which were for the time being governed by His Majesty through the Governor-General of India or through any Governor or other subordinate to the Governor-General of India, and as respects any period after that date, means all territories for the time being comprised within the Governor's Provinces and the Chief Commissioner's Provinces, except that a reference to British India in an Indian Law passed or made before the commencement of Part III of the Government of India Act, 1935, shall not include a reference to Berar" Part III of the Government of India Act, 1935, came into force on 1st April, 1937. Burma was part of British India till that date.

The Act applies to scheduled districts which are part of British India, and no notification is necessary under section 3 to extend the Act to such areas, *Subhagmal Neemchand v Commissioner of Income-tax, Bombay*, 7 ITC 100

India—Under section 3 (27), *ibid*, "India" shall mean 'British India' together with all territories of any Indian Ruler under the suzerainty of His Majesty, all territories under the suzerainty of such an Indian Ruler, the tribal areas and any other territories which His Majesty in Council may, from time to time after ascertaining the views of the Central Government and the Central Legislature, declare to be part of India

According to section 3 (27) (b), *ibid*, "Indian States"—"shall include any territory whether described as a State, an Estate, a Jagir or otherwise, belonging to or under the suzerainty of a Ruler who is under suzerainty of His Majesty and not being part of British India".

According to section 311 of the Government of India Act, 1935, "Tribal areas", "shall mean the areas along the frontiers of India or in Baluchistan which are not part of British India or of Burma or of any Indian State or of any Foreign State"

Local authority—Under section 3 (28), *ibid*, "Local authority" means 'a Municipal Committee, District Board, body of Port Commissioners or other authority legally entitled to, or entrusted by the Government with, the control or management of a municipal or local fund'

If the General Clauses Act has been extended to an administered area, then there can be local authorities there within the meaning of that Act

Scope of Act—The *personal* and *territorial* jurisdiction of the Indian legislature is determined by section 99 of the Government of India Act, 1935. The question was raised in *Governor General in Council v Raleigh Investments*, 1944 ITR 265 (FC), whether the Indian Legislature could tax a dividend payable abroad by a non-resident company to a non-resident shareholder even though such dividend came out of profits earned in British India, and answered by the Federal Court in the affirmative. A similar question arose in *Wallace Brothers v Commissioner of Income-tax, Bombay*, 1945 ITR 39 (FC) in which it was held by the same Court that the Indian Legislature was competent to enact sub-clause (b) of clause (c) of section 4-A under which a company is deemed to be resident if its profits within British India exceeds its profits without British India. There is no extra-territoriality in such a provision and even if there was, the provision was not *ultra vires* the Indian Legislature

Sub-section (2) governs the whole Act. The jurisdiction has primary reference to the liability to tax, and if there is liability, the Act gives jurisdiction to give effect to the objects of the Act. The liability does not depend on the effectiveness of the machinery to enforce liability, *Crane v Commissioners of Inland Revenue*, 7 Tax Cases 316, *Whitney v. Commissioners of Inland Revenue*, 10 Tax Cases 88 (H.L.)

The jurisdiction of the Indian Legislatures is regulated under section 99, Government of India Act, 1935 which runs as below—

'99 (1) Subject to the provisions of this Act, the Federal Legislature may make laws for the whole or any part of British India or for any Federated State, and a Provincial Legislature may make laws for the Province or any part thereof.

(2) Without prejudice to the generality of the powers conferred by the preceding sub-section, no Federal law shall, on the ground that

it would have extra-territorial operation, be deemed to be invalid, in so far as it applies—

(a) to British subjects and servants of the Crown in any part of India, or

(b) to British subjects who are domiciled in any part of India wherever they may be, or

(c) to, or to persons on, ships or aircraft registered in British India or any Federated State wherever they may be, or

(d) in the case of a law with respect to a matter accepted in the Instrument of Accession of a Federated State as a matter with respect to which the Federal Legislature may make laws for that State, to subjects of that State wherever they may be, or

(e) in the case of a law for the regulation or discipline of any naval, military, or air force raised in British India, to members of, and persons attached to, employed with or following, that force, wherever they may be."

Sub section (2) of section 99 referred to above does not confer any power on the Federal Legislature, it has been inserted out of abundant caution lest the omission of the corresponding provisions in the 1915 Act should wrongly suggest the withdrawal of these powers. The words 'without prejudice to the generality in show that the first sub section covers also the five specific cases referred to in the second.

Unlike the 1915 Act which referred to "persons, places and things within British India", the 1935 Act empowers the Federal Legislature to make laws 'for the whole or any part of British India' and on the matters referred to in Lists I and III of the Seventh Schedule. Entry No 23 of List I "fishing and fisheries beyond territorial waters" shows that no extra-territorial ban was intended on the powers of the Legislature, the only limitation is that implicit in the words 'laws for British India'

"The constitution requires that it must be possible to predicate of every valid law that it is for the peace, order and good government of the dominion with respect to a granted subject *e.g.*, customs, taxation, external affairs. In such cases, the presence of non-territorial elements in the challenged law has to be considered on a slightly different footing and those affirming its validity have to show not only that the dominion has some real concern or interest in the matter, thing or circumstance dealt with by the legislation, but that the concern or interest is of such a nature that the challenged law is truly one with respect to an enumerated subject matter" per *Evatt, J* in *Trustees, Executors and Agency, Ltd v. Commissioner of Taxation*, (1933) 49 Bom L.R. 220, quoted with approval by the Federal Court in *Governor-General in Council v. Raleigh Investments*, 1944 I T.R. 265

Though the Statute of Westminster does not apply to India, the Constitution Act of 1935 should be interpreted in the light of the discussions on the subject that had been taking place between 1926 (the year of the Imperial Conference) and 1935. Even independently of the Statute of Westminster it was held in *Croft v. Dunphy*, 1933 A.C. 156 that "once it is found that a particular topic of legislation is among those on which the Dominion Parliament may competently legislate as being for the peace, order and good government of Canada or as being one of the subjects enumerated in section 91 of the British North America Act, their Lordships see no reason to restrict the permitted scope of such legislation by any other consideration than is applicable to the legislation of a fully sovereign state."

The Federal Legislative list—List I of Schedule VII of the Government of India Act, 1935—includes 'Corporation tax' (Item 46) and 'Taxes on income other than agricultural income' (Item 54) while List II of the same schedule, *viz.*, the Provincial Legislative List includes 'Taxes on agricultural income' (Item 41). Under section 311 (2) of the Government of India Act, 1935, unless the context otherwise requires—"Agricultural income" means agricultural income as defined for the purposes of the enactments relating to Indian Income-tax, and "Corporation tax" means any tax on so much of the income of companies as does not represent agricultural income, being a tax to which the enactments requiring or authorising companies to make deductions in respect of income tax from payments of interest or dividends, or from other payments representing a distribution of profits, have no application.

Section 7 (2) of the Income tax Act applies only to the particular class of income mentioned therein, namely, "salaries", and sets out the extent to which a particular item of income not accruing, arising, or received in British India and not paid or accruing to a resident in British India may be deemed to be chargeable within the meaning of section 4. Section 1 governs section 7 (2) also, and the latter, it will be seen, does not—as indeed it cannot—go beyond the scope of section 1, which in its turn is determined by section 99 of the Government of India Act.

See also notes under sections 22 (Serving notices on non residents), 29 (Issuing notice of demand), 64 (4) (Jurisdiction of the Income-tax Officer), and 65 (Indemnity).

History—The words "and to all other servants of His Majesty in those dominions" were added in 1918. Formerly only British subjects serving outside British India were liable.

The words "Sonthal Parganas" were added in 1918. Previously the Act had been extended by the Sonthal Parganas Settlement Regulations (III of 1872) and (III of 1899).

The words "including British Baluchistan" were added in 1922. Formerly, the Act was applied by notification only to salaries and pensions paid by Government or local authorities. Several formal changes were made by the Government of India (Adaptation of Indian Laws) Order in Council, 1937.

Appendix I sets out in abstract the Notifications under the Foreign Jurisdiction Order in Council extending the Indian Income-tax Act, 1922 with or without changes, to areas outside British India.

Administered areas—Income arising, etc., in—An administered area is not part of British India, but a part of an Indian State administered under orders of His Majesty in Council, British Indian Laws being applied to these areas *ad hoc* to the extent necessary from time to time under the Foreign Jurisdiction Order in Council.

Berar, however, has been specially treated under section 47 (1) (b) of the Government of India Act, 1935, "any reference in this Act or in any other Act to British India shall be construed as a reference to British India and Berar." This however applies only to laws passed on or after 1st April, 1937. See definition of "British India".

Salaries in Indian States—In Indian States, all persons in the service of Government, of whatever nationality, are liable to tax, but only

those servants of local authorities who are British subjects are taxable. If a Government servant is lent to a 'local authority' in an Indian State (i.e. one established by the Crown representative or the Central Government) he will be taxable whether he is a British subject or not because he does not cease to be a servant of His Majesty owing to his being lent to a local authority but a Government servant lent to an Indian State for service in that State is not taxable as he ceases to be a servant of His Majesty—see section 7 (2). Other British subjects in Indian States are not taxable on salaries paid there.

United Kingdom Law—The English Income tax Acts do not contain any provisions similar to this section. The scope of the Acts there is defined by the various charging sections and the interpretations placed on them by the Courts. See the remarks of Lord Herschell in *Colquhoun v Brooks*, 2 Tax Cases 490 H.L. quoted in the Introduction p 19. See also *Whitney v Commissioners of Inland Revenue* (1926) A.C. 37 10 Tax Cases 88 cited under section 22 as regards the taxation of non residents and the remarks of Tomlin J. regarding the scope of the Australian Income-tax laws in *London & South American Investment Trust v British Tobacco Co Ltd* 42 T.L.R. 771 (1927) 1 Ch. 107.

income means such income as is within the Act and taxable under the Act. The Act nowhere purports to tax income which is neither derived from property in the United Kingdom nor received by a person resident in the United Kingdom. The word income wherever found in the statute is to be understood as excluding income neither so derived nor so received. Per Lord Wrenbury in *Whitney v Commissioners of Inland Revenue* quoted by Finlay J. in *Marchioness of Ormonde v Brown* 17 Tax Cases 333 as a general statement of the law on this point.

2 In this Act unless there is anything repugnant in the subject or context—

Definitions

In this Act—The definitions should be followed in construing not only the Act proper but also the Rules and Notifications. These definitions are supplementary to those in the General Clauses Act except where they definitely override them.

(1) agricultural income means—

(a) any rent or revenue derived from land which is used for agricultural purposes and is either assessed to land revenue in British India or subject to a local rate assessed and collected by officers of the Crown as such

(b) any income derived from such land by—

(i) agriculture, or

(ii) the performance by a cultivator or receiver of rent in kind of any process ordinarily employed by a cultivator or receiver of rent in kind to render the produce raised or received by him fit to be taken to market or

(iii) the sale by a cultivator or receiver of rent in kind of the produce raised or received by him, in respect of which no

process has been performed other than a process of the nature described in sub clause (ii)

(c) any income derived from any building owned and occupied by the receiver of the rent or revenue of any such land or occupied by the cultivator, or the receiver of rent in kind, of any land with respect to which, or the produce of which, any operation mentioned in sub clauses (i) and (ii) of clause (b) is carried on

Provided that the building is on or in the immediate vicinity of the land, and is a building which the receiver of the rent or revenue or the cultivator or the receiver of the rent in kind by reason of his connection with the land, requires as a dwelling house, or as a store house, or other out building

History—In the Income-tax Act of 1860 agricultural income was taxed. This was given up in 1865. In the Act of 1867 the tax was levied only as a licence tax on professions and trades and agriculture was neither a profession nor a trade. In 1869 an income tax was levied upon all incomes including agricultural income and in 1873-74 this was given up. In 1877 a licence tax was levied upon traders and artisans but not upon agriculturists on whom a cess on land was levied. In 1886 a regular Income-tax Act was passed but exempting agricultural income and the exemption is still in force. The principal reason for exempting agricultural income from 1877 onwards appears to have been not the fact that landlords paid revenue to Government (which of course was in return for the use of land) but that they paid a cess on land corresponding to income tax. This cess was not negligible having regard to the low rates of income tax then prevalent and it was considered that landlords should not be asked to contribute to the general exchequer more than once (apart from the payment of land revenue which as already stated was held to be not a contribution to the public revenue but a payment for the use of land). In those days when the Cess Acts were passed and an income tax levied on agricultural income the owners of permanently settled estates carried on a powerful agitation against these imposts on the ground that the new taxes constituted a breach of the Permanent Settlement. The Government met these complaints not by exempting permanently settled estates as such from income-tax but by exempting all agricultural income whether the lands were permanently settled or not. The omission of the 1886 Act to refer expressly to permanently settled estates led as will be seen from the Introduction to considerable litigation regarding the liability to income tax of non agricultural income from permanently settled estates.

In 1918 when the Income tax Act was amended and consolidated Government intended to take into account agricultural income for the purpose of fixing the rate at which an assessee should pay tax but this was opposed in the Legislative Council and the proposal was dropped. In 1922 when the Act was again revised Government desired to exclude forestry from agricultural income but this also was opposed in the Assembly and the proposal was dropped. Agricultural income as now defined in the Act, is not only exempt from income tax but must not even be taken into account in considering the rate at which the assessee should be taxed on his

non agricultural income Nor can it be taken into account even for super-tax, however large the income The existence of agricultural income is thus completely ignored by the Central Income tax Officer for all purposes

Since 1st April, 1937, the taxation of agricultural income is a subject for Provincial Legislation (see notes under section 1) and three Provincial Governments (Bengal, Bihar and Assam) have already imposed such taxation Another province, viz., Madras has, it seems decided to levy such impost and perhaps more provinces will do so in the near future

Under the Income tax Acts prior to 1922, profits from the sale by a cultivator or receiver of rent in kind of the produce raised or received by him were included under "agricultural income" only if he did not keep a shop or stall for the sale of such produce Under the Act of 1922 such profits are exempt from taxation if the produce is sold in a raw state or after it is subjected only to such processes as an ordinary cultivator would employ The present Act, it will be seen, makes the law more lenient

The words "in British India" in clause (a) and "such land by" in clause (b) did not occur in previous Acts. So, income from lands outside British India, e.g., in Indian States—whether falling under clauses (a)—any rent or revenue, or (b)—income derived from cultivation, etc., or (c)—from occupied buildings—escaped taxation Under the present Act only income from such land as is either assessed to land revenue in British India or subject to a local rate assessed and collected by officers of Government as such is exempt from income-tax.

Though the second proviso to sub-section (2) of section 4 relating to agricultural income in Indian States inserted in 1933 and deleted in 1939 led to litigation and divergence of views eventually going up to the Privy Council (See *In re Mohanpura Tea Co.*, 1937 I.T.R. 118 (Cal.) and *Commissioner of Income tax, Madras v Mathews*, 1939 I.T.R. 48 (P.C.)), the difficulty turned, not on the interpretation of 'agricultural income' but on the construction of section 4, those problems therefore are of little interest now It should be noted however that section 14 was amended in 1941, so as to tax a resident in British India on his income in Indian States on the basis roughly speaking, of such income brought into British India and it should be remembered that the definition in section 2 (1) will not cover agricultural income in Indian States, since such income will not arise from land paying revenue or cess in British India

The words "the Crown" were substituted for 'Government' in clause (a) in 1937

Restriction on change of definition—Under section 141 (1) of the Government of India Act, 1935, no Bill or amendment varying the meaning of the expression, "agricultural income" as defined here can be introduced or moved except with the previous sanction of the Governor General in his discretion

Onus—Under item (viii) of sub-section 3 of section 4 'agricultural income' shall not be included in the 'total income' of the person receiving it, and, as in respect of all exemptions and reliefs, it lies on the assessee to show that a particular item of income which he claims to be "agricultural" is in fact such *In re, Maharajahdhiraj of Burdwan*, 1940 I.T.R. 378 (Cal.).

Point of time—The question whether land is used for agricultural purposes is to be determined with reference to facts at the time of accrual of the income under dispute and has no reference either to the purpose of

a lease if any or to the uses to which the land may be put either before or after the time of accrual of the income. In re *Sir Bijoychand, Madhub* 1940 I T R. 378 (Cal)

Conditions to be satisfied by the land—The definition imposes the following conditions. The land must first of all be used for an agricultural purpose. As to what constitutes such purpose see below. The land should also be (1) either assessed to land revenue in British India or (2) subject to a local rate assessed and collected by officers of the Crown as such. In practice there is hardly any land not belonging to the Crown which is not assessed to land revenue or local rates i.e. none which escapes both. Even waste lands which are settled are assessed to revenue though up to a certain stage the revenue is remitted. Lands like those of *Col Malik Sir Umar Hayat Khan* in Shahpur District Punjab (cited *infra*) are rare.

Local rates—The Act does not define local rates and there is no general definition in other statutes in India. There are definitions in English statutes but they are clearly inapplicable to India. A rate as distinguished from a tax is sometimes used to denote a payment for service rendered but such a distinction is not relevant to the present context. The expression local rates evidently means taxes for the benefit of local authorities i.e. District Boards Municipalities etc. See *Hulas Narain Singh v Bihar* 1942 I T R. 115 (F C) a case under the Bihar Agricultural Income tax Act. It was argued in the case of *Malik Umar Hayat Khan*, 2 I T C 52, that if a land is not assessed to land revenue but pays irrigation rates to Government local rates should be construed to include such irrigation rates as well but the Court did not give a ruling on this point and decided the case on other ground.

A further condition is that such local rates should be assessed and collected by officers of Government as such. A tax therefore levied by a municipality which is assessed and collected by its own officers, would not come within the definition. Such land could not escape income-tax unless it was assessed to Land Revenue. On the other hand income from land assessed to Road and Educational cesses and cesses for the aid of District Boards and District Committees which are almost invariably assessed and collected by officers of Government would be exempt.

Under the Bengal Cess Act for example through a District Board may be empowered to determine the rate of cess from time to time so long as the cess is assessed and collected by officers of the Crown as such, the income from the lands will be agricultural income and thus exempt from income-tax if the land satisfies the other conditions of the definition. In so assessing and collecting the cess an officer of the Crown is functioning as such and not as an agent or a delegate of the District Board, the capacity in which the Collector or other officer of the Crown functions will not be altered by the destination of the cess when collected. *Hulas Narain Singh v Bihar* 1942 I T R. 115 (F C). Officers of the Crown referred to in this definition are officers in British India and in any case exclude officers outside India such as Burma. *Chockalingam Chettiar v Commissioner of Income tax Madras* 1945 I T R. 122.

What constitutes Agriculture?—There is no definition in the Act of the term agriculture nor is a simple definition of such a common and comprehensive word possible. The word should therefore be interpreted with reference to common usage as well as to the general spirit and the tenor of the Act. Usage however differs and the word is used sometimes in a wide sense and sometimes in a narrow one. The ordinary dictionary

meanings of agriculture are as below —

"Farming, horticulture, forestry, butter and cheese making, etc" (Webster)

"The tillage of the land, the art of cultivating the soil including the allied pursuits of gathering of the crops and rearing live-stock, also husbandry—farming, in the widest sense" (Murray's Oxford Dictionary)

The definitions and rulings in the United Kingdom Income-tax Acts are of limited assistance in construing the Indian Income tax Act because the scheme of taxation of agricultural income is different in the two countries

In a case under the United Kingdom Excess Profits Duty Acts *Commissioners of Inland Revenue v Ransom*, (1918) 2 KB 709 12 Tax Cases 21 Sankey, J, said at p 712

"The contention for the Crown is that husbandry' means farming I do not agree with that contention I think that husbandry is a term of very wide signification and though I am not prepared to hold that a man who tills and cultivates the soil is, in all circumstances a husbandman or a man engaged in 'husbandry', I can see no distinction between a man who does so in order to produce food for human consumption and a man who does so in order to produce medicines and herbs, also for human consumption"

In *Keir v Gillespie*, 7 Tax Cases 473, it was held that the term 'husbandry' was not restricted to tillage or cultivation of the soil but included the use of lands for the purpose of grazing sheep

Per the Lord President—Confessedly no light is thrown by the Statutes on the meaning of the word 'husbandry' It has no technical or secondary meaning It must be taken in its ordinary acceptation What is that? It is confined to tillage or cultivation

or does it embrace "all farming operations" For the answer

I rather think we must turn to the dictionary and having regard to the object and the purpose of the statute we are construing take the widest meaning which is there first put upon the expression (In) *Stormonth's Dictionary*

I find 'husbandry' defined first as 'the business of a farmer' and 'husbandman' as the "man who manages the concerns of the soil"

According to the *New English Dictionary* 'husbandry' signifies 'the business or occupation of a husbandman or farmer including also the raising of livestock and poultry' In *Murray's Dictionary* a like meaning is given to the term The attempt to confine husbandry' to the tillage' of the soil fails For tillage' is defined as "the act or practice of preparing land for seed and raising crops"

To adopt it would be to confine husbandry to the raising of crops which are artificial and not natural 'Husbandry' has in these days come to have a much more extended meaning than that, but even if turning over the soil to enable a crop to be grown were essential we have it in the cutting of the drains on the sheep farm 'Husbandry as

Mr Justice Kenny said In *re the Cavan Co-operative Society*, (1917) 2 IR. 594, 608, "presupposes a connection with land and production of crops or food in some shape" but, let me add it shall not pre suppose the use of artificial means to prepare the land for raising the crops

Neither judicial decision nor statutory enact-

ment nor practice throws any light upon it. All that one can say about it is that in common parlance lands devoted to grazing sheep are occupied 'for the purposes of husbandry' and that a sheep farmer is in the ordinary acceptation of the term a husbandman.

Per Lord Mackenzie—It may be that in its origin the word husbandman' meant the man who ploughed and planted as distinguished from the man who owned flocks and herds. No such limited meaning can now be attached to the word.

Per Lord Skerrington.—I think at the present day the primary and natural meaning of the word husbandry' as applied to land includes all those uses of the land which are common to what at the present day we describe as farmers. In short the rearing of sheep and cattle and the production of milk are a familiar and daily duty of the husbandman.

There are several rulings in India interpreting the word 'agricultural' with reference to other Acts but none of these interpretations can be adopted automatically in construing the Income tax Act, because those Acts are not *in pari materia* with the Income tax Act. Thus in a case under the Madras Estates Land Act, *Rajah of Venkatagiri v Ayyappa Reddi* 38 Mad 738, it was decided by the High Court that 'agriculture does not include pasturage but it would be obviously improper to apply this interpretation for the purposes of the Income tax Act, even if this view was not open to doubt (in fact it has been doubted by the same Court in a later case).

On the other hand in a case under the Madras District Municipalities Act, *Emperor v Alexander Allan*, 25 Mad 627 the same High Court held that pasture land was agricultural and therefore exempt from enhanced rates.

Per Davies and Moore, JJ—

We have no hesitation in holding that land on which potatoes, grain vegetables etc., are grown are lands used solely for agricultural purposes. We do not consider that any distinction can be drawn between large and small plots of lands on which roots or grain are cultivated.

Turning again to the definition of the word "agricultural" which we have accepted we find that agricultural lands include lands set apart as pasture ground only, also lands used for rearing live stock. If therefore, it could be shown that these so called waste lands were in reality pasture grounds or lands used for rearing live-stock, we should certainly decide that they were lands used solely for agricultural purposes.

The primary meaning of 'agriculture' is the cultivation of the ground and in its general sense, it is the cultivation of the ground for the purpose of procuring vegetables and fruits for the use of man and beast including gardening or horticulture and the raising or feeding of cattle and other stock. Its less general and more ordinary signification is the cultivation with the plough and in large areas in order to raise food for man and beast, or in other words that species of cultivation which is intended to raise grain and other field crops for man and beast. Horticulture which denotes the cultivation of gardens or orchards is a species of agriculture in its primary and more general sense.—*Per Bhaskyam Aiyangar J*, in *Murugesu Chetti v Chinnathambi Goundan*, (1901) 1 L.R. 24 Mad 421 (in which the question was whether a lease was agricultural).

In *Panada Pathan v Ramasami*, 45 M 710, on the other hand,

Spencer, J—"With due deference, while accepting that the case was rightly decided, I am unable to follow the opinion of Bhashyam Aiyangar, J., in *Murugesu Chetti v Chinnathambi Goundan*, (1901) I L R 24 Mad 421, that the word 'agriculture' in its more general sense comprehends the raising of vegetables, fruits and other garden products as food for man and beast, if the learned Judge intended thereby to limit it to the raising of food products. For to so restrict the word would be to exclude flower, indigo, cotton, jute, flax, tobacco and other such cultivation. For the purposes of that particular case, which related to a lease of betel gardens, considering the policy of favouring agriculture, upon finding that they produced a form of food, the connection between agriculture and the production of food may have seemed important, but such a limitation is not supported by the definition of agriculture in the Oxford Dictionary which is 'the science and art of cultivating the soil, tillage, husbandry, farming (in the widest sense)'. This dictionary notes that a meaning restricted to tillage is rare. In Bouvier's Law Dictionary agriculture' is defined as the cultivation of the soil for food products or any other useful or valuable growths of the field garden.

"Shepherd, J., who sat with Bhashyam Aiyangar, J., conceded that the earlier decision, *Kunhayyan Haji v Mayan*, 17 Mad 98, to which he was a party which decided that the lease of a coffee garden was not an agricultural lease was wrong.

"I am equally unable, with respect, to agree with the narrow definition of Sadasiva Ayyar, J., in *Seshayya v Rajah of Putapur*, (1916) 3 L W 485 and *Rajah of Venkatagiri v Ayyappa Reddi*, 38 Mad. 738, that agriculture means the raising of annual or periodical grain crop through the operation of ploughing, sowing, etc., though the decision may be perfectly sound so far as they excluded pasture lands from 'ryoti land' for the purpose of the Madras Estates Land Act.

"The learned Judge's definition would exclude sugarcane, indigo, tea flower, tobacco and betel cultivation from agriculture.

In my opinion agriculture connotes the raising of useful or valuable products which derive nutriment from the soil with the aid of human skill and labour and thus it will include horticulture, arboriculture and silviculture in all cases where the growth of trees is effected by the expenditure of human care and attention in such operations as those of ploughing, sowing, planting, pruning, manuring, watering, protecting, etc.' See also per Reilly, J., in *Chandrasekhara Bharathi v Duraisami Naidu*, 54 Mad. 900, 903, *et seq*. Also see *Kesho Prasad Singh v Sheo Pragosh Ojha*, 46 All 831 (P.C.)

As already observed, these rulings under other Acts are of very limited assistance in interpreting the Income-tax Act, but they will show that the word 'agriculture' has a rather wide and indefinite connotation.

Obviously 'agriculture' is not necessarily confined to the cultivation of foodstuffs. While it is not difficult to raise cases on the borderland which could be considered to be both agricultural and not agricultural, it is not so easy to exhaust, by enumeration, the possible agricultural uses to which land can be put. Evidently they must include dairying, poultrying, rearing of live-stock, gathering of wool, etc., but all such uses might be non-agricultural in certain circumstances. Thus dairying with stall fed cattle in urban areas or poultrying in similar areas could scarcely be considered agricultural. But these instances would also in most cases be excluded by the very defini-

tion of 'agricultural income' in the Act, which pre-supposes that the income is derived from *land assessed to Land Revenue*, etc. Even if the land is assessed to Land Revenue, if on the facts it is held that the operations are those of trade and not of agriculture, the profits would be taxable, land revenue being allowed as a deduction.

If cattle are kept in an urban area and wholly stall fed and not pastured on the land at all, doubtless the case is one of non agricultural trade, and no agricultural operation is being carried on. If, on the other hand, cattle are exclusively or mainly pastured on land and are nonetheless fed with small quantities of oilcake or the like, it may well be that income from the sale of milk is agricultural income. Between these two extremes the question is one of degree and therefore, of fact, and it is for the Income-tax authorities to decide on which side of the line a given case falls, *Commissioner of Income-tax, Burma v Kokine Dairy*, A.I.R. 1938 Rang 260 (F.B.), 1938 I.T.R. 502. The profits of a milk-seller who merely purchases from cattle owners and sells the milk, etc., to others are clearly profits from trade and cannot be brought under any of the clauses in the definition of "agricultural income".

A co operative society buying milk from its members and selling the butter in the open market, returning the skimmed milk to its members, does not carry on 'husbandry', though the making of butter by an ordinary farmer on his farm would be 'husbandry', *Commissioners of Inland Revenue v Cavan Central Co operative Society*, 12 Tax Cases 1, (1917) 2 I.R. 594 and 622. "As well might the owner of a machine for threshing corn or of a steam plough or of a mill for grinding corn or of a machine for spraying potatoes be held to be engaged in the trade or business of husbandry" per *Kenny, J.* In this case the members of the society were not necessarily farmers or engaged in husbandry, though the bulk of the milk was supplied by farmer's grazing cows on their farms.

Rule 4 of Case III of Schedule D in the United Kingdom Income-tax Act provides for cases of milk and cattle dealers who are charged supplementarily to the charge under Schedule B in certain cases. These conditions give a clue as to when in such cases agriculture becomes "trade". The conditions are (1) the man must be a dealer in cattle or a dealer in or a seller of, milk, (2) the lands must be insufficient for the keep of the cattle brought on to the lands, and (3) the lands must be so insufficient that the assessable value of the lands affords no just estimate of the profits. Condition (3) cannot be applied even by analogy in India in face of the definition of agricultural income, but conditions (1) and (2) seem to be applicable. In the United Kingdom, it is important whether a land is a 'farm' or a 'garden', and the matter has gone up to the House of Lords *Bomford v Osborn*, 1944 I.T.R. 27 (Sup).

Rulings in India—Income from inland fisheries has been held to be not agricultural, (*Maharajahdhras of Dharbhanga v Commissioner of Income tax*, 3 Pat 470, 1 I.T.C. 303 51 Cal 504, the decision in which was approved by the Privy Council in 58 Cal 430 (P.C.) *Commissioner of Income tax v Sevuga Pandia Thevar*, 56 Mad 251 (F.B.), 1933 I.T.R. 78. Profits from sea fisheries, including pearl and 'chank', and fisheries in public ponds lakes, etc., are clearly not entitled to the exemption at all even assuming that by any possible straining of words they could be considered 'agricultural' because the land (if the sea is 'land') is not assessed to land revenue in British India.

Income from markets, moorings and ferries, (1 ITC 303, 3 Pat. 470, *supra*, see also 51 Cal. 504, 54 Cal. 863, and 56 Mad 251 *supra*) stone quarries (*Shiblal Gangaram v Commissioner of Income tax*, 50 All 98) coal, manganese, mica, etc., is not agricultural. The profits from a mela (fair) held on land admittedly agricultural are not agricultural income (*Umed Rasul v Anath Bandhu*, 28 Cal. 637). So also the income from the use of land for storing purchased food crops, etc. 2 ITC 392 *supra*, and from land let out for making bricks (*Maharam Janki Kuer v Commissioner of Income tax, B & O*, 5 ITC 42).

The income derived from honey whether the deposit is spontaneous or derived from the rearing of bees, is perhaps agricultural and if the land is assessed to land revenue or a local rate, exempt from income tax. On the other hand rent received by a surface owner in return for permitting the owner of underground rights to withdraw support for the surface would not be income from agriculture. See incidentally, *Elliot v Burn*, 18 Tax Cases 595 (1934) 1 K.B. 109 (H.L.).

Forestry—According to the executive instructions in the Income tax Manual, income from timber or leaf grown on one's own land is agriculture, but not that from cutting down and selling timber belonging to others. But even when grown on his own land, the question may still arise whether the income is agricultural, e.g., from spontaneous growths. In *Chief Commissioner of Income-tax, Madras v Zemindar of Singampatti*, 1 ITC 181, 45 Mad 518, the Court inclined to the view that income from forests was agricultural, but this was *obiter*. There was no doubt however, that receipts for stacking timber on forest land (*Emperor v Probhat Chandra Barua*, 1 ITC 284 (Cal.), *Har Prasad v Emperor*, 1 ITC 417 (Lah.) are not 'agricultural'. The view taken in the *Singampatti* case was however doubted by the same Court in a later case. *Manavedan Tirumalapad v Commissioner of Income tax*, 4 ITC 421, but that case was decided on a different ground, viz., that the land was not assessed to land revenue or local rates. In a case referring to Bihar Agricultural Income-tax, it was decided by the Patna High Court, after reviewing several authorities, that neither income from the sale of wood (spontaneously grown) in jungle nor that from letting land and trees for the cultivation of lac nor that from wild forest in the jungle is agricultural income, because none of them required cultivation in the ordinary sense. Land held for agricultural purposes can only be land under cultivation, i.e., active effort to grow things on the part of man. *Bihar v Pratap Udyanath*, 1941 ITR 313. It has been similarly held by the Oudh Chief Court with reference to income tax that the word 'agricultural' should be understood, for this purpose, in its primary sense and that therefore income from the sale of trees growing spontaneously (without the aid of human agency) in a forest on land assessed to land revenue is not agricultural. *Maharaja of Kapurthala v Commissioner of Income tax, U.P.*, 1945 ITR 74, *Special Manager, Court of Wards v Ditto*, 1945 ITR 94, *Raya Mustafa Ali Khan v Ditto*, 1945 ITR 98. Whether receipts from felling timber in a forest, assuming that the income is not agricultural, are capital receipts or income receipts is a different matter, regarding which see notes under section 3.

Grazing Lands—Leased—The position of income derived from land leased out and used for grazing cattle of other persons than the lessee is not clear. In the United Kingdom it has been decided that such profits constitute profits of 'trade' and not income from 'husbandry' *McKenna v. Herlihy*, 7 Tax Cases 620.

In *Donald v Thomson*, 8 Tax Cases 272, the assessee rented certain grass parks outside his farm and utilized them for the grazing of young dairy cattle with which to replenish his farm stock. It was held that the profits from the seasonal occupation of the grazings outside the farm were assessable to income-tax under Schedule D i.e., as profits from business, and not as agricultural income. The assessee had been assessed in the usual course under Schedule B i.e. occupation of agricultural land. See however *Glancely v Wightman* 17 Tax Cases 634 (H.L.) *post* for the opposite view.

Leased Lands—The land need not be cultivated by the owner himself. If it is leased the income would still be income from agriculture both to the lessor and to the lessee. Where there are intermediary lessees or tenure holders—whatever the nature of interest and whatever the local tenure, the income of all these holders and lessees is clearly agricultural.

A father, son and daughter formed a partnership to manage leased agricultural land. The daughter leased her share to the other two, the management vesting in the father under whose directions the son who was to reside on the estate, managed it. Subject to certain limits both the father and the son received certain allowances entirely at the discretion of the father, the son's allowance depending on his residence on the estate. After deducting all expenses including the allowances the net income was divisible between father and son in the proportion of two to one. It was held that (a) the payment received by the son was exempt only in so far as it represented his due share of the income from the land and (b) there was sufficient material for the Income tax authorities to find that a part of the allowance was salary, whether paid by the firm to the assessee or by one co-owner to another. *Major Conville v Commissioner of Income tax, Punjab*, (1935) ITR 404 A.I.R. 1935 Lah. 978. Whether or not land is used for agricultural purposes is to be determined with reference to facts at the time of accrual of the income in dispute and not with reference to the purpose of the lease if any. In *re Bijoy Chand Madhav* 1940 ITR 378 (Cal).

Mortgaged Lands—Income from a simple mortgage on land is clearly not income from agriculture. Whether income from land held in usufructuary mortgage is income from agriculture has been the subject of much discussion. In *Commissioner of Income tax v Subramania Sastrigal*, 2 ITC 152 the Madras High Court held that when a person carrying on money lending business lends money in the course of such business on the security of lands of which he takes usufructuary mortgage and immediately leases these lands back to the borrowers, the rent of the lands being a definite percentage of the loans given, such rent is not agricultural income. The Allahabad High Court in the cases of *Mukand Sarup*, 2 ITC 495 50 A 495 and *Banwarilal* questioned this view. The scheme of the Act does not distinguish between agricultural income on the one hand and business income on the other and even if the income was admittedly from business there was nothing to prevent that part of the income which was derived from agriculture being exempt under section 4 (3) (viii). The court considered therefore that unless the mortgage was a sham (the consequences of such a mortgage they did not examine) the income was clearly agricultural. In a later case *Ibrahim & Rowther v Commissioner of Income-tax*, 3 ITC 33 51 Mad. 455 the Madras High Court receded from the view originally taken and adopted the line of reasoning of the Allahabad High Court and their conclusion.

Without deciding the general question whether income from genuine usufructuary mortgage, is exempt or not, the Patna High Court decided in *Rajni Prasad Singh v Commissioner of Income tax*, 9 Pat 914, A.I.R. 1930 Pat. 33 that when a usufructuary mortgage and a lease back are executed simultaneously and reciprocal references are made in the two documents, they should be construed together as parts of one and the same transaction. In the particular case, it was obvious from the two documents read together, that the intention of the parties was that the mortgagee was not to enter into possession nor really to enjoy the usufruct. The Madras case of *Ibrahim Rowther* was distinguished on the ground that in that case there was no mention in the mortgage deed of any rate of interest whereas in *Rajni's case* there was. The soundness of the Allahabad ruling was also questioned.

In a later case, *Commissioner of Income-tax, B & O v Maharajadhiraj of Darbhanga*, (1934) ITR 107 A.I.R. 1934 Pat 178 in which the balance of income after certain deductions was taken in reduction of the loan the Patna High Court ruled that the source of income should be considered in its proximate rather than in its ultimate significance, that is, without reference to the intention of the mortgagee in making the investment. Consequently, income from agricultural lands held in usufructuary mortgage is income from agriculture.

If the mortgagor receives rent from tenants it is agricultural income in his hands and ceases to be such when he parts with it. Similarly, if the mortgagee himself receives the rent it is agricultural income in his hands and ceases to be such when he parts with it. The fact that the mortgagee has to meet the repair and establishment charges out of the rent and credit the balance to interest and principal does not affect the nature of the income, *Commissioner of Income tax, Madras v Janab Khoyee Sahib*, (1935) ITR 1.

An exemption is conferred, and conferred indelibly, on a particular kind of income and does not depend on the character of the recipient, contrasting thus with the exemption conferred by the same sub-section [section 4 (3) (iii)] on the income of local authorities. As Ashworth, J., said in *Makund Sarup's Case*, 2 ITC. 495 the business of money lending may bring an income which is exempt from income tax on the ground that it is derived from agricultural land. It is, therefore, immaterial whether the lender in an usufructuary mortgage on agricultural lands is a professional money lender or not, *Commissioner of Income tax, B & O v Sri Kameshwar Singh*, (1935) ITR 305, 14 Pat. 623 (P.C.)

Under an arbitration award, a life annuity had to be paid to an assessee, there was default, and a scheme was drawn up to extinguish the liability within ten years. Under this scheme, the debtor's agricultural property was mortgaged to the assessee in usufruct and at a certain rate of interest. The assessee simultaneously leased the land back to the debtor, and the question arose whether any part of the rent received could be considered as interest because the assessee appropriated a part of the rent towards interest. The answer was given in the negative, because the proximate source of the annual payment received by the assessee was the lease, the whole of the rent receivable under this lease was agricultural income. There is nothing inherently suspicious about a possessory mortgage accompanied by a lease of the mortgaged property to the mortgagor although there has been no handing over of the land to the mortgagee and back to

the mortgagor as lessee. At the termination of the lease the mortgagee is entitled to possession if that is the effect of the document. The transaction cannot be treated as a simple mortgage, and evidence to show the intention of the parties or to contradict the express terms of documents is not admissible, being forbidden by section 92 of the Evidence Act, *Raja Mustafa Ali Khan v. Commissioner of Income-tax, U.P.*, 1945 I.T.R. 98 (Oudh), following *Commissioner of Income-tax, B. & O., v. Maharaja of Darbhanga*, 1934 I.T.R. 107 and *Feroz Shah v. Sabhat Khan*, 60 I.A. 273 (not an Income-tax case).

In a case in which though a mortgage purported to be with possession, the mortgagee was in fact entitled only to a fixed sum every year from the lessee (the land having been already under lease) in consideration of the money lent, and had otherwise no concern with the produce of the land or possession thereof, it was held that the mortgage was in fact a simple mortgage, and that the fixed sum received from the lessee was not income from the land, *Muhamad Yakub Khan & Muhammad Aslam Khan v. Commissioner of Income-tax*, 3 I.T.C. 308; A.I.R. 1929 Lah. 206.

An assessee who had advanced money (in 1913) on simple mortgage sued for the money in 1928 and obtained a compromise decree (in 1925) under which he was to recover a certain amount by a certain date (1931) failing which the mortgaged lands were to become his. A receiver was appointed under the decree and the net rents collected by him were to be given to the assessee in reduction of the amount due under the decree, and the assessee was to receive only the balance from the debtor. The debtor defaulted, and the assessee received possession of the land in 1933, but there was further litigation in respect of the title to lands, which was settled in 1936. The question arose as to the nature of the payments received by the assessee creditor from the receiver; and they were held not to be agricultural income since the mortgage was simple and not usufructuary, *Ar. Vr. S. Vecrappa Chettiar v. Commissioner of Income-tax, Madras*, 1941 I.T.R. 56.

Interest in kind.—If a loan is made in cash before the cultivation season and repaid in kind at harvest time, the excess value of the latter over the amount lent is taxable. The fact that the lender is the landlord and the borrower his tenant makes no difference, and the income in such cases arises from lending money and not from the functions of the landlord as such, *Haji Cassim Tayub Soorty v. Commissioner of Income-tax, Burma*, 10 Ran. 77; A.I.R. 1932 Rang. 19.

Rent in kind.—Where, during a period of low prices of paddy, a landlord who also traded in paddy, bought up the crops from the tenants at more than the market price, lest the tenants should repudiate payment of rents, and paid the balance to the tenants after retaining the rents due to him, the Income-tax Officer was not allowed to re-cast the trading profits as though the paddy had been bought at market price nor was the landlord allowed to deal with the rent as if it had been paid in kind. The transaction was ordered to be treated as one on a cash basis at the higher price, *Commissioner of Income-tax, Burma v. Kyauktaga, Ltd.*, 1937 I.T.R. 580.

Toddy.—Income received from toddy is agricultural when it is received by the actual cultivator, whether owner or lessee, of the land on which the trees grow. If the income is obtained by a person who has not produced the trees from which the toddy is tapped or has not done any agricultural operation whereby the trees have been raised, it is not agri-

cultural income within the meaning of the Act *Commissioner of Income-tax v Yagappa Nadar* 103 I.C. 489 2 I.T.C. 470 The ratio decidendi was that there can be no lease of trees apart from the land and in this case the assessee admitted that he had no interest in the land

Tobacco and Tendu—Profits on the sale of tobacco leaves not grown by the assessee but bought from others is not agricultural income. On the other hand even though a plant may grow wild and propagate itself any attention thereto however slight is cultivation of the soil and income arising from the plant in so far as processes are not applied to it not ordinarily applied by cultivators is agricultural income *In re Woolly Sicks & Co* 1939 I.T.R. 493 (Cal)

Water—Income from—Whether agricultural—In *Malik Usar Hayat Khan and others v Commissioner of Income tax* 2 I.T.C. 52 a case probably *sui generis* the assessee who owned certain canals purchased water from Government for which they paid irrigation rates and sold it to certain agriculturists who paid for it in kind by a share of the produce. It was contended on behalf of the assessee (1) that the income was derived from land—either from the land constituting the water courses or the land of those using the water the latter giving a share of the produce as rent for the water (2) that if the income was derived from the land forming the water courses that land paid irrigation rates which it was contended should be included in local rates (the latter not having been defined) and that if the income was held to be derived from the lands of those using the water the latter was assessed to land revenue (3) that the land constituting the water courses should be held to be subservient or appurtenant to the lands cultivated with the water purchased and (4) that as the income was dependent upon the crop of the lands cultivated by the purchasers it should be considered to be income from these lands The Court held that the income was not derived from land at all but simply from the sale of water and that the fact that the price was paid in kind and not in cash made no difference whatever It therefore held that the income was not agricultural income and the other points raised by the assessee were therefore not considered.

Payments out of Agricultural income—An annuity payable under a will even though paid out of agricultural income is not such income unless the annuity is a rent charge on specific agricultural property or represents a definite share of the income of the estate and is not merely a general charge over the whole estate Where it is only a general charge it might be paid out of the corpus of the estate or out of the non agricultural part of the income *Zamindars of Tirunel v Commissioner of Income tax Madras*, 3 I.T.C. 428 *Shrimati Sundrabai Sahib v Commissioner of Income tax Bombay* 5 I.T.C. 493 *In re Saltanat Begum* 1933 I.T.R. 379 9 Luck. 115 See also *In the matter of Lal Suresh Singh Kalakankar* 158 I.C. 810 1935 O.W.N. 1143

An allowance paid to a junior member of an impartible estate out of the income of the latter even when such income was from agriculture, was held on the facts not to arise from agriculture but from the bounty or gift by the estate and to be therefore not exempt from tax, *In re Mahoraj Kumar of Vizianagaram* 1934 I.T.R. 186 56 All 1009

In *Commissioner of Income-tax B & O v Gopal Sharan* 1934 I.T.R. 264 approved by the P.C. in 1935 I.T.R. 237 14 Pat. 552 the assessee claimed unsuccessfully that an annuity which he had obtained *inter alia*

in exchange for his estate was agricultural income. It was held not to be so, since the annuity had to be paid irrespective of the actual income from the estate. The fact that the assessee had a charge upon the property for the fulfilment of the contract did not affect the nature of the annuity. See also *Jagdish Chandra v Dhanpati Singh*, 1945 ITR 64 (Pat)—a case under the Bihar Agricultural Income tax Act.

The mere fact that the payment is charged on land will not convert into agricultural income, a payment made to a junior member of an impartible family, *Commissioner of Income tax, U P v Lal Suresh Singh*, 1935 ITR 356. (In this case exemption was not claimed on the ground that the assessee received the payment as a member of the family.) An allowance paid to a junior member of a family, under orders of Government, out of a jagir (an assignment of land revenue) is agricultural income in the hands of the recipient if the Government intended that a part of the assignment as such should pass to the junior member, *Kunwar Kantar Singh v Commissioner of Income tax, Punjab*, 1937 ITR 569.

An *ex gratia* allowance partly in consideration of the resumption of lease of agricultural lands is not agricultural income. *Commissioner of Income tax, B & O v Pandit Dhaneswardhan Misra*, 1940 ITR 416.

Where a *mutawali* of a *wakf* was remunerated by a salary of so much per month and not by a portion of the income of the *wakf*, the salary was held not to be agricultural income even though the income of the *wakf* was *Nawab Habibullah v Commissioner of Income tax, Bengal*, 1943 ITR 295 (P.C.). Where, however, a *mutawali* was entitled to appropriate towards his remuneration and personal expenditure the residual income of a *wakf* the income of which was partly from agriculture, it was held that a proportion of the residual income should be treated as agricultural income. A mere technical change of form is insufficient to deprive income of its agricultural character. *Syed Mohamed Isa v Commissioner of Income tax, U P*, 1942 ITR 267 (All). The remuneration paid to a partner, in addition to his share of profits, for managing agricultural properties, but not being a definite fraction of the agricultural income is not agricultural income though paid out of such income. *Danby v Commissioner of Income tax, B & O*, 1944 ITR 351 (Pat).

Rent and Revenue—What the framers of the Act meant by the distinction between 'rent' and 'revenue' is not clear. The words have come in the same form from 1886 and from a practical point of view the distinction is not of importance as both are equally entitled to the exemption.

'Rent' is defined in section 105 of the Transfer of Property Act as 'money, share of the crops, service, or any other thing of value to be rendered periodically or on specified occasions by the tenant to the landlord in consideration of the enjoyment of immoveable property'. The same idea pervades most of the definitions in Indian Tenancy Legislation. Rent implies the idea of a lessor and lessee or landlord and tenant. Revenue on the other hand is

"the return, yield or profit of any lands, property or other important source of income, that which comes to one as a return from property or possessions, specially of an extensive kind, income from any source specially of an extensive kind, income from any source but specially when large and not directly earned"—*Oxford Dictionary*

'Revenue' is ordinarily a word with a wider denotation than 'rent'. A possible distinction is that 'revenue' is income due to the State and

'rent' the income on account of the user of land due to the landlord but in the context of the definition revenue may be held to refer to all income from land other than rent and not falling under clause (b) See *eg*, *Raja Rajendra Narayan Deo v Commissioner of Income tax* 9 Pat. 1 (F B) in which certain illegal nazars received by a landlord were held to be revenue See also *Jhalak Prasad v Bihar*, 1941 ITR 386 (under the Bihar Agricultural Income tax Act)

A jagirdar who receives an assignment of revenue from lands whatever the tenure—is clearly in receipt of agricultural income The Income tax Manual also makes this clear On the other hand a fixed *malkhana* in lieu of an extinguished right to income is not rent or revenue from land even though the *malkhana* may have been originally fixed at a percentage of the revenue *Raja Mustafa Ali Khan v Commissioner of Income tax*, U P, 1945 ITR. 981 (Oudh)

Rent or Revenue—What may be included in—It was decided by the Calcutta High Court in *Maharaja Birendra Kishore Manukya Bahadur v Secretary of State for India in Council*, 1 ITC 67 48 Cal 766, that (1) the premium paid for the settlement of waste lands or abandoned holdings may reasonably be regarded as 'rent or revenue' derived from land within the meaning of clause (a) since the premium represented the capitalised value of a portion of the rent and (2) illegal cesses exacted by landlords are not agricultural income and therefore not rent or revenue The same ruling also decided that premium paid for recognition of a transfer of holding from one tenant to another was not rent and therefore not agricultural income' but the same High Court took a contrary view in a later Full Bench decision—*Nowabzadi Meher Khanum and others v Secretary of State*, 2 ITC 99, 53 Cal 34 and thus Full Bench ruling was followed in *Maharajadhiraj of Darbhanga v Commissioner of Income-tax*, 3 ITC 158, 7 Pat 550 by a Divisional Bench of the Patna High Court A later Full Bench of the Patna High Court decided that mutation etc., fees, whether legal or not, are agricultural income in so far as they arise from the land, *Raja Rajendra Narayan Deo v Commissioner of Income tax*, 9 Pat 1 (F B) This was followed in *Commissioner of Income tax Madras v Manavikroman Raja*, 1945 ITR. 174

The following are not agricultural income (1) Income derived from the use of land for storing purchases of crops by merchants *King Emperor v Probhat Chandra Barua*, 31 CWN 1047 A.I.R 1927 Cal 793, (2) *Nazar* paid by tenants at the beginning of the Zemindari year known as *punjaha nazar*—a voluntary payment paid on an auspicious day (31 CWN 1047, *supra*) (the Full Bench ruling in *Meher Bano Khanum's case*, 2 ITC 99, 53 Cal 34, was distinguished on the ground that fees paid for the recognition of transfer of holdings were virtually commuted payments of rent), (3) *Nazar* paid for the recognition of succession, inheritance, etc. not in connection with the land or tenure held by the tenant, *Emperor v Probhat Chandra Barua*, 106 IC. 353 (4) Rent of site of a flour mill, *Conville v Commissioner of Income tax*, 1936 Lah. 895, 1936 ITR. 137, (5) *Lambardari* fees, *i.e.*, remuneration for collection of land revenue (*Conville's case*, *supra*) (6) commission received by a landlord from tenants for selling the latter's produce, *Conville v Commissioner of Income tax*, Punjab, *supra*, (7) *Zar-i-Chaharun*, received when a house is sold, (8) *Nazrana* received when a house is built *Kunwar Bishwanath Singh v Commissioner of Income tax*, U P, 1942 ITR. 322.

The soundness of the distinction drawn above in regard to *Punyaha Nazars* was doubted by the Patna High Court in the case of *Raja Rajendra Narayan Deo*, cited above—see per Wort, J. The fact that the *Nazars* in *Meher Bano Khanum's* case were considered to be in effect capitalised rent did not make other illegal *Nazars* cease to be *revenue*; and 'Revenue' is a wider term than 'Rent'.

In a certain locality where rent is paid in kind, the produce is weighed by a separate agency called *Dharvais*. A landlord, instead of allowing the tenants to have the weighing made by their *Dharvais*, insisted, as part of the agreement regulating the rent, on the weighing being made by a man of his own, whom he selected by auction, the man so selected being given the sole right to do the work and receive certain fixed rates of fees from the tenants. The question arose whether the premium received by the landlord from the sole weigher (minus certain expenses) was agricultural income and was answered in the affirmative *Probynabad Stud Farm v Commissioner of Income tax Punjab* A.I.R. 1936 Lah 602, (1936) I.T.R. 114.

A subsidy in aid of cultivation of land will presumably be part of the revenue from the land, and be therefore agricultural if the land otherwise satisfies the conditions laid down in the definition in this sub section, but the subsidy can be of a capital nature i.e. for ploughing up new or abandoned land. Cf *Higgs v Wrightson*, 1944 K.B.D. (?)

As to whether premiums paid for a lease generally are income or capital, see notes under section 3.

Rent—Interest on arrears of—Interest on arrears of rent of land used for agricultural purposes is ordinarily part of the rent derived from the land and is therefore not liable to income tax. If, however, the arrears are secured by a bond and are therefore recoverable by a civil suit, such interest is taxable (*vide* Income tax Manual). This view was confirmed by the Madras High Court in *Commissioner of Income tax v Zemindar of Kirlampudi*, 55 M. 830, 63 M.L.J. 20, A.I.R. 1932 Mad 436. The point is that the bond converts the liability for rent into a loan.

In *In re Radhika Mohan Roy Ward's Estate*, 1940 I.T.R. 460 (Cal.) it was held that interest on arrears of rent regulated by the Bengal Tenancy Act is not a part of the rent. Rent is paid for the use of land and interest for the use of money *viz.*, the rent payable, also the former arises out of a contract and the latter out of a statutory penalty. Therefore the interest was not agricultural income. This view was followed in the Madras case of *Pethaperumal v Commissioner of Income tax*, 1942 I.T.R. 532 and in the Calcutta case of *D. P. Garga v Commissioner of Income-tax*, 1942 I.T.R. 546. Where, however, a lessee in consideration of the right to collect produce rents from tenants pays an annual sum to the landlord, that sum is 'rent', and the interest on arrears of such rent payable under the lease is part of such rent and therefore agricultural income. *Sri Ramachandra Deo v Commissioner of Income tax, B & O*, 1942 I.T.R. 141.

In *Shrimati Lakshmi Daji v Commissioner of Income tax*, 1944 I.T.R. 309 the Patna High Court reviewed all the authorities and definitely dissented from the decision in *In re Radhika Mohan Roy's Estate*. 'Interest' is only a relative idea involving the existence of a principal, and the source of the two cannot be different any more than that leaves and flowers spring from different sources. If the principal is agricultural income, it follows that interest also is such, a default cannot be a source of income.

The decision in *Ramachandra Deo's case* assumed that interest on arrears of rent is not rent and did not canvass the question. Following *Lakshmi Day's case* the same High Court held in *Zamuddin Hussan Mirza v Commissioner of Income tax*, 1944 I T R. 428, that even assuming that such interest was taxable a bond in place of the interest due is not the equivalent of income and therefore not taxable not being cash or moneys worth but merely a security for debt. See also *Bihar v Dalip Naran Singh* 1945 I T R. 37, a case under the Bihar Agricultural Income tax Act.

Business and agriculture—The fact that income is held in a given case to arise from a 'business' as defined in sections 2 (4) and 10 would not by it self negative its being 'agricultural income' as defined in this clause if it otherwise falls under it. *Commissioner of Income tax Madras v Mathias*, (1939) I T R. 48 (P C). There is no inherent contradiction between 'agriculture' and business. See also *Commissioner of Income tax B & O v Sir Kameshwar Singh*, 1935 I T R. 305 14 Pat 623 (P C).

Mixed occupations—Where land which is partly agricultural and partly non agricultural is leased for a lump rent it is open to the Revenue to dissect the lump rent and tax the non-agricultural part thereof. See also per Fazl Ali, J. 'the rent ought not to be taxed when it is shown that at the time of the lease, it was fixed on the basis of the agricultural income only and that the non agricultural income was not taken into account'. *Rani Bhubaneswari v Commissioner of Income tax, B & O*, 1940 I T R. 551.

There is nothing to prevent a person from practising more than one trade or having more than one source of income, *Egyptian Hotels Ltd v Mitchell*, (1915) A.C. 1022 6 Tax Cases 542. *Commissioners of Inland Revenue v Ransom* 12 Tax Cases 21 (1918) 2 K B 709. *Commissioners of Inland Revenue v Maxse*, 12 Tax Cases 41 (1919) 1 K B 647 (C.A.), and one of such businesses might be agricultural. Thus a Tea Company may not only cultivate and raise tea but manufacture it into a state fit for the market by applying processes not applied by the ordinary cultivator. Similarly a sugar refinery may not only have its own sugar plantations but also buy cane as well as crude sugar from other persons and with the assistance of the up-to-date machinery on a large scale prepare refined sugar. In the case of the *Bhikanpur Sugar Concern* 53 I C 301 A I R. 1919 Pat. 377, 1 I T C 29, the Patna High Court (Dawson Miller C J) said—

"The truth is in my opinion that the concern was really acting in a dual capacity. In so far as they were cultivators of sugarcane their operations ceased when they handed over the raw material to their factory branch. In so far as they were manufacturers of refined sugar, they were carrying on a business which required the adoption of manufacturing processes not ordinarily used by cultivators before disposing of their produce in the market."

In the *Killing Valley Tea Company's case*, 48 Cal 161, A I R 1921 Cal 40, 1 I T C. 54 the Calcutta High Court found as below—

"The earlier part of the operation when the tea bush is planted and the young green leaf is selected and plucked may well be deemed to be agriculture. But the later part of the process (i.e., the processes in an up-to-date large scale Tea Factory) is really manufacture of tea, and cannot, without violence to language, be described as agriculture." Both these rulings were given before Rules 23 and 24 were framed.

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of course without any ingenuity one could multiply cases by the score. Supposing a man conducted a milk business it really comes to the limits of absurdity to suppose that he would not be allowed to charge for the keep of one of his cows because at a particular time of the year, towards the end of the year of assessment, that cow was not in milk and therefore the profit which he was going to get from the cow would be outside the year of assessment. The real point is what are the profits and gains of the business? Now, it is quite true that in arriving at the profits or gains of business you are not entitled, simply because—for what are likely quite prudent reasons—you either consolidate your business by not paying the profits away or enter into new speculations or increase your plant and so on—you are not entitled on that account to say that what was a profit is a profit no more. The most obvious illustration of that is a sum carried to a reserve fund. It would be a perfectly prudent thing to do, but none the less if that sum is carried to a reserve fund out of profit it is still profit and on that income tax must be paid. But when you come to think of the expense in this particular case that is incurred for instance in the weeding which is necessary in order that a particular tree should bear rubber how can it possibly be said that that is not a necessary expense for the rearing of the tree from which alone the profit eventually comes? And the Crown will not really be prejudiced by this because when the tree comes to bear the whole produce will go to the credit side of the profit and loss account.

—*Vallambrosa Rubber Co. Ltd v Farmer* 5 Tax Cases 529 535 47 Sc L R 488

As to how far income from rubber is agricultural see below

The above ruling however will not justify the cost of additional planting to be treated as revenue expenditure only true revenue expenditure e.g. weeding and manuring and pruning or watering can be deducted from taxable income irrespective of whether particular bushes or trees yield taxable income in a particular year. It stands to reason that if expenditure on maintenance on particular blocks of trees or bushes is allowed as revenue expenditure receipts arising during the year from the corresponding bushes or trees should be included in the taxable income. Instructions on the above lines are to be found in the Income-tax Manual.

Rubber—Income from rubber cultivation will be treated as agricultural income to the extent that the methods adopted in preparing the raw material for the market are those ordinarily employed by a cultivator. The legal position is that it is a question of fact how much of the income is agricultural (and therefore exempt from Income tax) and how much not. In the absence of a rule specifying a percentage or profits to be taxed as in the case of tea the profits should be worked out in each case in accordance with Rule 23.

Salt Pans—In *Commissioner of Income tax v Lingareddi* 50 Mad. 763, 2 I T C. 363 the Madras High Court held that the process of flooding land by letting in sea water and then extracting sodium chloride by the elimination of other constituents is not an agricultural purpose.

rights—In the United Kingdom the value of sporting rights is 11 under Schedules A and B but it seems fairly clear that it includes the leasing of sporting rights. The charge under these two schedules is not on agricultural

fall under clause (b) of the definition but it might arguably fall under clause (a) as 'revenue'

Hore breeding—In the United Kingdom fees derived from a stallion kept on a farm by serving *outside* mares were considered to be separate source of income from the farm, *Malcolm v Lockhart*, 7 Tax Cases 99 (H.L.) See also *McLaughlin v Mrs Blanche Bailey*, 7 Tax Cases 508 and *IVernher v Commissioner of Inland Revenue*, 1942 11 R 165 (Sup). While in these cases the land was occupied as an ordinary farm and the use of the stallion was outside the purposes of the occupation the position in *Lord Glaneley v Wightman*, 49 T.L.R. 356 12 ATC 209 (H.L.), was that the land was occupied as a stud farm and the stallion incidentally served outside mares also which were sent to the farm. It was held accordingly that the fees for serving outside mares need not be assessed as a separate source of income. The Irish case of *McLaughlin v Mrs Blanche Bailey*, 7 Tax Cases 508, was incidentally overruled, as having extended the principle of *Malcolm v Lockhart* too far.

In another case, *Earl of Derby v Bassom*, 5 ATC 260 42 T.L.R. 380 (H.L.), the assessee owned a racing establishment and a breeding stud at which he raised and trained a number of mares. He also bred several stallions which were first tested in the race course and then sent to the stud where they served the assessee's mares and were also let out to serve other mares. In order to prevent interbreeding the assessee also sometimes hired other stallions to serve his mares. The Commissioners found that the letting out of the stallions was a separate business and chargeable as a "Trade". Held, that there was evidence on which the Commissioners could arrive at the finding. In this case the assessee paid tax under Schedule B for the lands occupied by the stud. It has also been held that whether profits from racing and horsebreeding are sufficiently closely connected with the occupation of land is a question of fact, being one of degree and of evidence, *Dawson v Counsel* 16 ATC 148 (K.B.).

It has been held in construing a United Kingdom statute which defined an "agricultural society" as "any society or institute established for the purpose of promoting the interests of agriculture, horticulture, livestock breeding or forestry" that "live stock" need not be restricted to animals whose use is an integral part of agriculture, horticulture or forestry and that it can include foxhounds, *Peterborough Royal Foxhound Society v Commissioners of Inland Revenue*, 20 Tax Cases 249, (1936) 2 K.B. 497.

Poultry farming—A poultry farm occupied 33 acres of land on which poultry were raised and a few sheep grazed. Most of the food for the poultry was brought from outside. Only half an acre of the land was cultivated for green food for winter feeding. The farm buildings served as incubating rooms and for storing food. Held, that having regard to the facts in this case the poultry farming was "husbandry".

Per the Lord President—"I think it may be extracted from (the previous decisions) that lands are properly said to be occupied for 'husbandry' if the trade or business carried on by the occupier depends to a material extent on the industrial or commercial use of the fruits (natural or artificial) of the lands so occupied. I say 'to a material extent' because it is notorious that there are many agricultural farms in this country which depend to a large extent upon imported foodstuffs which are not and could not be produced on the lands of such farms."

Per Lord Cullen—"The case is not one of a space having the character of a mere poultry yard used for housing and for artificial feeding and affording exercise to poultry but is one where the poultry derives sustenance to a material extent from the produce of the ground," *Lean and Dickson v Ball*, 5 A.T.C. 7, 10 Tax Cases 341

A poultry farmer occupied three acres of grass land on which he raised the poultry and grazed a couple of cows in summer and four sheep in winter. No part of the land was cultivated and the entire food for the poultry was brought from outside. It was argued by the Crown that the profits from the sale of the poultry and eggs were derived from a trade or business. *Held* by Rowlatt, J., following the above ruling, that the grass land on which the poultry were kept was used for husbandry.

'It seems to me that he is using the land as land. The stock is not all kept in the same place in a yard and the mess cleared away, he moves them from place to place, they live to some extent upon the herbage and upon insects and other produce of the soil. He moves them about, the herbage springs up and the cow comes and eats it and so he works this little bit of land.' *Jones v Nuttall*, 5 A.T.C. 229, 10 Tax Cases 346, 42 T.L.R. 384

It is a question of fact, i.e., one of degree and of evidence, whether profits from poultry farming are sufficiently closely connected with land, *Long v Belfield Poultry Products, Ltd and Thoruber Bros, Ltd v McInnes*, 16 A.T.C. 277 (K.B.). See also *Lowe and Sons v Commissioners of Inland Revenue*, Sc. 21 Tax Cases 597.

Processes applied ordinarily by cultivators—The test is whether the process employed to render the produce fit to be taken to the market is a process ordinarily employed by a cultivator or receiver of rent-in-kind. This is essentially a question of fact, *Commissioner of Income-tax, Madras v Katraguda Madhusudhana Rao*, 1944 I.T.R. 1 depending, it would seem, on the locality, the crop, the magnitude of the holding, the organisation adopted, etc. Thus the husking of paddy is an agricultural operation, so is the preparation of *gur* or brown sugar, but not sugar refining or the milling of paddy. (See *In re Bhikanpur Sugar Concern*, 1 I.T.C. 29, already cited.) It has been held that drying and curing coffee, after picking the beans, are not manufacture but only processes ordinarily employed by the cultivator to render the produce fit to be taken to market, *Commissioner of Income-tax, Madras v Mathias*, A.I.R. 1937 Mad 745, (1937) 2 M.L.J. 310, (1937) I.T.R. 435. Similarly the cultivation and plucking of the tea plant is an agricultural operation but the manufacture of the leaves into a state fit for consumption, with the aid of up-to-date appliances on a large scale is not such an operation. (See *In re Killing Valley Tea Company*, 1 I.T.C. 54, 48 Cal 161, A.I.R. 1921 Cal 40 already cited.) In the same way the growing of cotton is an agricultural operation but not its ginning, *Sheolal Ramlal v. Commissioner of Income-tax (C.P.)*, A.I.R. 1932 Nag 61.

The word 'cultivator' means the person who 'cultivates', i.e., applies the process of agriculture. He need not cultivate with his own hands, but may hire others to do so, and the expression includes a firm or company. (See *Killing Valley Company* and *Bhikanpur* cases cited above.)

It is clear from the definition that an agricultural process does not necessarily stop short at the removal of the plant from the soil. To test whether a particular process applied to the produce is agricultural, it should be seen whether it would be ordinarily employed by a cultivator or receiver,

of rent in kind to render the produce fit for the market. The "market" implies a real centre of economic exchange. *Held*, accordingly in a case in which there was no market except a jail which sometimes purchased raw aloes and no standard of comparison of processes ordinarily employed by cultivators and the assessee cultivated aloe plants and prepared with the help of machinery the fibre which he sold, that the entire process including the preparation of the fibre was agricultural, *J M Casey v Commissioner of Income tax, Bihar and Orissa* A I R. 1930 Pat 44, 9 Pat 185

Buildings—Agricultural buildings are exempt from taxation only if (1) they are on or in the immediate vicinity of the land, (2) the receiver of rent or revenue or the cultivator, etc., requires as a dwelling house store house or other out buildings and (3) so requires it because of his connection with the land. All these three conditions should be satisfied. The exemption of the building is on the notional income and not on the actual income, because unless the owner occupies the building there can be no exemption, and if he occupies it, the income must be notional, *Raja Rajendra Narayan Deo v Commissioner of Income tax*, 9 Pat 1, 4 ITC 15. This point however is not material since the income would be included neither in taxable income nor in total income.

Immediate Vicinity—There are no decisions as to what constitutes "immediate vicinity." Zemindar's dwelling houses and kacheries have in practice been exempted, and the question of what constitutes "immediate vicinity" is one of fact, and it is not open to the assessee to claim a building to be a dwelling house, etc., without regard to facts. *Raja Rajendra Narayan Deo v Commissioner of Income tax*, 9 Pat. 1, 4 ITC 15.

Connection with land—In *Maharajadhiraj of Darbhanga v Commissioner of Income tax*, 7 Pat 550, 3 ITC 158, the Patna High Court ruled that a guest house which was really part of the landlord's dwelling house but built separately owing to custom was not taxable, the dwelling house itself being exempt from tax. In a later case, *Raja Rajendra Narayan Deo v Commissioner of Income tax, Bihar and Orissa* 9 Pat 1, 4 ITC 15, in which this view was reaffirmed, it was argued by the Commissioner that "requires" means "needs" and that the words "by reason of his connection with the land" mean "for the purpose of agriculture"—in the particular case that of collecting rent or revenue. It was held that the word "requires" means that the assessee demands to appropriate the building for the purpose of a dwelling house, etc. The words "by reason of" land "merely explain the nature of the class of persons entitled to exemption. The verb 'requires' is separated by a comma from the grammatical subject and the phrase "by reason of" land," but the words "by reason of" land "are not separated by a comma or otherwise from the words 'the receiver of the rent'. The phrase "by reason of" has therefore a qualitative and not a quantitative significance. One cannot add the words "for agricultural purposes" to the statute so as to say that unless the building is required for such purposes its value is not exempt.

It might be open to the Department to hold that a particular building because of its size or situation is not a building which the receiver of rent or revenue requires by reason of his connection with the land as a dwelling house, and in that case the entire value of the building could be taxed but once you admit that the building is required you cannot allocate it between agricultural and non agricultural purposes. *Raja Rajendra Narayan Deo v Commissioner of Income tax, Bihar and Orissa*, 9 Pat 1, 4 ITC 15.

Questions of law and fact—Whether a particular income is agricultural or not is essentially a question of fact, *Kokine Dairy v Commissioner of Income tax, Burma*, (1938) I T R. 145

(2) "assessee" means a person by whom income tax is payable,

Assessee—Income tax can become payable only after the liability to pay has been determined by the Income tax Officer under section 23 or other appropriate section. Before such assessment the person it can be said is not an assessee. The fact that the Income tax Officer had wrongly determined the liability would however not make the person any the less an 'assessee'. See section 30. Every person as defined in section 2 (9) and General Clauses Act section 3 (39) can be an assessee. Under the latter person includes any company or association or body of individuals whether incorporated or not.

In some sections e.g. section 24 section 64 the word has not been used in the above sense but in that of the person to be assessed which is its etymological meaning. Even in sections 7 to 16 the word is not used in the sense of the definition but in that of its ordinary meaning. It is only after computing a person's income that his liability to tax can be determined.

In *Gowind Saran v Commissioner of Income tax*, A I R. 1927 Oudh 465 2 I T C 480 the Chief Court of Lucknow suggested that if the representative of a deceased person's estate was an assessee for the purpose of liability to pay he was also an assessee for the purpose of claiming a refund. In *Commissioner of Income tax v Ellis Reid* 55 Bom 312 A I R 1931 Bom 333 5 I T C 100 the Bombay High Court held that this definition in terms applied only to a living person. These rulings however have ceased to be of interest after the addition of section 24-B regarding the assessment of estates of deceased persons and section 49 F (formerly 49 B) regarding the grant of refund of tax to such estates.

Income tax includes super tax. See section 55, which defines super tax as an additional duty of income-tax and also section 58 which lays down which sections of the Act do not apply to super tax.

The word 'assessment' is used in the Act sometimes in the sense of determining the amount of profit or loss sometimes in that of determining or levying tax and sometimes with reference to the whole procedure for imposing liability and where there is nothing repugnant in the context it would seem to refer to the first, *Commissioner of Income tax Madras v P R A L M Muthukaruppa Chettiar* (1939) I T R 29 *Belaridai Chatterjee v Commissioner of Income tax*, (1934) I T R 377 (All). *Kunwar Bishwanath Singh v Commissioner of Income tax, UP* 1942 I T R. 322 (All).

There are really three stages in the levy and collection of tax, viz. the declaration of liability by a statute, the quantification of that liability by an assessment and the collection of the tax. See *Whitney v Commissioners of Inland Revenue* 1926 A.C. 37 10 Tax Cas. 88.

History—In the 1886 Act there was no definition of assessee. In the 1918 Act the definition of assessee was a person by whom income tax is payable and includes a firm and a Hindu undivided family. In 1922 the Select Committee considered that the proper place to lay down liability etc. was the charging section (section 3) and dropped the latter part of the 1918 definition.

Liability to tax of different kinds of assesseees—As regards the liability to tax, see sections 3 and 55—the charging sections for Income tax and Super tax respectively. Under section 3 income tax is payable by every individual Hindu undivided family company firm and other association of persons.

Firms—Partners of—As to how far a firm is a separate assessee from its partners, see the remarks of Schwabe C.J. in *Commissioner of Income tax v M. Ar. Arunachalam Chetti* 47 Mad 660 AIR 1924 Mad. 474 1 ITC 278 in which he discussed the position of partners of firms with reference to claims to set off under section 24 also other connected rulings referred to under that section. The scheme of the Act as amended in 1939 seeks to tax partners of registered firms and not the firms as such except as a step in the process and to tax only unregistered firms as firms. See however section 23 (5) and section 2 (6-B).

With reference to the Madras Agricultural Debt Relief Act it has been held that a partner is assessed to income tax when his firm is so assessed. *Somappa v Venkatrama Chetti* 1941 ITR 289.

(3) "Appellate Assistant Commissioner" means a person appointed to be an Appellate Assistant Commissioner of Income tax under section 5,

The word Appellate was inserted in 1939. Formerly there was only one class of Assistant Commissioners who discharged both appellate and inspecting functions. The two functions have been separated since 1st April 1939.

See notes under section 5 as to how these Assistant Commissioners are appointed their duties and powers under the Act etc.

(4) "business" includes any trade, commerce, or manufacture or any adventure or concern in the nature of trade commerce or manufacture,

History—The definition of business was first introduced in the Act of 1918. In the Act of 1886 incomes from this head fell under Part III—profits of Joint Stock Companies or Part IV—other income as the case may be.

Business—The definition of business in the Indian law is perhaps slightly wider than the corresponding definition of trade in the English law in which the word business has not been used. Trade has been defined in the English Income tax Act 1918 as including every trade manufacture adventure or concern in the nature of trade.

Includes—Under the Excess Profits Duty Act the definition of business was identical with the definition in the present Income-tax Act and it was argued on behalf of the Crown in the *Royal Calcutta Turf Club v Secretary of State* that the definition was not exhaustive but the point was not decided. Attention was drawn to other definitions in the Act in which the word means was used when an exhaustive definition was contemplated. See also *Commissioner of Income tax Bombay v National Mutual Association of Australasia* 57 Bom 519 AIR 1933 Bom 42 1933 ITR 351 where also it was observed that the definition is not exhaustive.

Business has a more extensive meaning than the word trade. *Harris v Amery* 35 LJCP 92 LR 1 CP 148 but ordinarily speaking

'business' is synonymous with 'trade', *Delany v Delany*, 15 L.R.IV 67 In *Smith v Anderson*, 50 L.J Ch 43, 15 Ch D 258, Jessel, M.R., after citing definitions of 'business' from several dictionaries said "anything which occupies the time and attention and labour of a man for the purpose of profit is business." Further on he remarks —

"There are many things which in common colloquial English would not be called a business when carried on by a single person, which would be so called when carried on by a number of persons. For instance a man, who is the owner of a house divided into several floors, if used for commercial purposes, *e.g.*, offices, would not be said to carry on a business because he let the offices as such. But suppose a company was formed for the purpose of buying a building or leasing a house to be divided into offices and to be let out—should we not say if that was the object of the company that the company was carrying on business for the purpose of letting offices? The same observation may be made as regards a single individual buying or selling land with this addition that he may make it a business and then it is a question of continuity. When you come to an association or company formed for a purpose, you will say at once that it is a business because there you have that from which you would infer continuity. So in the ordinary case of investments a man who has money to invest, the object being to obtain his income, invests his money and he may occasionally sell the investments and buy others but he is not carrying on a business" (Stroud)

(This portion of the decision was not affected though it was reversed on appeal, but the decision was with reference to the English Companies Act and not for income-tax purposes.) But there may be a business without pecuniary profit being at all contemplated. In this sense 'business' is a much larger word than trade, *Rolls v Muller*, 53 L.J Ch. 101. The keeping of a lodging house, for instance, would be a business. A covenant not to permit the carrying on of any 'trade' or 'business' was held to be broken by allowing the premises to be used as an out patient's branch of a hospital, *Bramwell v Lacy*, 10 Ch.D 591. In interpreting a restrictive covenant it was held that a Boy's School constituted 'business', *Kemp v Sober*, 20 L.J Ch 602. These rulings however scarcely affect Income tax Law which is concerned only with such 'business' as yields profits. It has been held that a Council of Law Reporting, for instance, carried on if not 'trade' certainly 'business', 58 L.J Q B 90. On the other hand there may be a sequence of acts from which profit is anticipated without a 'business' being constituted. Thus, where a Barrister occupying a house and 79 acres of land as a private residence, which he had originally taken for pleasure, used some of the land for breeding cattle and horses and raising vegetables, fruits and flowers which he sold and he also occasionally bought and sold cattle and horses it was held on the evidence that he did not carry on 'business', *Re Wallis*. Ex parte *Sully*, 14 Q B D 950. (This decision, however, was given under the Bankruptcy Act.) But there may be a business without any sequence of acts for 'if an isolated transaction, which if repeated would be a transaction in a business, is proved to have been undertaken with the intent that it should be the part of several transactions in the carrying on of a business then it is a first transaction in an existing business', *Re Giffin*, 60 L.J Q B 235. (This again was under the Bankruptcy Act.) In *In Re Kaladan Suratee Bazar*, 58 I C 914, 1 I T C 50 a case under the Excess Profits Duty Act, the Rangoon Chief Court held that

where a registered limited company owned house property consisting of stalls and tenements let out for rents and distributed the rents collected as dividends to its shareholders it was not carrying on a business (defined exactly as in the present definition)

Though where in fact there is business *e.g.* systematic and organised purchases and sales or manufacture the question of motive or desire to make profit is not relevant and the business is liable to tax if in fact it makes a profit (*Commissioners of Inland Revenue v Incorporated Council of Law Reporting* 3 Tax Cas 105 *Royal Agricultural Society v Wilson* 9 Tax Cas 62), an important and often conclusive criterion in doubtful cases as to whether or not particular operations or transactions constitute a business is very often the motive to make a profit

An important point to be remembered in distinguishing business for income-tax purposes from business for other purposes *e.g.* under the Partnership or Bankruptcy Acts is that under the Income tax Act business does not include a profession a partnership is possible between two or more professional persons but such a partnership would not be treated as a business under the Income tax Act Business under the Indian Partnership Act includes every trade occupation and profession

According to the Madras High Court *Commissioner of Income tax v Bosotto Bros.*, 1940 I T R. 41 the word business denotes something abstract and intangible apart from physical adjuncts and also apart from goodwill reputation and connections

Trade — Trade in its largest sense is the business of selling with a view to profit goods which the trader has either manufactured or himself purchased—Per Lord Davey in *Granger v Gough* (1896) A C 345 3 Tax Cases 462.

Buying in itself does not constitute a trade Unless the selling also is taken into account there are no profits—See per Lord Watson *ibid*

I do not think there is any principle of law which lays down what carrying on trade is There are a multitude of things which together make up the carrying on of a trade but I know of no one distinguishing incident which makes a practice a carrying on of trade and another practice not a carrying on a trade. If I may use the expression it is a compound fact made up of a variety of incidents —Per Jessel, M.R. in *Erichsen v Last* 4 Tax Cases 422 8 Q B D 414

When a person habitually does and contracts to do a thing capable of producing profit and for the purpose of producing profit he carries on a trade or business —Per Cotton L.J. quoted with approval by Esher M.R. in *Werle v Colquhoun* 2 Tax Cases 402 20 Q B D 753

It is not possible to lay down definite lines to mark out what is a business or trade or adventure and to define the distinctive characteristics of each nor is it necessary or wise to do so The facts in each case may be very different and it is the facts that establish the nature of the enterprise embarked upon—Per the M.R. Pollock M.R. in *Martin v Lowry* 5 A T C 11 11 Tax Cases 297

Taking into account the ordinary occupation of the appellant the subject matter of his purchase and sale the method adopted for disposal the number of operations and the period occupied there is ample evidence to support the findings of the Commissioners that the appellant carried on a trade.—Per Atkin L.J., *ibid*.

A series of retail purchases followed by one bulk sale or a single bulk purchase followed by a series of retail sales may well constitute a trade—*Per Sargant LJ, ibid*

It is possible that, while each independent transaction may not by itself constitute a trade, i.e., other persons sharing in the profits will not be liable to tax on the ground that the profits to them were casual, the transactions taken together may constitute a trade by the person common to all the transactions. Thus a person, who bought, liquidated and reconstructed a number of companies, the persons working with him and sharing the profits being different in each transaction, was held to carry on a trade, though the other persons were not so held, *Pickford v Quirke*, 44 TLR 15, 13 Tax Cases 251 (CA). See *Louvy v Field*, 20 Tax Cases 679 and also other decisions set out under section 3 (capital receipts) and section 4 (3) (vi) (casual profits)

In determining whether a case is one of trade or of investment, all the relevant facts have to be considered, e.g., the nature of the assets bought and sold, the circumstances of purchase and sale, the duration of ownership of the assets, the vocation of the tax payer, the number of transactions of purchase and sale, if the assessee is a company, its memorandum and articles, etc. In other words, the existence—or not—of business (or trade) is primarily a question of fact. The question of law that usually arises is therefore whether there is evidence for the finding of fact, *Thakor Datt Sharma, etc v Commissioner of Income tax, Punjab*, (1939) ITR 154

Obviously no man can trade with himself and it follows therefore that several persons whose interest in a transaction are identical cannot be held to 'trade' among themselves, e.g., members of mutual societies, etc., in respect of transactions among themselves, *Dublin Corporation v McAdam*, 2 Tax Cases 387 L.R. Ir 20 Ex Div 497. The definition in section 2 (6-C) of the Indian Act which seeks to tax mutual insurance associations and section 10 (6) which similarly seeks to tax profits on services rendered by trade, etc., associations are exceptions to this general principle.

'Commerce' is 'traffic trade or merchandise in buying and selling of goods' (Stroud)

'Manufacture'—No mere philosophical or abstract principle can answer to the word 'manufacture'. Something of a corporal and substantial nature, something that can be made by man from the matters subject to his art and skill or at the least some new mode of employing practically his art and skill is required to satisfy the word, *Vf Gibson v Brand*, 4 M & G 199, 11 LJCP 177 (Stroud)

'To work up (material) into forms suitable for use'—(Murray's new English Dictionary) 'The operation of reducing raw materials into a form suitable for use by more or less complicated processes.'—(Annandale's Concise English Dictionary) 'To make from raw materials by any means into a form suitable for use'—(Chamber's Twentieth Century Dictionary)

Manufacture can be easily distinguished from Trade and Commerce, but it is difficult to distinguish *inter se* between the latter. But the distinction is of no consequence as the definition of 'business' includes both and there is no provision in this Act with reference to which it is necessary to distinguish between the two.

Continuity—While the words used in this definition are wide, underlying each of them is the fundamental idea of the continuous exercise of an

activity Taxable income must be profit earned by a process of production of income, *Commissioner of Income-tax, Bengal v Shaw Wallace & Co*, 63 MLJ 124, 5 ITC 211, 59 IA 206 (PC). Carrying on business can only exist where there is a succession of acts or a continuity of transactions or acts the performance of a single act apart from special circumstances is not enough even though it may result in gains or profits, *Commissioner of Income tax, Bombay v Currimbhoy Ebrahim & Sons Ltd*, (1933) ITR 341, 57 Bom 651 AIR 1933 Bom 422. See however notes on 'Isolated transactions' under section 4 (3) (vi).

"Adventure or concern in the nature of trade, commerce or manufacture"—These words are used to bring into the net transactions of a somewhat doubtful nature. The word 'adventure' connotes the idea of 'risk' however remote which almost every transaction made for profit bears. The word 'concern' implies a certain element of continuity and a certain degree of organisation though as will be seen from the rulings referred to later, repetition of transactions is not always necessary. The essential features in the nature of trade, commerce or manufacture are (1) an element of profit—involving buying and selling, (2) such profit ordinarily being the purpose of the transaction, and (3) a certain degree of continuity—actual or possible but all these features need not exist together. See notes under section 3 (distinction between Capital and Income) and under section 4 (3) (vi) (casual receipts not arising from a business). Mere investments in securities or shares, even if regularly made do not constitute business, *Forbes v Commissioner of Income tax, B and O*, 6 ITC 208.

The cases which have been before the Courts—and there have been many—fall broadly into four categories—

(1) Single transactions—See *Martin v Lowry*, 11 Tax Cases 297 (H.L.) and other cases under section 4 (3) (vi).

(2) Quiescent ownership—*Inland Revenue v South Behar Ranky*, 12 Tax Cases 657 and other cases referred to below.

(3) Winding up or realising assets including cases of executors and liquidators—See cases referred to below.

(4) Mutual concerns—See notes under section 3. It cannot be too often repeated that there is no clear formula as to what constitutes 'trade' or 'commerce' etc. and it is a question of fact in every case whether the activities constitute a 'business'.

"In the nature of Trade, etc."—In *Liverpool and London and Globe Insurance Company v Bennet*, (1913) AC 610, 6 Tax Cases 327 it was held that the words 'in the nature of trade' used in the definition qualified only 'concern' and not 'adventure' therefore the entire business of an Insurance Company was its 'adventure', though a part of its business was that of making investments as an ancillary to its main business. This question arose with reference to the question whether the company should be taxed in the United Kingdom on the whole of its profits wherever arising whether remitted to the United Kingdom or not.

Destination of profits—Not relevant—Whether an adventure or concern is a business or not is not affected by how its profits are ultimately disposed of, *Trustees of Psalms and Hymns v Whitwell*, 3 Tax Cases 7, *Religious Tract and Book Society v Forbes*, 3 Tax Cases 415. *Grove v Y M C A*, 4 Tax Cases 613, *Mersey Docks v Lucas*, 2 Tax Cases 25, 8 App Cas 891, *Governors of the Rotunda Hospital v Coman*, (1921) 1 A. C. 1, 7 Tax Cases 517.

Advances—In course of business.—A company in the course of a wool broking business, granted temporary advances on the security of second mortgages, or on wool and produce. The advances fluctuated in amount as the produce was realised. *Held*, that the interest from the advances was profits of a trade and not interest from investments even though some of them were secured by real property.

Per the Lord President—'The sort of trade in which they are engaged is partly the trade of a broker, and partly the trade of a banker not at all of the nature of investments of money. On the contrary, the advances are of the most irregular and fluctuating description; this is proper trading and nothing else and not investment of money upon securities (*Scottish Mortgage Company v McKelvie*, 2 Tax Cases 165 and *Smiles v Northern Investment Company*, 2 Tax Cases 177, distinguished), *Smiles v Australasian Mortgage and Agency Company, Limited* 2 Tax Cases 367.

House Property—Profits from.—A company invested its capital in house property and kept an office and a staff of collectors for the collection of rents and for letting out the property. *Held*, that it was not carrying on business. The *ratio decidendi* was that though it was an association for acquiring gain its method was passive by owning property and not active by carrying on business. *In re Kaladan Suratee Bazaar Co*, 1 ITC 50, a case under the Excess Profits Duty Act section 2, of which defined business' in exactly the same way as the present Income-tax Act. But see *Smith v Anderson*, 50 LJ Ch. 43. Under the Income-tax Act the profits in question would be taxable as income from 'property'—See notes under section 9.

Moneylender taking over properties.—In *RM P RM P Valluappan Chettiar v Commissioner of Income tax, Madras*, 1945 ITR 49, it was held that income abroad from properties and rubber estates taken over in the course of foreign money lending business is income from business. This decision given with reference to Excess Profits Tax applies to income-tax also. See also *A S P L V R Ramasami Chettiar v Commissioner of Income tax, Madras*, 1933 ITR 389 57 Mad 22 (income from house property abroad), *Ponnuswami Pillai v Ditto* (income from tea estate abroad) 3 ITC 378, *S N A S A Annamalai Chettiar v Ditto* 1944 ITR 254 (this did not overrule 1933 ITR 389 but merely decided that, after 1939, income from foreign house property is to be computed with reference to section 9 even if the income is from a business).

Inventor—Director—Company promoter.—Whether carrying on business.—An assessee had for many years been an inventor and had been granted nearly four hundred patents. Of these he had only sold one, and that was twenty five years before the period of assessment in question. He was managing director of a company which worked some of his patents and paid him a fixed salary and commission dependent on results, and he was also managing director of, and principal shareholder in, another company of which he was the promoter and which paid him royalties on non exclusive licences in respect of some of his patents granted by him to the company. He was also a director of several other manufacturing companies. *Held*, that he was not carrying on a trade or business (a case under the Excess Profits Duty Act).

Per Roxlatt, J—The (assessee) is managing director of a company that is not, nor is being a shareholder, carrying on a business

He is also an owner of royalties. That again is not carrying on business. But those are the whole sources of his income. It is true that he is adding to his royalties, and he is performing his duties of managing director of the company and it may be very advantageous that he has those positions—that he has that particular form of property, and is creating more but I do not think those matters can be added together and that it can be said, in what I cannot help describing as a loose way, "Look at the general position." I think the (assessee's) position must be dissected and what his income is really derived from must be ascertained. In my judgment it is derived from those three distinct sources, and he is not, in respect of each or all of them put together, deriving this royalty income from a business.

It is said if a person habitually invents, or habitually paints pictures or habitually writes books, with a view to gain from the patents when he has taken them out, the books which he has written and the pictures which he has painted, that is carrying on a business, and I feel a little difficulty about it. Very possibly if a person habitually paints a number of pictures year after year and sells them, it would be said that he was carrying on a business. He might be a professional man, but that is another matter. If he was writing books habitually year after year and carrying on a business I suppose he would be assessable under Schedule D in respect of it. If he was inventing patentable devices year after year and selling them and gaining an income, it would be difficult perhaps to say that he was not carrying on a business—I do not know whether that could be said—and if he kept on developing land and selling year after year he would be carrying on a business. On the other hand (Counsel for assessee) asks, 'Supposing he has land and keeps on building on it and never sells it at all but has rent from the houses that he builds, is he carrying on a business?' One cannot help feeling that the answer to that question must be 'No,' because he is merely investing his money in new property and keeping it, he is not dealing with it in any way.

Now the (assessee) does not sell his patents. He sold one twenty-five years ago, but it is quite clear that that is not the way in which he deals with the produce of his inventive ability. He simply keeps on inventing things and keeping the patent in his own hands, making what he can out of it by granting licences, just as a man builds a house and makes something out of it by letting it. Of course a painter cannot, as things are, do otherwise than sell his picture. An author is more like an inventor, because he can grant licences under royalties unless it can be shown that the property called into existence by the invention, or by the painting is sold so as to obtain a money return against it, no evidence is produced that the inventor or the artist is carrying on a business. If the artist or the inventor sells the product of his ability, in many cases inquiry would have to be made whether he does so habitually as to bring him within the category of persons who carry on a business, but if he does not sell at all I do not think there is any evidence in support of the contention that he carries on a business.

It is said, for the Crown, that by granting these licences the (assessee) is putting his patent on the market. So he is but so is the man who builds a house and lets it. It seems to me that carrying on a business involves, in a case like this, the disposal of the article which

is produced as opposed to retaining it as a valuable thing in itself which can be treated as an investment, just as anything bought with the money obtained for it if it had been sold could be treated as an investment. On those grounds I think that the (assessee) cannot be regarded as carrying on a business.

I think it better not to say anything upon the question whether if I had held he was carrying on a business, I should have held that his business was a profession. *Inland Revenue Commissioners v Sangster*, (1920) 1 KB 587, 12 Tax Cases 208.

When a business commences—The question when a trade commences is one of fact to be settled with reference to all the relevant evidence. Neither the date of registration of a company nor the date of a vending agreement is conclusive. *Todd v Jones* 15 Tax Cas 396. A coal company formed in 1906 started sinking pit shafts soon but there was little or no output of coal till 1912. The question arose with reference to Excess Profits Duty whether in 1914 the business had existed for more than three years, and the answer was given in the affirmative, *Cannop Coal Co v Commissioners of Inland Revenue*, 12 Tax Cas 31. A company was registered in June, 1913 but no plant or machinery was set up till October when production also began. Held that the business did not start before October. *Birmingham and District Cattle Byproducts v Commissioners of Inland Revenue*, 12 Tax Cas 92.

A company was formed in 1912 to take over an existing business. The company was unsuccessful and during 1913/1914 it got no new order, but merely completed the pending orders of the old business. In 1914, the Government took over the works of the company. In 1918, after the war, the company tried again to get contracts and failed. There was a new arrangement for finance in 1920 and new contracts were obtained. The Special Commissioners held that there was no business between 1914 and 1920 and that a new business began in 1920. The Courts held on the other hand that the business had continued all along and that in 1920 there was only an extension of the company's activities. *Kirk and Randal v Dunn*, 8 Tax Cas 663. See also cases referred to under sections 25 and 26 in connection with Discontinuance and 'Succession' where the question often arises whether a new business is set up or not.

Business—One or many—Fact—Whether a business is one or many is a question of fact, *Birt, Potter and Hughes v Commissioners of Inland Revenue*, 6 ATC 237, 12 Tax Cases 976. *South Indian Industrials, Ltd v Commissioner of Income tax*, Madras 1935 ITR 11 58 Mad 433, 8 ITC 128. On this may depend important issues e.g., the right of carry forward of losses under section 24 (2) whether particular profits arise from business or otherwise (very important when profits arise from isolated transactions of a speculative nature or from mere appreciation of capital) questions of succession and discontinuance, all of which are questions of fact. There is nothing (in the taxation acts) to prevent a person carrying on more than one business or exercising more than one profession, *Gloucester Railway Carriage Co v Commissioners of Inland Revenue*, (1925) A.C. 469, 12 Tax Cases 720. *Commissioners of Inland Revenue v Maxse (Magazine Editor and Owner)* 12 Tax Cas 41, *Ditto v Ransom* (growing herbs and manufacturing chemicals) 12 Tax Cas 21, *Egyptian Hotels v Michell*, 6 Tax Cas 452. See also the cases referred to under 'Mixed Occupations' under section 2 (1). Agricultural income, *supra*. As to the multiplicity of business being a question of fact, see

Gloucester Railway Carriage Co v Commissioners of Inland Revenue, (1925) A.C. 469, 12 Tax Cases 720, *Spiers & Son, Ltd v Ogden* 17 Tax Cases 117 Whether particular operations constitute a mere extension of an existing business or create a new and separate business is a question of fact Where a cinema company bought other cinemas and sold some of them, keeping separate accounts for each, it was held that there was more than one business *H and G Kinemas, Ltd v Cock*, 12 A.T.C. 300 18 Tax Cases 116

In *Farrell v Sunderland Steamship Company* 4 Tax Cases 605 it was held that the business of a whole ship which the company owned was a separate trade from that of another ship in which the company owned only a share. As already stated, however, such questions are primarily questions of fact See also *St Aubyn Estates v Strick*, 12 A.T.C. 31 17 Tax Cases 412

The question whether particular transactions constitute a business or not being one of fact, the Courts will not interfere with the findings of fact by the Income tax authorities or the Appellate Tribunal so long as there is evidence for the findings In *re R. H. Mody* 1940 I.T.R. 179 (Bom.) *Seth Mathra Prasad v Commissioner of Income tax Punjab*, 1941 I.T.R. 244 There is little doubt however that questions of law will arise as to whether the proof of certain facts is sufficient to indicate the existence of a business *Sri Hardeo Bengal Salt Co v Commissioner of Income tax B and O*, 1942 I.T.R. 13

Business—Question of fact—As to the extent to which the existence of a 'business' is a question of fact and how the Income tax Officers should give their findings, see per Justice Rowlatt in *Mellor v Commissioners of Inland Revenue*, 3 A.T.C. 659 quoted below

The question is whether the profits made by the financial operation in regard to these two mills and the stock was a profit of his stock broker's business Now, it does not appear that he is found to be a stock-dealer That is the first difficulty In paragraph 2 it is stated that he bought shares sometimes not knowing whether he would sell them again and not having an immediate purchaser for them, and that he sometimes resold them if he found a purchaser, and he kept them if he did not and so on It does not state whether he was doing that as a stock dealer or whether he was doing that as any person with a fancy for playing with investments might do It does not appear that he sold them as a stock broker to his clients or that he sold them in any market where he operated as a stock dealer It is quite vague It is only thrown in as a sort of argument it is thrown in argumentatively, and I do not find that there is any finding in this case that he really was a stock-dealer That question is not faced.

Then, further, I do not think there is any finding that these profits or gains were the profits or gains of the business assessed which is called stock broking One of the contentions set out is that the business ought to be dissected and these profits ought to be separated from the stock broker's business That is certainly an argument How is it dealt with? There are really only three findings in the case One is that it is not an isolated transaction the second is that it is not an investment and, third, that it is done for the purpose of gain.

"Now the Attorney General says that reading that with the form of the assessment and the contentions, the result is that the Com-

missioners have found that the profits were those of a stock broking business. But I do not think so. It seems to me that the tribunal in a case like this must be made to find the very fact in dispute, they must find that it is part of the stock broker's business.

'Now, if this gentleman had dealt in furniture or in pigs or in horses outside his business, all these questions would have been answered in precisely the same way. The argument would have been that it is not part of the stock broker's business and ought to be dissected. That argument is stated here. The Commissioners find that it is not an isolated transaction. That would be also true in the other case. They also find that it is done for the purpose of gain. That is also true. They also find that it is not an investment. That is also true. But that is all that is found in this case.

"It seems to me it would be very dangerous indeed to allow tribunals, whether they are Income tax Commissioners or juries or anybody else, not to face the real issue, but to find a person liable upon a series of conclusions upon matters of argument which throw light upon the question, and then, merely because they have found for one side, to say that they necessarily must have found all the things to which they ought to have addressed their minds, the question being whether they did do so or not.

I think the case must go back to the Commissioners to say whether or not in terms these profits were the profits of the stock broking business."

The question of what is the business of the company is apparently a pure question of fact and the matter is one which is for the revenue authorities and the revenue authorities alone"—Per Robinson CJ, in *Ahlone Land Company v Secretary of State for India*, 67 IC 633, AIR. 1922 LB 35 11 TC 167. See also *Currie v Inland Revenue Commissioners*, 12 Tax Cases 245 (CA), (1921) 2 KB 332 and *Cape Brandy Syndicate v Inland Revenue Commissioners*, 12 Tax Cases 358 (CA), (1921) 2 KB 403, which were followed in the above case and are referred to under sections 66 and 4 (3) (*vis*), *infra*.

An extreme exposition of this principle that the carrying on of a business is a question of fact was given in *Edwards v Old Bushmills Distillery Coy*, 10 Tax Cases 285 in which a company went into liquidation in August, 1920 and in order to sell the business as a going concern the liquidator continued distilling but on a reduced scale. The distillery was put up for sale in March, 1921 but was not sold as no purchasers offered. For the year ending 5th April, 1921 the liquidator, i.e. the company, was assessed to income-tax. The Special Commissioners upheld the assessment but the Recorder of Belfast cancelled it on the ground that the receipts were capital received in the course of winding up. For the year ending 5th April, 1922, the company was again assessed to income tax. The company appealed and the Special Commissioners cancelled the assessment as they felt bound by the decision of the Recorder. The Crown appealed and it was finally decided by the House of Lords (approving the decisions of the Court of Appeal and the KB Division for Northern Ireland) that the case should be sent back to the Commissioners to find on the facts, independently of the Recorder's decision for 1920-21, whether a business had been carried on in 1921-22. See also *Commissioners of Inland Revenue v Old Bushmills Distillery (in liquidation)*, 12 Tax Cases 1148.

Consulting Engineer—Fees—When treated as income from business—A skilled engineer acted both as consulting engineer and as an inventor. As a consulting engineer he advised his clients to instal new machinery the orders for which were placed through him. In supplying his clients with the machinery he charged them an inclusive price which covered three items, viz, (1) a merchant's profit to himself for getting the machinery, (2) an engineer's fee for his advice, and (3) he also arranged that machinery under his patents was to some extent provided. He claimed that deductions should be made on account of item (2) in assessing him to Excess Profits Duty on the ground that they were not profits from business. *Held* by the Court of Appeal that the assessee was not carrying on a profession but was carrying on a merchant's business in which he incidentally brought his professional skill to bear. *Commissioners of Inland Revenue v Marx*, 4 A T C 467.

See also the Excess Profits Duty cases referred to under section 10 as to the distinction between 'Business' and 'Profession'.

Executors—Carrying on business—Whether taxable—Executors may not trade as a general rule but they may do certain things which are, from other points of view, trading without offending against the prohibition that they may not trade, that is to say, they may trade to the extent of winding up the business they find left to them by the testator. *Per Rowlatt, J*, *The Executors of E. A. Cohen v Commissioners of Inland Revenue*, 12 Tax Cases 602, 131 L.T. 377. But it was held by the Court of Appeal on the particular facts of the case that there was no trade. *Per the M of R*—"It seems to me that the evidence shows that the executors only dealt with the business, only handled the business for the purpose of securing the proper advantage to the estate of the testator. Of course it is largely a question of degree as to whether or not a business is being carried on by the executors for their own purposes or not" (*ibid*).

This does not, however, mean that, if all that is done is merely to wind up in the best manner, there is no trade, that question has to be determined on the facts of each case. Three partners who traded in land promoted a company which built houses on land owned by the partnership, sold the houses and paid the partnership for the land. Two of the partners died, and their executors thought that in respect of certain land on which the company had already laid sewers and roads, the best method of realising the assets was to let the company construct the houses. There was no provision in the will permitting the executors to trade, and it was held on the facts that the executors did not trade, *Executors of Marshall and Hood, Rogers v Joly*, 20 Tax Cas 256, (1936) 1 All E.R. 851. On the other hand where a syndicate of four individuals dealt in land and one of them died and the executor allowed the transactions to continue, the Commissioners held on the evidence and particularly the frequency of the transactions that there was a trade and the Court declined to interfere, *Newbarns Syndicate v Hay*, 17 A.T.C. 308 (K.B.).

An individual sold his business to a private company on terms *inter alia*, that (1) all orders remaining unexecuted on the date of sale shall be executed by the company as agent for the vendor who would receive three fourths of the gross profits or commissions, and (2) the company shall collect on behalf of the vendor all the book or other debts in connection with the business reserved by the agreement for the vendor and excluded from the sale. The individual died sometime after and it was held that what the exe-

erator received from the company was income from a new business set up by the deceased through the company and not instalments of capital. *Southern v. Cohen's Executors* 23 Tax Cas. 566 (C.A.)

Liquidators—A liquidator is not like a trustee in bankruptcy; he is *cadem persona cum defuncto*. Therefore, even if he does not trade, if he receives monies representing profits before liquidation started, such profits can be taxed in his hands. *Commissioners of Inland Revenue v. Oban Distillery (in liquidation)* 18 Tax Cas. 33, 1933 S.C. 44; *Commissioners of Inland Revenue v. Daluane Tahoker Distilleries* 15 Tax Cas. 163, 1930 S.C. 878.

A trustee liquidating an insolvent firm of pinners continued to supply steam power at a profit to certain lessees and others. It was contended that as he did not carry on any other part of the firm's business, and that as the supply of power was being made in order to assist the realisation of the assets to the best advantage, the profits were not from trade but an accidental result from the liquidation of a previous loss. *Held* that the supply of power was a trade, and that the profits therefrom were taxable. *Armitage v. Moor*, (1900) 2 Q.B. 363, 4 Tax Cas. 199.

A company (with a small share capital—£2,500) acquired certain valuable rights for a small sum (£2,500) and its members arranged to sell all their shares at £20 per £1 share. An advance of £13,500 was received but the transaction fell through. A suit followed and was compromised on the footing that the company was to go into liquidation, that a part of the rights originally arranged to be sold was to be given to the purchasers for £20,000 and that the £13,500 was to be taken as an advance on this account. The balance of £6,500 was also paid and the question arose whether this £20,000 was taxable in the hands of the liquidator. It was held that there was no evidence to justify a finding that the liquidator carried on a trade. He merely realised the assets, paid off the liabilities, and the balance to the shareholders. The fact that the company had power to sell a part of the undertaking was in itself of no significance since such a power was provided for as a matter of routine in almost every company's memorandum. The fact that the transaction would have been a trading one if made by the company did not necessarily convert it into one in the hands of the liquidator. *Wilson Box (Foreign Rights) in Liquidation v. Brice* 20 Tax Cas. 736 (C.A.), 156 L.T. 24 (1936) 3 All E.R. 728.

Where a film company on liquidation sold its rights in current films to certain other companies (from which it had originally bought its assets) and the latter companies exploited the rights and paid a substantial share (80 to 90 per cent) of the takings, reserving the balance for themselves in return for their services, it was held that the liquidator carried on a trade. *Baker Liquidator of First National Pictures Ltd v. Cook*, 16 A.T.C. 248 (K.B.D.). *Prima facie* the sale by a liquidator of the whole undertaking of a company would result in a capital asset, but if the liquidation and the sale by the liquidator are parts of an original scheme of profit making, the receipt would be income. It is all a matter of evidence in each case. *Rhodessa Metals, Ltd v. Commissioner of Taxes* 1941 I.T.R. (Supp.) 45 (P.C.).

Winding up of partnership—Where a partnership had been dissolved and arrangements were made merely to receive goods already contracted for (paying the cost and other expenses) and deliver goods already sold (receiving the price) it was held by Rowlatt J. that there was no trade. Buy-

ing and selling are an essential element of trade and once this has been done, all that remains is the mechanical operation of working out the books so to speak. This view however was rejected by the Court of Appeal who considered the case scarcely different from one in which, instead of dissolving the partnership the partners, because of slack trade decided not to enter into further commitments till conditions improved *Hullerns and Fowler v Murray*, 17 Tax Cases 77 48 T.L.R. 213

Outstanding on close of business—See *Southern v Cohen's*, 23 Tax Cases 566 (C.A.), referred to above, and also *Bennett v Ogston*, 15 Tax Cases 374 referred to under section 12. In *Parker v Batty*, 1942 I.T.R. (Supp.) 62 it was held, following *Southern v Cohen's Executors*, that where an individual dealing in the hire purchase of musical instruments formed a company to take over his business, and that company agreed to collect the outstandings in respect of past transactions and make them over to him the individual set up a new business as from the transfer of the business to the company. A hire purchase agreement is not like an ordinary contract of sale and the several sums of money became due in respect of the old hire purchase agreements only after the sale of the business to the company. The *as essee* retained in his own hands after the sale to the company a right to receive and to have collected for him sums which might or might not become due under the old contracts. This is the distinction between such a case and an out and-out closing of a business or profession.

Beneficiaries under a will forming a company—A company was formed for administering property in which a number of beneficiaries under a will were interested. Each beneficiary assigned his interest in the estate to the company receiving shares in exchange. A good part of the estate was under lease to collieries and this was the principal income of the company. The company claimed that it was only an executor or trustee for the beneficiaries under the will and was not doing business but was in effect a landowner. The Special Commissioners and the High Court accepted this claim, but the Court of Appeal unanimously rejected it.

The company has become the absolute legal and beneficial owner of the estates and no relation of trustee and *cestui que trust* exists between it and the beneficiaries. They are relegated to the ordinary position and rights of shareholders and there is no time-limit whatever to the activities of the company, *Commissioners of Inland Revenue v Westleigh Estates*, 3 A.T.C. 17, 12 Tax Cases 657 (1924) 1 K.B. 390, per *Sargant, L.J.*

Royalties, annuities or dividends—Receiving and Distributing—In *Commissioners of Inland Revenue v Marine Steam Turbine Co* (1920) 1 K.B. 193, 12 Tax Cases 174, it was held by the High Court that a company doing nothing else than merely receiving royalties which were in effect payments by instalments of the price of the property sold and distributing dividends to shareholders out of such royalties was not doing business. In this case the company which had acquired patents sold them to another company in return for cash, some shares and a royalty. Soon thereafter the first company went into voluntary liquidation, but this was stayed and the company went on merely receiving royalties. But for all practical purposes this decision was overruled in *Korean Syndicate case*, (1921) 3 K.B. 258, 12 Tax Cases 181, in which a company, one of whose purposes *inter alia* was to acquire and work concessions, acquired a mining concession and without working the mine itself leased it to another com-

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A company was formed in 1895 to acquire and carry on a railway under a contract with the Government of India. In 1906 the company sold the whole undertaking to the Government in return for an annual payment of £30,000 or a payment of a certain sum if and when the Government determined the arrangement.

Per L. C. Cave — It is true that its principal and only function at the present moment is to receive and distribute the fruits of its undertaking but that is a part and a material part of the purpose for which it came into existence.

Per Lord Sumner — To ascertain the business of a limited liability company one must look first at its memorandum and see for what business that provides and whether its objects are still being pursued. The important thing is that the old business still continues of getting some return for capital embarked in the line. Business is not confined to being busy in many businesses long intervals of inactivity occur.

Apart from advancing in its early stages money to Government for construction the company had always received profits from the Government which worked the line. The company merely exchanged in 1906 its fluctuating receipts depending on earnings of the line from year to year for a fixed annuity. So the change was not of much consequence.

The above ruling was followed by the Privy Council in the *Pondicherry Railway Company's case* 5 ITC 362 58 I A 239 A I R 1931 PC 165 54 Mad 691. The Court of Session applied the *South Bihar* ruling in *Commissioners of Inland Revenue v Edinburgh & Bathgate Railway Co* 12 Tax Cases 895.

Investment by a Shipping Company — A Shipping Company one of whose objects was to invest and deal with the moneys of the company not immediately required upon such securities etc. had five ships on the date of outbreak of the War. One of these ships was sold three sunk and one detained by the enemy. The insurance money and the sale proceeds received on account of the ships were invested in fluid resources with a view to resumption of trading or winding up. Held, that the company was carrying on a business. *Commissioners of Inland Revenue v Dale Steam Ship Company* (Corporation Profits Tax Case) 12 Tax Cases 712.

Company receiving rents — A company was formed in 1899 its objects being among other things to acquire and take over the assets and liabilities of the proprietors of the Theatre Royal Birmingham. The old proprietors were a joint stock company who were landowners only and did not work the theatre but had merely received the rents. The new company on the other hand acquired the Theatre Royal and other properties subject to an existing lease. Later on the theatre was rebuilt. During the several years under appeal the whole of the real estate belonging to the company was let to five tenants under leases the period

of which was in no case less than eighty nine years. The income of the company consisted of the rents payable under the leases and of interest and dividends on investments. The company contended that it did not carry on a 'trade' or 'business'. *Held*, that the company was carrying on a trade or business within the principle laid down by the Court of Appeal in *Commissioners of Inland Revenue v Korean Syndicate, Ltd*, (1921) 3 K B 258, 12 Tax Cases 181.

Per *Rowlatt, J*—Now the question arises whether the company was carrying on business. Undoubtedly it was, it was enjoying the turning to account of the property which it was formed, among other things, to turn to account, but the form in which its revenue came in was the comfortable form of simply receiving rents.

What I should like to have known, of course, was this. If my way of looking at the facts had not been questioned at all, would it then have been said that it is quite enough to make a company carry on business if it is simply receiving rents which it had arranged for in the course of turning to account the property it has to turn to account? I very much wish that the Court of Appeal in the *Korean Syndicate Case*, (1921) 3 K B 258, 12 Tax Cases 181, could have seen their way to say that if they meant to say it. I do not think Lord Justice Younger meant to say it, nor has anybody said, as far as I can see, that the mere fact that it is a company carrying on something, makes that something a business, when it would not have been a business if a private person had been carrying it on. Nobody has gone the length of saying that, but it is obvious from what the Master of the Rolls said that when you are considering whether a certain form of enterprise is carrying on business or not, it is material to look and see whether it is a company that is doing it. In the present case I think the inclination of my mind on the whole is in favour of the Crown, because it seems to me that looking at what the company were incorporated to do, they applied themselves to that and they were fairly active in the early years in arranging their property, and during those years they enjoyed it and there is nothing more for them to do, but they have not gone out of their business and been left merely with the rents to collect. One can understand that a company might have had a large factory or something of the kind which ceased to manufacture, but here they had property left in their hands and they continued to draw rents and so on. One might say in that case that they were not carrying on business, but as you are to look at the fact that they are a company, and as you are to look at the objects with which they were incorporated, if you find that the only object was to deal with this property, and they are only to deal with that property, although it happens at the moment that all they have to do is to receive the rents for the next 90 years unless they sell the reversion, then I think it is more within the spirit of the decision of the Court of Appeal to say that they are carrying on business, even if I think that they were not. The case is very near the line and of some difficulty, but that is the best conclusion to which I can come, therefore I must give judgment for the Crown here, *Commissioners of Inland Revenue v Birmingham Theatre Royal Estate Company, Ltd*, 12 Tax Cases 560.

Speculative building on land, if otherwise it is of the nature of trade will not cease to be such, merely because the trade is carried on largely through a company dominated by the assessee instead of entirely by the assessee. *Talwar v Wilkinson*, 1944 K B D ?

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(4-A) "The Central Board of Revenue" means the Central Board of Revenue constituted under the Central Board of Revenue Act, 1924,

This clause was inserted by the Central Board of Revenue Act (IV of 1924)

Formerly the functions of the Central Board of Revenue under this Act were performed by the Board of Inland Revenue

Its important functions under the Act are as follows—Section 2 (6)—power to declare a foreign association to be a company section 2 (11) (b)—power to define previous year in certain cases and to delegate such power, section 5 (4)—determining jurisdiction of appellate Assistant Commissioners section 5 (5)—permitting the Commissioner and the Inspecting Assistant Commissioner to function in specified cases or classes of cases as the Appellate Assistant Commissioner and Income tax Officer respectively, section 5 (6)—power to appoint Commissioners Assistant Commissioners and Income tax Officers for specified persons areas or classes of income, section 5 (8)—general control over Income tax administration section 18 (6)—power to direct to whom tax deducted at source should be paid, proviso to section 50—condonation of delay in application for certain refunds, section 58-B (5)—appeal against refusal to recognise a provident fund chapter IX B power to recognise and withdraw approval of superannuation funds and various incidental powers in regard to details of such funds section 59—power to make rules section 61—laying down qualifications etc for Income tax practitioners disposing of appeals against their dismissal and section 64 (3)—to determine the place of assessment when the Commissioners concerned are not in agreement.

(5) 'Commissioner' means a person appointed to be a Commissioner of Income tax under section 5,

See notes under section 5

(6) "Company" means a company as defined in the Indian Companies Act, 1913, or formed in pursuance of an Act of Parliament or of Royal Charter or Letters Patent, or of an Act of the Legislature of a British possession, or of a law of an Indian State and includes any foreign association which the Central Board of Revenue, may by general or special order, declare to be a company for the purposes of this Act,

History—The present definition of company was introduced in the 1918 Act. The definition in the 1886 Act was "An association carrying on business in British India whose stock or funds is or are divided into shares and transferable whether the company is incorporated or not and whether its principal place of business is situate in India or not."

In 1940 the definition was made to include companies incorporated under laws of Indian States and the following words qualifying other foreign association ~~the~~ carrying on business in British India and whether its principal place of business is situate in British India or not" ~~were deleted~~. The former change was made in order to prevent companies in Indian States operating in British India from escaping sub-section (6-A) of section 2, e.g., (by accumulating profits and reducing capital). The object of the deletion of the words qualifying foreign associations is not clear but it would

Company—Business of—There is no limitation on the capacity of a natural person to trade, but a company is bound by its memorandum and articles. It is therefore not only permissible but often necessary to look into them to consider the nature of particular transactions carried on by the company, *Commissioners of Taxation v British Australian Wool Realization Association*, 9 ATC 449 (PC). Other things being equal, it is therefore more difficult to decide in what circumstances the activities of an individual amount to the carrying on of a trade or business than in what circumstances the activities of a company would similarly amount to the carrying on of a trade or business. In the case of an individual a piece of evidence similar to a company's memorandum or articles is not ordinarily available. Incidentally, a Chartered Company (as distinguished from an Incorporated Company) stands on a peculiar footing, and may do any business that is not specifically prohibited by its charter.

The distinction between a company and an individual in this respect, viz., as to the circumstances in which a particular activity may be a business if conducted by a company whereas if conducted by an individual it might not be a business, was set out in *Smith v Anderson*, 15 Ch D 247, (a UK case under Company Law). But this distinction was hardly emphasized—in fact it had been lost sight of—in various cases under the Income-tax Acts for quite a long time until it came to prominence in *Commissioners of Inland Revenue v Korman Syndicate, Ltd.*, (1921) 3 K.B. 258; 12 Tax Cases 181. In that case the Court of Appeal reaffirmed the principles set out in *Smith v Anderson*, 15 Ch D 247. In the *South Bihar Railway case*, 12 Tax Cases 657, the House of Lords confirmed the views of the Court of Appeal in the *Korman Syndicate case*. If an individual had done what the South Bihar Company did, he might not have been held to be carrying on a 'trade' or business'. See Lord Sumner's judgment.

On the other hand, the memorandum cannot be conclusive, its value lies in its throwing light on the motive, so to speak, of the company. In other cases, the motive has to be established by other evidence.

It can be argued that a company can do only one business, viz., the business set out in the Memorandum and the Articles. That is, while a company may have different activities, it could have only one business. Whether this argument is valid or not, Revenue decisions (chiefly Excess Profits Duty cases and cases of discontinuance and succession of businesses) proceed on the assumption that, for the purpose of the Taxing Acts a company may have more than one business.

Difference between Excess Profits Acts and Income-tax Acts.—In *Morning Post, Ltd v George*, KBD (1942) 1 T.R. Sup. 20, *Lawrence, J.*, considered that rulings as to what constituted a 'trade' with reference to Excess Profits Duty and Corporation tax should not be automatically extended to cases under the Income-tax Acts because (1) the Excess Profits Duty related to 'trades and business' (whether continuously carried on or not), and under the Income tax Acts, it cannot be assumed that 'trade' and 'business' are always interchangeable synonymous terms and (2) the Corporation tax related to the 'profits of a British company, carrying on any trade or business or any undertaking of a similar character including the holding of investments'. In the *Morning Post case* the old company, after the amalgamation of the newspapers received a monthly fixed sum and could not participate in the profits or be responsible for any losses resulting from the joint publication. Such an arrangement did not constitute a 'trade'.

of Income tax, Bihar and Orissa 1 ITC 303 3 Patna 470, which arose under section 14, as it stood before 1939, *i.e.*, when dividends as such were exempt from income tax (but not super tax) in the hands of the shareholder. A company holding shares in another is liable to pay super tax again on the dividends received by it. By special exemption under section 60 investment trusts have been relieved from this liability.

Company Super tax and Corporation Profits Tax.—The super tax on companies corresponds to the Corporation Profits Tax levied elsewhere but with this difference—the Corporation Profits Tax is or was allowed elsewhere as a deduction from profits for assessment to income tax whereas the Indian Company super tax is not. It will be seen that the shareholders in a company are in a worse position than partners in a registered firm. The former have to pay an additional super tax through the company though in other respects they are more or less in the same position. Objection has, therefore, been raised to the tax on the ground that it handicaps joint stock concerns. On the other hand the arguments in favour of the tax are that incorporation as such confers certain advantages which might be legitimately taxed, these advantages being the possibility of limiting liability, corporate finance, freedom of transferring or selling shares, publicity, audit etc. and the rights of shareholders to enforce liquidation.

Company and partnership.—The principal points of difference between a partnership and a company are the following—(a) The individual members of a partnership are collectively entitled to the property of the partnership but the property of the company belongs to the company as such and not to the shareholders—*Re George Newman & Co*, (1895) 1 Ch 674, (b) The creditors of a firm can proceed against the property of the partners but the creditor of a company can proceed only against the company as such *Fitcroft's case* 21 Ch D 533, (c) Unlike a member of a firm a shareholder cannot dispose of the property of the company or incur liabilities on behalf of the company. A shareholder can contract with his company whereas a partner cannot contract with his firm. All these differences flow out of the fundamental principle that a company is a separate person apart from the shareholders while a firm is not a separate person apart from the partners. The distinction between a firm or partnership and a company has also been put in another way. A partnership is an arrangement between definite individuals bound together by a contract while a company is so to speak a constantly changing partnership or succession of partnerships, *Smith v Anderson*, 15 Ch D 273.

Company—Separate entity.—Upon the issue of the certificate of incorporation a company becomes a body corporate—*see* section 24 of the Indian Companies Act. As already stated it is not like a partnership or association (leaving aside the Hindu undivided family which is peculiar), a mere collection or aggregation of individuals but a separate legal person entirely distinct from the shareholders—a metaphysical entity (as has been described by Palmer), a fiction of law with no physical existence.

'One man' Companies—Not invalid.—The law does not prescribe any minimum shares to be held by a shareholder nor a maximum. An 'one man' company therefore is not forbidden by law.

The statute enacts nothing as to the extent or degree of interest which may be held by each of the seven, or as to the proportion of interest or influence, possessed by one or the majority of the shareholders over the others" per *L. C. Halsbury* in *Salomon v Salomon*

seem that both in respect of Indian States Companies and other foreign associations the result of taxing them as companies *à la*, at a flat rate instead of as associations, *à la*, at graduated rates will be the lightening of tax in many cases. On the other hand the Central Board of Revenue is not bound to declare a foreign association to be a company.

The changes in the definition do not affect the ambit of liability to tax which is regulated by section 4 but only the manner of assessment and the quantum of tax.

Companies without shares—Even companies which have no shares—and are limited by guarantee—are 'companies' for the purpose of the Income-tax Act. The general framework of the Act (*see* sections 16, 18 and 48) however, with its provision for refunds clearly contemplates companies with shares.

Company—The following is the definition in the Indian Companies Act. A company formed and registered under this Act or an existing company.

The rules about incorporation of companies in other parts of the British Empire differ but if a company has been duly incorporated in accordance with the local laws in those parts, it is a 'company' for the purposes of the Income-tax Act, no matter what the motives of incorporation were.

Foreign business associations—See above regarding the change in the definition in 1940. The object of the last part of the section is to include associations such as the French Sociétés Anonymes, which have many characteristics in common with the companies recognised by Indian law. But the Central Board of Revenue can make the declaration only if the association is foreign *à la*, not belonging to the British Empire or an Indian State, on the other hand, the Central Board of Revenue is not bound to make such declaration.

Company—How taxed—A company is assessed to income tax on its profits at the maximum rate whatever its income. This is done under the Finance Act. The shareholder, however, is entitled to relief under section 48 in respect of the dividends received by him. The dividend is not exempt from tax in the hands of the shareholder but under section 18 (5) he will be given credit for the tax payable (whether paid or not) by the company in respect of the dividend. The assessment of the company's profits does not depend on the profits distributed. It is based on its profits as computed under sections 8 to 13. The company is not an agent for the purpose of income tax acting on behalf of the shareholder except to the extent laid down in section 18 (5). No shareholder has a right to have a dividend declared, and it is only after a dividend has been declared that the dividend becomes his income, *Commissioners of Inland Revenue v Bloth*, 8 Tax Cases 101. The company is assessable as a company on its profits. It is conceivable that the assessable profits may be nil while the company may distribute profits from reserves or some other source. Nevertheless the shareholder can get refund of income tax under sections 48 and 18 (5).

Super-tax—Companies pay a flat rate of super tax on their profits. This again is regulated by the Finance Act. This tax is in no sense paid on behalf of the shareholder nor is a refund allowed to the shareholder as in the case of income-tax. As already stated the Income tax Law does not recognise any agency on the part of the company on behalf of the shareholder, except to the extent that it has indirectly countenanced such agency in sections 18 and 48. See *Maharajadhiraj of Darbhanga v Commissioner*

of the company was not the income of the shareholder *O K Trust Ltd v Rees*, 19 A T C 185 (K.B.)

See also *Apthorpe v Peter Schoenhofen Brewing Co* 4 Tax Cases 41, *St Louis Breweries v Apthorpe*, 4 Tax Cases 111, *United States Brewing Co v Apthorpe*, 4 Tax Cases 17, *Gramophone and Typewriter Co, Ltd v Stanley*, 5 Tax Cases 358, *Commissioners of Inland Revenue v John Sansom*, 8 Tax Cases 20. The Income tax Officer can examine the genuineness of one-man companies and tax shareholders on the basis of the true nature of transactions, *e.g.*, when dividends are disguised as loans, the Income-tax Officer can tax the shareholder—see *In re Sir D M Petit*, 2 I T C. 255, but in the absence of a specific finding of fact that a company is doing the business of some one else, (*e.g.*, an individual who controls it) the court will not assume that it is doing so *Commissioners of Inland Revenue v Morgan Grenville Gawn*, 20 Tax Cases 529 (1936) 1 A.E.R. 895 (K.B.D.)

(6-A) 'Dividend' includes—

(a) any distribution by a company of accumulated profits, whether capitalised or not, if such distribution entails the release by the company to its shareholders of all or any part of the assets of the company,

(b) any distribution by a company of debentures or debenture stock, to the extent to which the company possesses accumulated profits, whether capitalised or not,

(c) any distribution made to the shareholders of a company out of accumulated profits of the company on the liquidation of the company

Provided that only the accumulated profits so distributed which arose during the six previous years of the company preceding the date of liquidation shall be so included, and

(d) any distribution by a company on the reduction of its capital to the extent to which the company possesses accumulated profits which arose after the end of the previous year ending next before the 1st day of April, 1933, whether such accumulated profits have been capitalised or not

Provided that 'dividend' does not include a distribution in respect of any share issued for full cash consideration which is not entitled in the event of liquidation to participate in the surplus assets, when such distribution is made in accordance with sub clause (c) or (d)

Explanation —The words 'accumulated profits' wherever they occur in this clause, shall not include 'capital profit'

History—This definition was inserted in 1939. Its intention is brought out in the following extract from the report of the Select Committee

& Co., (1897) A.C. 22. 'It was said in the present case that six shareholders other than the appellant were mere dummies, his nominees, and held shares in trust for him. I will assume this was so. In my opinion it makes no difference,' per Lord Herschell, *ibid.* 'There is nothing in the Act requiring that the subscribers to the memorandum should be independent or unconnected, or that they or any of them should take a substantial interest in the undertaking or that they should have a mind and will of their own as one of the learned judges seemed to think or that there should be anything like a balance of power in the constitution of a company,' per Lord Macnaghten, *ibid.*

The facts of the above case are as below. Salomon, a leather merchant and the owner of a profitable business, converted his business into a private company. He was solvent at the time. Of the shares he took 20,000 and his wife and children a share each. Salomon also received debentures to the amount of £10,000 in part payment by the company for the business. Later on, the company went into liquidation and the validity of these debentures was challenged on the ground that the company was a sham. The Court of first instance held that Salomon was bound to pay the unsecured creditors of the company out of his own pocket even though his shares had been fully paid up. This decision was confirmed by the Court of Appeal but on a slightly different ground, *viz.*, the whole scheme was a fraud on the law which required substantial shareholders and not mere dummies. This decision was unanimously reversed by the House of Lords who held that there was nothing in the law which required the seven shareholders to be beneficially or substantially interested.

The ordinary reason for which a man forms his business into a company is that he may have the advantage of the trading of the company, by holding a greater part of the shares and receiving a greater part of the profits in dividends as they are distributed, while at the same time he need not be personally liable on the contracts which are made to earn the profits. That this is a perfectly legitimate object was decided by the House of Lords in the case of *Salomon v. Salomon*, (1897) A.C. 22 quoted above.

Incorporation cannot be challenged—If a certificate of incorporation had been obtained wrongly, that may be a ground for the persons interested to get the certificate cancelled, but so long as the certificate is in force it is valid as against the world. The income-tax authorities cannot refuse to recognise as a 'company' a company that has actually been registered under the Indian Companies Act, seeing that the definition of 'company' in the Indian Income tax Act begins 'company means a company as defined in the Indian Companies Act, 1913'.

Company—Doing business of other persons—'There may be a position such as that although there is a legal entity within the case of *Salomon v. Salomon*, (1897) A.C. 22, that legal entity may be acting as the agent for another person or it is conceivable that although there be a legal entity that legal entity may really be doing the business of somebody else and not its own business at all,' per M. R. Sterndale in *Commissioners of Inland Revenue v. Sansom*, 8 Tax Cases 22.

A company being a separate legal entity, the mere fact that only one individual is beneficially interested in all the shares and that the company in effect acts as his agent or nominee will not in itself make its income the income of the shareholder. A company was formed to take over another company and refloat the latter, the sole beneficial shareholder being precluded from using his own name as promoter. It was held that the income

The words 'whether capitalised or not', occurring also in parts (b) and (d), are intended to make it clear that the decision of the company to capitalise profits, whether as bonus shares or as bonus debentures or in any other form though valid and conclusive as against the rest of the world, will not save the distribution from the mischief of this definition if otherwise the conditions laid down in this definition are satisfied.

See *Commissioner of Income tax Madras v Ramasamy Chettiar*, 1941 I T R. 656, in which a refund of tax was unsuccessfully claimed on the ground that a bonus share represented a dividend.

Shareholder—Includes all shareholders, holding preference ordinary or deferred shares. There is no definition of a shareholder in the Indian Companies Act but the definition of a share is as below—

Section 2 (16)—Share means share in the share capital of the company, and includes stock except when a distinction between stock and shares is expressed or implied.

Part (b)—This part mostly nullifies the decision of the Privy Council in *Mercantile Bank of India (Trustees of India) v Commissioner of Income tax, Bengal*, 1936 I T R. 239 which followed the decision of the House of Lords in *Blotts and Fisher's cases*, reported respectively in (1921) A C 171 and (1926) A C 395.

Unlike part (a) of the definition this part does not refer to any release of assets. According to this definition a debenture which is deemed to constitute a release of assets even though it may be redeemable only after a long time or not at all.

As to the meaning of the word 'stock', see per Lord Hatherley in *Horrice v Aylmer*, (1875) 7 H L. 717.

'The difference between stock and shares is that shares are not necessarily paid up whereas stock can exist only in the paid up state, and that shares cannot be bought or sold in fractions whereas the consolidated stock of a company can be split up into as many portions as one likes and bought or sold in such fractions. Otherwise stock is just like shares, it is in fact simply a set of shares put together in a bundle.'

and the above remarks apply, *mutatis mutandis* to debenture stock.

It should be noted that the debentures referred to in this definition can be taxed as income only to the extent that they are covered by accumulated profits in the hands of the company, i.e., not when issued out of capital sources.

Part (c)—This part of the definition nullifies for this purpose, the decision in *Burrell's case*, 9 Tax Cases 27, (1924) 2 K B 52 (C A), which has been followed in India also. In the absence of this definition, the distribution of assets by a liquidator would be all capital irrespective of their origin.

Under this part of the definition, the distribution can be treated as income only to the extent it is covered by accumulated profits i.e., not when met out of capital sources, and the phrase further excludes profits accumulated earlier than during the six previous years before liquidation. Payments out of profits made during liquidation will presumably be capital in the hands of the shareholder.

The 'date of liquidation' is evidently the date of commencement of liquidation.

'We have recast and expanded the definition of 'dividend', primarily in order to ensure that no distribution falling under this head shall be taxed unless there is a release of assets. Under the amended definition a debenture will when issued be treated as a dividend but an ordinary bonus share will not be liable to taxation until it is actually paid off. The definition further secures that accumulated profits distributed on the liquidation of the company shall only be included in dividend for the purposes of taxation, if they arose within six years of the liquidation. Clause (d) of the revised definition provides for the case in which a company tries to disguise a distribution of profits as a reduction of capital."

Includes—The definition expands the ordinary meaning of the word 'dividend', and should be read along with the special definition of 'income' in section 2 (6-C). As a result, certain types of dividends which would otherwise, under various rulings, both English and Indian, be considered to be of a capital nature are deemed to be income.

"The word 'dividend' carries no spell with it. Applicable to various subjects, it is not intelligible without knowing the matter to which it is meant as referring but its ordinary meaning is share of profits." *Henry v. G N Railway*, 27 L J Ch. 1.

In fact in ordinary usage the meaning is even more restricted and applies to a share of profits in companies and in any case, the definition in this clause refers to payments by companies only.

'Company'—See the definition of this word in section 2 (6). The special definition of 'dividend' in clause (6-A) applies to the dividends of all companies including those that may be dealt with under sections 23 A, and 44-D *et seq*.

Income already taxed in the hands of a person under sections 23 A or section 44-D *et seq* cannot again be taxed in the ordinary course in his hands at a later stage as a dividend, *see* sections 23 A (4) 44-D (9). *Cf also Inland Revenue v Roberts*, 9 Tax Cases 603 (C A).

Part (a) of definition—Two conditions have to be satisfied, *viz*, (a) the distribution must be from accumulated profits, not from capital sources or appreciation thereof, *see* the Explanation (under the definition) which is really otiose and has been inserted out of abundant caution, and (b) there should be a release by the company to the shareholders, of its assets. A loan to a shareholder will, evidently not be a distribution of profits, nor will a dividend paid out of capital sources, *e.g.*, sale of fixed assets or appreciation of capital.

As regards condition (b), *see Blott's case*, (1921) A.C 171, 8 Tax Cases 101 and *Pool's case*, (1922) 1 K.B 347, 8 Tax Cases 167, both of which are referred to below. The judgment of *Sankey, J.*, in the latter brings out clearly what is meant by a release of assets. An ordinary bonus share as such clearly does not release any assets, but if at any time a share is paid off, whether in cash or in kind, *e.g.*, a redeemable preference share, there will then be a release of assets.

The distribution need not take the form of a dividend. A loan not intended to be repaid (*Jacobs v. Inland Revenue*, 10 Tax Cases 1), a distribution through a Reserve Fund (*Inland Revenue v Doncaster*) or in any manner without an increase in the share or loan capital are all within the mischief of this definition. On the other hand, a distribution, even as a dividend if conditional on an equivalent, simultaneous loan from the shareholder to the company, may not amount to a distribution of income at all. *Inland Revenue v Marbob, Ltd*, 18 A.T.C. 257 (K B).

Per Lord Justice Fry, in the Court of Appeal—

"When a testator or settlor directs or permits the subject of his disposition to remain as shares or stocks in a company which has the power either of distributing its profits as dividend or of converting them into capital, and the company validly exercises this power, such exercise of its power is binding on all persons interested under the testator or settlor in the shares, and consequently what is paid by the company as dividend goes to the tenant for life, and what is paid by the company to the shareholder as capital, or appropriated as an increase of the capital stock in the concern, enures to the benefit of all who are interested in the capital"

cited with approval by Lords Herschell and Watson in the House of Lords who confirmed the decision

In *re Taylor Waters v Taylor*, (1926) Ch. 923, following *Bouch v Sproule*, (1887) 12 A.C. 385 and *In re Evans*, (1913) 1 Ch. 23 it was held that in deciding questions of capital and income as between remaindermen and life tenants the intention of the company should be regarded. Did it intend to capitalize? Reference should be had to substance and not to form. The fact that in form an option is given to the shareholder does not necessarily decide that the bonus shares are income and not capital

Similarly in *In re Bates Mountain v Bates*, (1928) Ch. 683, in which a company sold assets at favourable prices and carried the difference between this and the book value to suspense and gave cash bonuses to shareholders with a covering letter that the bonuses were capital payments not liable to income-tax or super tax, it was held as between remainderman and life tenant that no bonus shares having been issued the payments were income and not capital. On the other hand, in *In re Ward's Will Trusts Ringland v Ward*, 15 A.T.C. 502 it was held that, where a company distributed its surplus funds from sale of capital assets as capital in cash to its members proportionately according to their shares these receipts were capital as between life tenants and remaindermen.

Though *Bouch v Sproule* was not a Revenue decision but one relating to the rights of a tenant for life and the remainderman, the general principle underlying it, viz., that if a company validly capitalises its profits, its action is valid as against the outside world was considered in *Commissioners of Inland Revenue v Blott*, 8 Tax Cases 101, *infra* to extend to Revenue matters also

In *Swan Brewery Company v The King*, (1914) A.C. 231, however, it was held under an Act of West Australia which specially defined 'dividend' as including "every dividend, profit, advantage or gain intended to be paid or credited to or distributed among any members or directors of any company except the salary or other ordinary remuneration of directors" that bonus shares issued out of undivided profits were taxable as income, that is to say, the company had in effect declared a dividend within the meaning of the Act equal to the nominal amount of the new shares. A very similar case was *Nicholas v Commissioner of Taxes, Victoria* 1941 I.T.R. (Sup.) 53 (P.C.)

But this decision was not followed by the House of Lords in *Commissioners of Inland Revenue v Blott*, though Lord Sumner who delivered the judgment of the Privy Council in the *Swan Brewery* case and also sat in the House of Lords in the *Blott* case considered that the decision of the

Part (d)—The object of this part is to prevent the distribution of profits in the guise of reduction of capital so as to escape tax. It will be noted that, while under part (c) accumulated profits for only six previous years are taken into account, this part takes into account all profits arising after the previous year preceding 1st April, 1933.

Second proviso—The object of this proviso which applies to parts (c) and (d) both is to save from the operation of these parts preference shares which have no right to undistributed profits and can only claim their own capital value on liquidation. If a preference share with no share in surplus assets is paid off in liquidation even out of past accumulated profits, the distribution is not a dividend. The words 'issued for full cash consideration' were inserted in order to confine the protection to *bona fide* preference shares. The consideration must both be 'full' and in 'cash', and the latter condition will exclude from the benefit preference shares issued in return for full value but not for cash. And, clearly, it will exclude from the benefit shares issued in return for the abandonment of claim to arrears of dividends.

It will be seen that even if the shares have only a limited right to participate in surplus profits on liquidation they cannot get the benefit of the proviso.

Dividends out of exempt income—All that this definition does is to treat as income what would otherwise be considered to be capital, and the taxability, in the hands of the shareholder of dividends paid by a company from sources of income not liable to tax, e.g. from agricultural income or from tax free securities or, in certain circumstances, from income abroad would not be affected one way or the other by this definition. See notes under section 16 (2).

Refunds—If dividends which would not otherwise be taxable are taxed under this definition, it stands to reason that they will be eligible for refunds under section 48 and section 49 *et seq* credit being given under section 18.

Bonus Shares—The following rulings, mostly relating to the United Kingdom deserve study even though the definition in this clause renders some of them nugatory as already explained in the notes under each part. There is no provision in the United Kingdom statutes corresponding to this definition, and the rulings were given with reference to general considerations as to income and capital which have to be borne in mind when there are no clear statutory provisions.

In *Bouch v Sproule*, 12 A.C. 385, a testator bequeathed his residuary estate in trust for his wife for life and after her death to some one else absolutely. Part of the residue constituted shares in a company whose directors had power before recommending a dividend to set apart out of the profits such sum as they thought proper as reserve fund for certain purposes. On the recommendation of the directors the company by special resolution passed a new article empowering the directors, with the sanction of the company in a general meeting afterwards given, to declare a bonus to be paid to the shareholders out of the reserve fund with its profits so enlarged or out of any other accumulated profits in proportion to their shares. The directors allotted to each shareholder new shares in proportion to his existing holdings, crediting the amount taken from the reserve fund as paid upon the new shares. It was held that the allocation by the company was in substance not a distribution of profits but a capitalisation thereof.

"The benefit, and the sole benefit which the assessee derived, was that the business in which he had a share was a larger one, with more capital embarked in it, precisely as might have been the case if the accumulated profits had been applied in the improvement of the company's works and machinery. The preference shares are in themselves valueless"—Per Lord Finlay, at p 195

"The transaction took nothing out of the company's coffers, and put nothing into the shareholders' pockets, and the only result was that the company, which before the resolution could have distributed the profit by way of dividend, or earned it temporarily to reserve, came thenceforth under an obligation to retain it permanently as capital. It is true that the shareholder could sell his bonus shares, but in that case he would be realising a capital asset producing income, and the proceeds would not be income in his hands. It appears to me that, if the substance and not the form of the transaction is looked to, the declaration of a bonus was, as Mr Justice Rowlatt said, 'bare machinery' for capitalising profits, and there was no distribution of profits to the shareholders"—Per Lord Cave at p 200

It takes two to make a paid up share. A share issued is a share to be paid for, paid for by the allottee in meal or in malt, in money, unless by contract between himself and the company he is enabled to satisfy his obligation to pay by some other consideration moving from himself to the company. Under the contract in question, what consideration so moves from the shareholders? None that I can see, except the discharge of the company's debt for a dividend, which has become due to him by being declared. When debt for dividend is set off against debt for calls and the account is squared, the equivalent of payment of a dividend takes place. If the word 'bonds' has some effect to the contrary, then no consideration has moved from the shareholder and his shares are not fully paid. The company can choose whether it will divide its profits in meal or in malt, if it decides to divide otherwise than in cash, a contract to accept something in lieu of cash operates nothing, for no right to cash has accrued. A contract to accept shares in satisfaction instead of cash implies, first a declaration which gives the right that has to be satisfied, and second a satisfaction of that right, which is equivalent to payment. It is just as reasonable to call the shares allotted 'mere machinery' for wrapping up a distribution of profits as to call bonus shares 'mere machinery' for effecting distribution of capital. " Per Lord Sumner dissenting in *Commissioners of Inland Revenue v Blott*, 8 Tax Cases 101, (1921) 2 A.C. 171 at p 212.

A company distributed its dividends in the shape of fully paid up shares in the concern, the shareholders having no option to take the profits in any other form. Held, following *Commissioner of Inland Revenue v Blott*, 8 Tax Cases 101, and distinguishing *Swan Brewery v The King*, (1919) A.C. 231 that there was no 'income, profits or gains' to the shareholders which was taxable to super tax. The Court emphasised the word "advantage" which occurred in the Colonial Act in the *Swan Brewery Case*. *Steel Bros & Coy v Secretary of State*, 1 I.T.C. 326. The Crown appealed to the Privy Council for leave under the prerogative powers but the Privy Council refused to give leave. A similar decision was given by the Madras High Court in *Commissioner of Income tax v Binny & Coy*, 1 I.T.C. 358, 47 Mad. 837 in which Binny & Company as shareholders in

Privy Council did not turn on the special definition of "dividend" in the taxing statute of West Australia.

Bonus Shares—In same company—Not income—An assessee was a shareholder in a Limited Company, which, under the authority of its Articles of Association, had declared a bonus out of its undivided profits and, in satisfaction of such bonus, had allotted to its shareholders as fully paid up certain ordinary shares forming part of the company's authorised but unissued capital. The shareholders had no option to receive cash in lieu of shares in satisfaction of the bonus. *Held* (Lords Dunedin and Sumner dissenting), that the shares credited to the respondent in respect of the bonus, being distributed by the company as capital were not income in the hands of the assessee, (1921) 2 A C 171 (H L.)

"A shareholder is not entitled to claim that the company should apply its undivided profits in payment to him of dividend. Whether it must do so or not is a matter of internal management to be decided by the majority of the shareholders. He cannot sue for such a dividend until he has been given a special title by its declaration. Until then, no doubt, the profits are profits in the hands of the company until it has properly disposed of them, and it is assessable for income tax in respect of these profits. But if, acting within its powers, it disposes of these profits by converting them into capital instead of paying them over to the shareholders, that, as I conceive it, is conclusive as against all the outside world, including the Crown, and the form of the benefit which the shareholder receives from the money in the hands of the company is one which is for determination by the company alone."

"The money so applied is capital and never becomes profit in the hands of the shareholder at all. What the latter gets is no doubt a valuable thing. But it is a thing in the nature of an extra share certificate in the company. His new shares do not give him an immediate right to a larger amount of the existing assets. These remain where they were. The new shares simply confer a title to a larger proportion of the surplus assets if and when a general distribution takes place, as in a winding up. Per Lord Haldane, at p 182, 184

"As the capital was increased, it might reasonably be expected that the profits of the company would be increased, and that the shareholders would benefit in this way, but their relative shares in the undertaking remained the same. The use of the sums which had been available for dividend to increase capital would enable the company to carry on a larger and more profitable business, which might be expected to yield larger dividends. These dividends, however, were to be in the future. So far as the present was concerned there was no dividend out of the accumulated profits, these were devoted to increasing the capital of the company. The company had power to do what it pleased with any profits which it might make. It might spend the accumulated profits in the improvement of the company's works and buildings and machinery. These improvements might lead to a great accession of business and increase of profits by which every shareholder would benefit, but of course it could not for a moment be contended that such a benefit would render him liable to super tax in respect of it. The benefit would not be in the nature of income, and super tax can be levied only on income. It would be so levied on the dividends afterwards received' per Lord Finlay, at p 193

there has been no release of assets, there has been no distribution and there is nothing to tax, neither is there anything to tax if the release is the distribution of capital. The *Blott's case* was so decided because the majority of the Members of the House of Lords were of opinion that there had been no release of assets. The company in fact kept the assets in respect of, and distributed, previously unissued capital. Similarly in *Bouch v Sproule*, (1887) 12 A C 385, the company kept the accumulated profits and allotted new shares (partly paid up) in respect thereof ' at p 355

"In my view the true test as to whether a distribution of shares falls to be taxed depends upon two questions —(1) whether there has been a release of assets, and (2) if so, whether the assets released were capital or income" at p 357

As to (1) —In the present case there has been a release of assets within the meaning of the words as used by the majority of the Law Lords in *Blott's case*. As to (2) —I doubt if it is possible, I am sure it is not desirable, to lay down in answer to the second question any general rule for future guidance" at p 357

"The matter appears to be free from authority in England, but it has already been decided in the Supreme Court of the United States where the principles of law to be applied in this respect do not differ, in my view, from our own. In the case of *Peabody v Eisner*, (1918) 247 U S Reports 347, it was held that a dividend by a Corporation of shares owned by it in another Corporation is not a stock dividend and is subject to the tax like an equivalent distribution of money. By a 'stock dividend' is meant a dividend paid in the company's own stock which, as the Court pointed out, in fact took nothing from the property of the Corporation and added nothing to the interest of the shareholder, but merely changed the evidence which represented this interest

Later on the whole matter was discussed and it was decided in *Eisner v Macomber*, (1920) 252 U S Reports 189, that mere growth or increment of value in a capital investment is not income. Income is essentially a gain or profit in itself of exchangeable value, proceeding from capital, severed from it and received by the taxpayer for his separate use, benefit and disposal and that a stock dividend evidencing merely a transfer of an accumulated surplus to the capital account of the Corporation takes nothing from the property of the Corporation and adds nothing to that of the shareholders and a tax on such dividend is a tax on capital increase" at p 358

"As Mr Justice Pitney points out in giving the judgment of the Supreme Court of the United States, at page 206 of the Report, the fundamental relation of capital to income has been much discussed by economists the former being likened to the tree or the land the latter to the fruit or the crop—the former depicted as a reservoir supplied from springs, the latter as the outlet stream to be measured by its flow during a period of time. He cites on the subsequent page various definitions, one of which was that income may be defined as the gain derived from capital, from labour or from both combined, and points out that the essential matter is that income is not a gain accruing to capital but a gain derived from capital.

the Deccan Sugar and Abkari Company received a share of the accumulated undistributed profits of the latter concern in the shape of bonus shares

Bonus Shares—Of other Company—A company which was registered and carried on business in England as an Investment Trust Company owned a number of common shares of \$100 each in the Union Pacific Railroad Company. It was held by the Supreme Court of the United States that the Union Pacific Railroad Company, an American Company, had so invested its accumulated reserve funds as to contravene the Sherman Anti Trust Statute. The company was required by the Court to dispose of its entire holding of Common Stock of the Southern Pacific Railway Company in such a manner as to terminate the control of that company by the Union Pacific Railroad Company. An arrangement for this purpose received the approval of the Court and was carried into effect, under which a portion of the said holding of Southern Pacific Railway Company's Common Stock was transferred to the Pennsylvania Railroad Company in exchange for holdings of Preferred Stock and Common Stock in the Baltimore and Ohio Railroad Company, and the remainder of the holding was sold for cash. The Union Pacific Railroad Company thereupon distributed a substantial portion of its accumulated surplus funds, and declared an extra dividend on its common stock, to be satisfied by the distribution to the holder of each \$100 share of \$12 (par value) Preference Stock and \$22.50 (par value) Common Stock in the Baltimore and Ohio Railroad Company and \$3.00 in cash. At the same time the company announced its intention to reduce the regular rate of dividends on its Common Stock from 10 per cent, at which for many years it had stood to 8 per cent, but explained that the annual income derivable from the Stock, etc., comprising the Extra Dividend would compensate approximately for the reduction of 2 per cent, in the rate of dividend.

The assessee company duly received certain Common Stock and Preference Stock in the Baltimore and Ohio Railroad Company, together with a payment in cash in respect of the Extra Dividend on its holding of common stock in the Union Pacific Railroad Company, and it sold the stocks included in such Extra Dividend for £1,086-19-6 and credited the proceeds to capital account in its books.

Held that in the payment of the Extra Dividend there was a distribution not of capital assets but of assets which were profits or gains in respect of which the assessee company was chargeable with income tax, *Pool v Guardian Investment, etc.*, 8 Tax Cases 167, (1922) 1 K.B. 347.

Per Sankey, J—There have been many decisions chiefly in connection with the winding up of the companies or the interpretation of wills, where the difference between income, capital and accumulated profits has been discussed and dealt with, and there are undoubtedly some where it has been held that, by reason of the facts, accumulated profits have been transmuted into capital. For example *In re Bridgewater Navigation Company*, (1891) 2 Ch. 317, *In re Spanish Prospecting Company, Limited*, (1911) 1 Ch. 92, and *In re Thomas*, (1916) 2 Ch. 331, it was held that accumulated profits had not been impressed with the character of, or become capital. *In Bouch v Sproule*, (1887) 12 A.C. 385, it was held they had. "at p. 353.

"As Lord Finlay says in *Blott's case*, 8 Tax Cases 101 'The case differs *toto caelo* from a case in which a dividend is paid not in money but in money's worth by the delivery, say, of goods or securities'. If

Profit and Loss, and bonus shares issued out of the latter to be satisfied by shares of the subsidiary which were allotted by the latter directly to the shareholders of the parent company, the first shareholders of the subsidiary being identical with those of the parent company. It was claimed by a shareholder that the assets of the subsidiary were meant to remain as capital to help the parent company in its work and that the value of the bonus shares was not taxable being of the nature of capital. It was held (by Rowlatt, J) that it was taxable. The assets had passed from the possession of the parent company, and there had been no increase either in its share capital or in its loan capital. Further a distribution to shareholders if paid out of profits is a dividend unless validly capitalised i.e., by the distributing company, and there can be no question of one company capitalising a distribution made by another company. The assets having been released by the parent company the value of the shares in the new company was taxable, *Briggs v Commissioners of Inland Revenue*, 17 Tax Cases 11 following *Hull and others v Permanent Trustee Company of New South Wales and others*, (1930) A.C. 720 and *In re Piercy Whitwham v Piercy*, (1907) 1 Ch 289.

In a case involving rights of remaindermen and life interest holders (not an income tax case) trust funds were invested in certain cumulative preference shares, dividends on which got into arrears. Under a scheme of re-construction, the preference shareholders waived their right to arrears and received in return certain ordinary shares surrendered by the ordinary shareholders. Held, that the ordinary shares so received were income and not capital in the hands of the recipients, the company not having capitalised the moneys, *In re Melver's Settlement Melver v Rae*, 14 A.T.C. 571, (1936) Ch 198. In another case in which dividends on cumulative preference shares fell into arrears and, with the sanction of the Court, the ordinary shares were subdivided into smaller ones and part of these subdivided shares was paid to the preference shareholders in cancellation of their arrear dividends it was held, following *Melver's case*, that the value of the ordinary shares received by the preference shareholders was income, *In re Smith's Will Trust Smith v Melville*, 15 A.T.C. 613 (Ch D). While a company has the right to capitalise its profits, it cannot convert income into capital by mere accounting devices. A company A lent money to another company B. The latter got into difficulties, and such interest as it paid was used by A to write down the loan in its books since it thought that the debt was bad. B, however, eventually prospered and paid off the loan and interest in full. A credited the excess of the receipt over the written-down book value of the loan as a capital receipt and distributed it to its shareholders as a capital surplus. Held, that the shareholders were taxable on this distribution, the money being, in truth, income representing interest which had been used in the first instance in writing down the debt, *Dixon v Commissioners of Inland Revenue*, 16 A.T.C. 36 (K.B.D.).

Bonus Debentures—Same company.—A company distributed its undivided profits in the shape of debentures—a portion of which were to be exchanged for fully paid preference shares. Held, by the House of Lords, affirming the decision of the Court of Appeal (reversing the decision of Rowlatt, J), that these debentures were not income in the hands of the shareholders, *Commissioners of Inland Revenue v Fisher's Executors*, (1926) A.C. 395, 10 Tax Cases 302.

Applying the metaphor of a reservoir to *Blott's Case*, 8 Tax Cases 101 the facts found therein may be stated as follows —From the reservoir of capital certain proceeds were allowed to flow down the outlet stream, but these proceeds were not allowed to reach the shareholder, the company enlarged the area of the reservoir and put back the proceeds into the enlarged reservoir—in other words the proceeds in that case never became the profits or gain or income of the shareholder but were put back into the capital of the company and the unissued shares issued to the shareholder in respect thereof

In the present case just the opposite has happened. The proceeds have been allowed to flow down the outlet stream, but they have not been put back into capital. They have been allowed to reach the shareholder in the form of a cash payment and a dividend *in specie* of the shares of another company or as Lord Halsbury put it in *Tennant v Smith*, 3 Tax Cases 158, (1892) A.C. 150, 156. 'There has been a distribution of money and of money's worth'. I am far from saying that there can never be a distribution of capital to the shareholders of the company. There might certainly be such a distribution in the case of the voluntary winding up of a company and the division of its capital assets among the shareholders, but in the present case I am entirely unable to say that there was any distribution of capital, as distinguished from profits or gains. I again repeat the words of Lord Finlay in *Blott's Case*, 8 Tax Cases 101 where he said that that case differed *toto caelo* from a case in which a dividend is paid not in money, but in money's worth by the delivery, say, of goods or of securities. As Mr Justice Pitney in *Macomber's case* 252, U.S. at page 215 —The reliance upon the supposed analogy between a dividend of the Corporation's own shares and one made by the distribution of shares owned by it in the stock of another company calls for no comment beyond the statement that the latter distributes assets of the company among the shareholders while the former does not.

In the present case there has been, as above stated a distribution of assets and for the reasons that I have endeavoured to give, in my view those assets were not capital assets but were profits or gains and are taxable under the Income tax Act.

The so-called dividend was severed from the capital was not added to it and never became part of it, but was received by the company for its separate use benefit and disposal'. *A F Pool v Guardian Investment Trust Company, Limited*, 8 Tax Cases 167, (1922) 1 K.B. 347, 359. This decision was quoted with approval by the House of Lords in *Commissioners of Inland Revenue v Executors of Bishop Fisher*, 10 Tax Cases 302 (1926) A.C. 395.

Following *Pool's case* it was held in *Howard Wilkinson v Commissioners of Inland Revenue*, 16 Tax Cases 52, that so long as what is distributed to shareholders is the investments of the company in another company it is immaterial whether the distribution is made as capital or as extra dividend. In either case the distribution is taxable in the hands of the shareholder as income. The Court left open the question what would be the position if the accumulated profits of the company had disappeared and the investments were required to answer the share capital in the balance sheet.

A company with large reserves formed a subsidiary company to which it transferred its reserves and received in return its shares. The transactions were recorded as follows —Sums were transferred from Reserves to

extent of the conservation of assets to be adopted by the company and in the present case also in some private liability affecting some of the shareholders but not the company. As a matter of fact if the sum, in respect of which the debenture stock was issued in this case had been distributed as cash dividends nearly the whole of the ordinary shareholders would have been chargeable with super tax in the following year, and some of them in large amounts. To the company this mattered nothing, but I cannot think it was lost sight of in the transactions in question.

In both cases the resolution with which the transaction began spoke of "capitalising" the undivided profits and distributing the sum dealt with as a "bonus," and in both cases the use of the word "dividend" was carefully avoided. It was submitted to your Lordships as the essence of the decision in *Blott's Case*, that assets consisting of profits earned but not divided, were to be turned into authorised share capital, and that, if so, the decision would not apply in the present case where no alteration was made in the share capital. I am unable to accept the first reply suggested by the respondents, that the sum actually was turned into capital, namely, loan capital, since it is clear that no such addition to effective capital, as arises when a company borrows a large sum on the security of its assets, was brought into existence at all, and I do not myself think that debts or promises to pay form part of capital, though some debtors do. The second reply was very different, namely, that it was natural to speak of "capitalising" and "converting" into capital in *Blott's Case* for there a purported "capitalisation" took place, but these expressions ought not to be read as limiting the *ratio decidendi* to cases, where new paid up capital is created in the strict sense of the word. The real application of the principle is to assets, from which any further character of divisible profits has been taken away, whatever may be the substituted character thereafter impressed upon them. If so, that principle applies here. My Lords, for my part I think this argument is right and to hold otherwise would be disloyal to the former decision of your Lordship's House.

There are also expressions in *Bouch v Sproule* and in *Blott's Case* which direct attention to the "substance" of the company's transaction, but I do not think these affect the present appeal either. Lord Herschell, 12 A.C. 398, speaks of looking at "both the substance and the form", so does Lord Finlay in *Blott's Case*, (1921) 2 A.C. 198. Lord Cave, on the other hand, uses the expression, (1921) 2 A.C. 201 "If the substance and not the form of the transaction is looked to." In both cases, however, both the form and substance were fully considered. Not only were the deeds and resolutions construed, but the scheme of the transaction, its financial results, and the supposed desires and intentions of the company were examined. Lord Finlay speaks of the option, which was given to the shareholder in *Bouch v Sproule*, as one which should be ignored because it was merely formal, (1921) A.C. 198. Lord Cave speaks of that option as at least so substantial that it might make a difference, and a feature not occurring in *Blott's Case* (p. 202). In spite, however of these discussions and divergences all the noble and learned Lords, who formed the majority, refused to be influenced by the fact that to call the shares "paid up" was formally untrue, on the ground that the form of transferring the

The judgment of Lord Sumner (who was in the minority in *Blott's Case*) sets out the *ratio decidendi* very clearly, (1926) A.C. at p 507

"Shortly stated, I understand that *Blott's case* was decided on this principle To attract super tax to a bonus distributed to him by a company, in which he is a shareholder, what reaches the tax payer must at that moment bear the character of income, impressed upon it by the Company which distributes it and by it alone Provided that the Company violates no statute and also keeps within its articles it can call the subject matter of the distribution what it likes, and I think, this involves the corollary, that it can either call it by a new name or simply discard its old one After all, it is natural for the creature to be named by its creator Further what the company says it is, that it is as against all the world What the company says it shall no longer be, that it is no longer for any purpose How this is effected and by what resolutions, confirmations and instruments does not matter, for such things are 'bare machinery' In what the company has said and done is found the answer to the question What has the subject matter of the distribution now become or ceased to be, when first it reaches the tax payer? See *Viscount Haldane*, 182, 184, 188 and *Viscount Finlay*, pp 194, 196, 197 of (1921) 2 A.C Transmuted by this alchemy, profits in hard-earned gold became extra share certificates, and yet the shareholders, who receive them, may be greatly the gainers

Both cases are alike in the following respects In both the company had among its assets considerable amounts of undivided profits and its board proposed to distribute among its shareholders shares of stocks of an aggregate face value corresponding to the amount of the undivided profits, which were to be dealt with The company passed a resolution to distribute a bonus in the form in the one case of preference shares, part of an authorised but as yet unissued amount, and in the other of debenture stock, newly created for the purpose In the former case the shares were to be credited as fully paid and, as between the company and the shareholders, the shares distributed carried no liability for calls but enjoyed a full right to participation upon the footing that they were paid up In truth however, nothing was paid up on the shares, though alterations in the books and balance-sheet were made as required In the latter case the company executed a trust deed in which a large indebtedness was acknowledged to exist, which in truth was purely voluntary, for the company had borrowed nothing and owned nothing to the trustees, and the deed included a covenant to pay off that indebtedness at a future time In neither case were any assets 'released', *Pool's case*, (1922) 1 K.B 357, 8 Tax Cases 167, they remained in the business just as before In each case the advantage, which the company got by what was done was simply this, that money, which might have been distributed at any time as dividend under ordinary resolutions declaring a dividend and authorising its payment, could no longer be dispersed in this simple way, but, if at all, only by more complicated resolutions duly passed by the shareholders and in *Blott's Case* probably involving liquidation Were there an antagonism in interest between a company and its shareholders, there might be some intrinsic advantage in such a change, but otherwise the object of it must in *Blott's Case* be sought in some conflict of view between different bodies of shareholders as to the

v Sproule now applies to revenue cases and because, under *Blott's Case*, the mere decision of the company, operating through voting majorities, whose private motives and interests may have been no concern of the company at all, has this effect. If any part of the dividends of the year can be so converted, I presume all could be, nor, if a six years' currency of the debenture stock is permissible, do I see why six weeks should be less so. How far this position is tolerable is however, a matter for the Legislature. It is not material here, but I think it may well be doubted whether, in the long run it should be permissible for a limited liability company to create obligations for which no consideration has been given to it, or to increase its paid up share capital out of its own assets, without imposing on the holders of this additional share capital the usual obligations which are involved in the subscription of shares', *Commissioners of Inland Revenue v Fisher's Executors*, 10 Tax Cases 645, (1926) A C 395.

It would appear however, from *Lord Cave's* judgment that he applied the principle of *Blott's Case* because though the debenture was redeemable it was not likely to be redeemed and was not redeemable in the ordinary course for the next six years. If the debentures had been redeemable on short notice the decision may have been different, *e.g.*, it might have been held that income arose when the debentures were paid off.

Mr Whitmore owned the whole of the ordinary capital and he and his wife the bulk of the preference capital in Whitmores Ltd., the rest of the shares being held by their close relatives. The company had a large accumulation of undivided profits which it distributed partly as paid up shares in the company and partly as debentures. Following *Blott's Case* the Crown did not seek to tax the value of the bonus shares. Held, following *Fisher's Case*, that the value of the debentures was not taxable, *Whitmore v Commissioners, Inland Revenue*, 5 A T C 1, 10 Tax Cases 645.

Per *Rowlatt, J*—'He has not received a payment of the debt but he has become an acknowledged creditor a secured creditor, instead of having an interest in the profits. The Court of Appeal have held that for the purposes of a payment of this kind capital is to include loan capital in the application in *Blott's Case*, 8 Tax Cases 101. It is said (by the Crown) that *Fisher's Case*, 10 Tax Cases 302 is distinguishable because there, as in *Blott's Case*, the indications were that the company wanted to keep the money. Here the company merely wanted to turn it into debenture capital for a span and then pay off the debenture capital soon. Now having regard to the two limbs in the decision in *Fisher's Case* so clearly stressed by Lord Justice Scrutton I do not think it is possible to find any distinction on a consideration of the kind.

It has not been argued before me that it was a finding (of the Commissioners) that these debentures were fictitious, were mere pieces of paper shown to the Inland Revenue and that the real transaction was that the profits were to be distributed in cash at any early date. If what is meant is that the company adopted this transaction, being a real transaction and one which does not make the shareholder liable to super tax in lieu of another transaction, which would have made him liable that circumstance has no materiality, as many cases show, in a contest of this kind."

required sum from the category of undivided profits to that of paid up share capital had been correctly gone through in accordance with the articles

I think it is unusual where the form of a transaction is against those whose transaction it is to invoke the substance in their favour in order to eke out what they have left defective in form. Sometimes again it is the intention of the company that is said to be dominant *Burrell's Case* (1924) 2 K.B. 52 sometimes it is what the company desired to do *Blott's case* (1921) 2 A.C. 200 In any case desires and intentions are things of which a company is incapable. These are the mental operations of its shareholders and officers. The only intention that the company has is such as is expressed in or necessarily follows from its proceedings. It is hardly a paradox to say that the form of a company's resolutions and instruments is their substance. At any rate in the present case there is no need to distinguish between form and substance in the transaction itself or to refer to desires or intentions further than to examine what was done for everything was carried out in plain terms and without concealment. What the requisite majorities of the shareholders desired and intended is pretty plain too, but that is another matter.

Equally must the Crown fail in its contention that the shareholder is taxable because at any rate the company distributed money's worth, namely, debenture stock that could be sold. The point was before the House in *Blott's Case*. Lord Haladane (p. 184) said that the share distributed to the shareholder was 'valuable', and Lord Finlay (p. 196), that it was 'valueless' but this difference of opinion made no difference in their conclusion. Lord Cave (p. 199) expressly deals with it saying that the shareholder no doubt got something which he could sell but if he did so he would be selling a capital asset, producing income (p. 200). The fact is that money's worth is not a material circumstance until the bonus distributed has been shown when still in the company's hands and at the time of distribution to be impressed with the character of income of the company. If it is not, the bonus does not attract tax as part of super tax payer's income, even though he spends it, when he gets it exactly as he spends his taxable income.

My Lords the highest authorities have always recognised that the subject is entitled so to arrange his affairs as not to attract taxes imposed by the Crown so far as he can do so within the law and that he may legitimately claim the advantage of any express terms or of any omissions that he can find in his favour in taxing Acts. In so doing he neither comes under liability nor incurs blame. It may be a question however whether these considerations of justice and public policy apply equally to a limited liability company, a creature of the law strictly controlled by statute in a case where it has no interest in either payment of or escape from a tax that is not levied upon it. In this case a sum of £64,464.5 part of the profits of the current year 1914, has been dealt with apart from the undivided accumulations an amount sufficient in itself to have paid a dividend on the issued ordinary shares of 25 per cent. or 5s in the pound for every pound paid up, and by the use of mere machinery it has been converted into debenture stock, not redeemable under normal circumstances for a certain period. This is valid as against all the world, because *Bouch*

Liquidation—Assets distributed—A firm held shares in a number of single ship companies. On the sale or loss of its ship each company went into voluntary liquidation and its surplus assets, including reserves set aside out of profits, and other undivided profits, both accumulated and current, were distributed. Held that on the liquidation of a company undistributed profits can no longer be distinguished from capital and that the portion of the distributed assets representing undivided profits, was not liable to tax, *Commissioners of Inland Revenue v Burrell*, 9 Tax Cases 27, (1924) 2 K.B. 52.

Per Pollock, M R—"These sums have not been distributed to the shareholders as dividends. The voluntary liquidation has deprived the directors of the power of declaring a dividend. The rights of the Crown and the subject must be governed by what is and not what might have been. Further it is a misapprehension, after the liquidator has assumed his duties to continue the distinction between surplus profits and capital."

Per Atkin, L J—"But (the liquidator) has no power to capitalise or decapitalise, to distinguish in his distribution between capital and income. His duty is simply to distribute assets. In fact (the shareholder) receives his share of the joint stock as L J Scrutton said in the *Blott Case*, 8 Tax Cases 101, not income of the property but the property itself."

There are suggestions by the Court of Appeal in the course of argument in *Commissioners of Inland Revenue v Wright*, 11 Tax Cases 181, that the decision in the *Burrell Case* might not apply to the payment of arrears of dividends by liquidators. The decision in the *Burrell Case* is largely obsolete because of the subsequent amendment of the law—see Finance Act of 1927. The principle of the above ruling was extended by the Madras High Court by analogy to cases of partnership in which on dissolution each partner receives his share of capital and profits, *Commissioner of Income tax v P R A L M Muthukaruppan Chettiar*, 1934 I T R. 406, A I R. 1934 Mad 633, but the Privy Council overruled this decision in A I R. 1935 P C. 117, 62 I A. 203, 58 M 881, 1935 I T R. 208. When a company is dissolved, a shareholder merely gets a share of the assets, on the other hand when a firm is dissolved, the partners have a right to receive their shares of profits which do not cease to be profits merely because of dissolution. The profits are a first charge on the assets before any amounts due on account of capital can be distributed, *Commissioner of Income-tax v P R A L M Muthukaruppan Chettiar*, 62 I A. 203. It should be noted however that the above decision does not cover cases of undrawn profits allowed by consent to remain in the business and increase its capital.

Dividend Equalisation Fund—Receipts from—Several directors of a limited company, of whom the assessee was one, held between them all the ordinary shares therein. Each year for five years in succession, the company set aside out of profits certain sums as a reserve fund to be at the complete disposal of the directors for the time being, and in particular as a provision for equalising dividends. On the retirement or death of any director a proportionate share of this "Dividend Equalisation Fund" was payable to him or his legal representatives. Some years later, the company authorised the directors to distribute the fund among the ordinary shareholders as a funded debt payable at the option of the directors in

The estate of Sir David Yule consisted mainly of holdings in interlocked private companies and the trustees of the estate held either the whole or almost the whole of the capital in them. The companies had large accumulated reserves of undistributed profits, and the trustees, who had to meet heavy death duties on the estate, devised a scheme as follows. In those Companies in which the trustees held all the ordinary shares, there was a bonus issue of debentures to them, and in the others, preferred ordinary shares were first issued to the trustees alone and then there was a bonus issue of debentures in respect of the holding of preferred ordinary capital. The debentures were all redeemed after a short interval. It was held by the Privy Council, following *Blott's and Fisher's Cases* and distinguishing *Swan Brewery v Rex*, (1914) A C 231, that the debentures were a capital receipt and not income in the hands of the shareholders and therefore not taxable. The personal motive of individual shareholders whatever their controlling interest, is irrelevant so long as the company has in fact capitalised its accumulated profits, *Mercantile Bank of India, Ltd (Trustees of Yule) v Commissioner of Income tax*, 1936 ITR 239 (Cal).

Where a company declared a dividend, not in cash but by a certificate of indebtedness promising to pay the amount with interest before a certain date it was held that the dividend was received not when the certificate of indebtedness was given but when it was paid off. *Associated Insulation Products, Ltd v Golden*, 1944 KBD (?). It will be seen from *Raja Raghunandan Prasad Singh v Commissioner of Income tax, B & O*, 1933 ITR 113 (P.C.) *Cross v London Provincial Trust*, 21 Tax Cas 705 (C.A.) and other rulings referred to under section 13 that a promise to pay is not the same as a payment.

It should be noted however, with reference to all these rulings about debentures, that the definition in the Indian Act of dividend makes these rulings inapplicable.

Bonus shares—Option to receive cash—In *Wright v Inland Revenue Commissioners*, 5 A.T.C 525, (1927) 1 K.B 333, bonus shares were issued and the shareholders given the option of receiving either cash or shares. The assessee exercised the option in part and received a certain number of shares and a certain amount of cash. Held (by the Court of Appeal reversing the decision of Rowlatt, J) that the existence of the option did not affect the nature of the bonus which had been capitalised by the company. In *Bouch v Sproule*, (1887) 12 A.C 385, also there was an option though it was not exercised. That decision having been followed in *Blott's and Fisher's Cases*, the existence of the option could not in *Wright's Case* make the bonus 'income'. The Master of the Rolls said "We have to treat the company as dominant for all purposes."

Bonus shares—Issue of, to employees—The underlying principle in *Bouch v Sproule* and in *Blott's Case* is that even though shareholders may have been given the option to take cash a company has absolute dominion to determine conclusively against the world whether it will withhold distribution of profits and if it distributes profits, whether as income or capital. But it has no such dominion in regard to what it owes. It must somehow discharge its debts unless it can get a release. It was held therefore, when a manager of a company was paid his remuneration in the shape of additional shares, that the value of the shares was taxable. *Parker v Chapman*, 7 A.T.C 158 (C.A.) 13 Tax Cases 677.

case of a firm, where the assessee is a partner actively engaged in the conduct of the business, profession or vocation, or

(c) which is chargeable, under the head 'Other sources' if it is immediately derived from personal exertion or represents a pension or superannuation or other allowance given to the assessee in respect of his past services or the past services of any deceased person,

and includes any such income which, though it is the income of another person, is included in the assessee's income under the provisions of this Act, but does not include any such income which is exempt from tax under sub section (2) of section 14 or under a notification issued under section 60

History—Differentiation in favour of earned income was first introduced in 1945. The Amending Bill, which met with opposition in the Select Committee in respect of some of its other provisions was not proceeded with and the provisions in respect of 'earned income' were given effect to by an Ordinance.

Scheme of allowance—A part of earned income, determined by the Finance Act from time to time is excluded from total income for purpose of income tax only, and is thus excluded both from liability to tax and also for rate purposes. See section 15 A, the Amendment to section 16 (1) (a), section 17 (5) and sections 56 and 58. It should be noted that unlike insurance premia (section 15) which are included in total income, though exempt from tax, earned income is both exempt from tax and excluded from total income for the purpose of income tax. For the purpose of super tax, however, it is neither exempt nor excluded from total income.

Persons eligible—From the very nature of the allowance it is obvious that companies and local authorities have to be excluded. A partner in a registered firm or a firm treated as registered under section 23 (5) (b) is an 'individual', and therefore eligible for the allowance. On the other hand, a partner in an unregistered firm or a member of a non descript association of persons is not eligible for this allowance in respect of his share of profits of the firm or association, see the concluding part of the definition which excludes items covered by section 14 (2).

Exempt income—Income in Indian States and income exempted under section 60 are also excluded from 'earned income', for there is no reason why any allowance should be given in respect of income which is not taxable at all.

Computation—The allowance should be worked out after the income has been worked out with reference to the other provisions of the Act, viz., sections 7 to 12. Cases of marginal relief relating to incomes a little above the margin are dealt with specially in the Finance Act. See notes on section 7 thereof.

'Salaries'—There must be a relation of master and servant if the payment is to come under this head. Pensions, etc., paid by employers will fall under this clause while those paid by trustees of pensions, etc., funds will fall under clause (c) 'other sources'.

cash or in fully paid preference shares at par', and four days later the directors resolved to pay the Fund in cash and to credit the amount to which each shareholder (director) was entitled, to his loan account with the company, but no special arrangement was made as to interest on the amounts so credited or for their redemption by the company. The directors' loan accounts were used for crediting their fees, dividends and interest and they were in the habit of withdrawing varying amounts therefrom from time to time. Interest was allowed on these accounts at 5 per cent for two years and thereafter at 6 per cent. *Held*, that the Dividend Equalisation Fund was receivable by the directors as income on the passing of the resolution authorising the distribution of the Fund and that the assessee's share of the Fund was therefore properly included in computing his total income for super tax purposes, *Commissioners of Inland Revenue v Blott*, 8 Tax Cases 101, distinguished *Commissioners of Inland Revenue v Doncaster*, 8 Tax Cases 623.

Special dividends carrying obligation to purchase shares with them—To enable a particular director to withdraw from the management of a company it was arranged that the remaining shareholders of whom the assessee was one, should be placed in a position to buy the greater part of his shareholding. In order to provide the remaining shareholders with funds for this purpose the directors recommended that £45 000 should be distributed out of the profits of the company by way of special dividend and the retiring director further agreed to apply the special dividend on his own shares and the cash received for their sale in taking up £45 000 debentures in the company. A few days later the company declared out of accumulated profits special dividends on ordinary and preference shares amounting to £60 000 in all, or £45 000 after deduction of income tax. Prior to the passing of the resolution the assessee signed a letter authorising the directors to use his portion of the special dividend in payment of the consideration money for such of the retiring director's shares as were purchased by him, and similar letters were signed by the other shareholders. With three exceptions the existing shareholders including the assessee, duly applied their portion of the dividend to the purchase of shares from the retiring director who in turn duly took up and paid for £45 000 debentures in the company. *Held* that the transaction was in no sense a capitalisation of profits, that the special dividend was receivable by the shareholders as income, and that the arrangement, whether binding or not, to apply it in the purchase of other shares in the company could not affect the liability to tax, *Roe v Commissioners of Inland Revenue*, 8 Tax Cases 613, 131 L T 255.

(6 AA) 'earned income' means any income of an assessee who is an individual, Hindu undivided family, unregistered firm or other association of persons not being a company, a local authority, a registered firm or a firm treated as registered under clause (b) of sub-section (5) of section 23,—

(a) which is chargeable under the head 'salaries', or

(b) which is chargeable under the head "Profits and gains of business, profession or vocation", where the business, profession or vocation is carried on by the assessee, or in the

case of a firm, where the assessee is a partner actively engaged in the conduct of the business, profession or vocation, or

(c) which is chargeable, under the head 'Other sources' if it is immediately derived from personal exertion or represents a pension or superannuation or other allowance given to the assessee in respect of his past services or the past services of any deceased person,

and includes any such income which, though it is the income of another person, is included in the assessee's income under the provisions of this Act, but does not include any such income which is exempt from tax under sub section (2) of section 14 or under a notification issued under section 60

History—Differentiation in favour of earned income was first introduced in 1945. The Amending Bill, which met with opposition in the Select Committee in respect of some of its other provisions was not proceeded with and the provisions in respect of 'earned income' were given effect to by an Ordinance.

Scheme of allowance—A part of earned income determined by the Finance Act from time to time is excluded from total income for purpose of income tax only, and is thus excluded both from liability to tax and also for rate purposes. See section 15 A the Amendment to section 16 (1) (a), section 17 (5) and sections 56 and 58. It should be noted that unlike insurance premia (section 15) which are included in total income, though exempt from tax, earned income is both exempt from tax and excluded from total income for the purpose of income tax. For the purpose of super tax, however, it is neither exempt nor excluded from total income.

Persons eligible—From the very nature of the allowance it is obvious that companies and local authorities have to be excluded. A partner in a registered firm or a firm treated as registered under section 23 (5) (b) is an 'individual', and therefore eligible for the allowance. On the other hand, a partner in an unregistered firm or a member of a non-descript association of persons is not eligible for this allowance in respect of his share of profits of the firm or association, see the concluding part of the definition which excludes items covered by section 14 (2).

Exempt income—Income in Indian States and income exempted under section 60 are also excluded from 'earned income', for there is no reason why any allowance should be given in respect of income which is not taxable at all.

Computation—The allowance should be worked out after the income has been worked out with reference to the other provisions of the Act, viz., sections 7 to 12. Cases of marginal relief relating to incomes a little above the margin are dealt with specially in the Finance Act. See notes on section 7 thereof.

'Salaries'—There must be a relation of master and servant if the payment is to come under this head. Pensions, etc., paid by employers will fall under this clause, while those paid by trustees of pensions, etc., funds will fall under clause (c) 'other sources'.

Business, profession or vocation—The firm referred to in clause (b) is a registered firm or a firm treated as registered under section 23 (5) (b), otherwise the word 'assessee' occurring after the word 'firm' would be meaningless in view of the concluding part of the definition which excludes income covered by section 14 (2). The case of an unregistered firm or a non-descript association is covered by the words "carried on by the assessee", the firm or the association being the assessee in such cases, and it is immaterial for the purpose, whether some of the members or partners are 'sleeping' or not, for *qua* partners or members they are out of the picture altogether. Whether a partner is 'actively engaged' in the business, etc., of a firm is obviously a question of fact.

Other sources—The income must be *immediately* derived from *personal exertion*. The immediateness has obviously nothing to do with time but with sequence of operations or activities leading to the springing up of income. This as well as what is personal exertion must obviously be a question of fact. A dividend in a company or interest on loans for example will clearly not be earned income, so also, income from property or from any kind of passive or quiescent ownership. But special or additional dividends given to working directors as remuneration will be 'earned'.

Pension, etc—Pension is of the nature of deferred salary and the definition seeks to protect pensions granted by trustees of pension, etc., funds, which would not be included in 'salaries' because the trustees are not the 'employer'.

Trusts—Income received by a beneficiary from trustees can clearly not be 'earned income'. Cf *Inland Revenue v Shiel's Trustees*, 6 Tax Cas 583 (CS), and *M'Dougall v Smith*, 1919 P.C., 86, but it will be treated as such if it is included in the income of the beneficiary under section 16 (1) (c).

Income of other persons included—See sections 16 (1) (c), 16 (3), 23 A and 44-D, *et seq*. If the income of the assessee is made to include, under other provisions of the Act, the income of others he has also the corresponding benefit in respect of earned income if other conditions are satisfied and if the income is not exempt under section 14 (2) or by notification under section 60.

(6-B) 'Firm', 'partner' and 'partnership' have the same meanings respectively as in the Indian Partnership Act, 1932—provided that the expression 'partner' includes any person who being a minor has been admitted to the benefits of partnership.

History—This definition was first introduced in 1930, in order to remove doubts which had been suggested—see for example *In re Ambalal Sarabhai*, 1 I.T.C. 234. Generally speaking however, even before 1930 the expressions 'firm', 'partner' and 'partnership' as used in the Income-tax Act had in fact been construed by Courts with reference to the definitions in the Indian Contract Act the provisions in which relating to partnership were recodified into a separate Partnership Act in 1932. The proviso was added in 1939.

Before this proviso was added to this definition, minors admitted to the benefits of partnership were eligible for the benefit of set-off of losses under section 24 and for that of refunds under section 48. This proviso makes such minors partners for all the purposes of the Income-tax Act.

Though, under the Partnership Act, a minor partner's liabilities are restricted, he gathers as a consequence of this proviso all the incidents of a partner for income-tax purposes, *e.g.*, in respect of tax due from other partners. See also section 16 (3) under which, in certain circumstances, the income of a minor admitted to the benefits of partnership is treated as the income of the father.

Hindu joint family firms—See section 5 of the Indian Partnership Act, 1932, which excludes such firms and a Buddhist husband and wife carrying on business as such from the definition of 'partnership', which latter relationship arises from contract and not from status *Ram Lal v Lakshmi Chand*, (1861) 1 BHC App 11

Registered firm—As to the method of assessing a registered firm, see notes under section 2 (14) as regards the procedure for registering a firm, see notes under section 26-A.

Unregistered firm—See notes under section 2 (16)

Firm—What is a.—There is no such thing as a firm known to the law, *Ex parte Corbett*, (1880) 14 Ch 122, though in Scotland a firm is recognised as a separate entity, *i.e.*, a different legal person from the partners. All the same a 'firm' is recognised in commercial practice as a separate entity apart from its partners, and the Income tax Act recognises this. See also *Ex parte Chippendale*, (1853) De G M & G 19 (36)

"It is argued by the Commissioner that a partnership is for income-tax purposes an entity but it is not an entity known to the law, it is not a separate entity like a company limited by shares, its name is merely a convenient method of describing its partners each of whom is jointly and severally liable for its debts and for income tax purposes it is a convenient body to assess, as the partners carry on trade together and keep books in which the partnership transactions are entered and earn together profits or make losses. It is to be observed, that for this purpose no distinction can be made between registered and unregistered firms for whether a firm is a legal entity or not does not depend on registration," per *Schwabe, CJ*, in *Commissioner of Income tax v Mr Ar Ar Arumachalam Chett*, 1 ITC 278, 47 Mad 660

The new Partnership Act adheres to the view that a firm is not a legal person

Section 239 of the Indian Contract Act was as below —

"'Partnership' is the relation which subsists between persons who have agreed to combine their property, labour or skill in some business, and to share the profits thereof between them"

"Persons who have entered into partnership with one another are called collectively a 'firm'"

The corresponding definitions in the Indian Partnership Act, 1932, are as below —

"'Partnership' is the relation between persons who have agreed to share the profits of a business carried on by all or any of them acting for all

Persons who have entered into partnership with one another are called individually 'partners' and collectively 'a firm', and the name under which their business is called the 'firm name'"

To quote the comment of the Special Committee (which prepared the Draft Partnership Bill) the new definition contains three distinct elements

(1) There must be an agreement entered into by all the persons concerned, (2) the agreement must be to share the profits of a business (a trade occupation or profession) and (3) the business must be carried on by all or any of the persons concerned acting for all

The element of sharing of losses was omitted as a pre requisite since it may be regarded as consequential on the sharing of profits, i.e., on the relation of a partnership established otherwise

Persons who have no mutual rights and obligations do not constitute an association because they happen to have a common interest or several interests in something which is to be divided between them *Smith v Anderson*, (1880) 15 Ch D 247 If the shares are distinct and separately transferable, there would only be a co ownership and not a partnership which can only arise if there is a common business and sharing of profits Thus the joint proprietorship in defined shares of a house let to tenants would not be a partnership but if the house was used as a hotel under their own management a partnership would arise in regard to hotel keeping *French v Styring* (1857) 2 CBNS 357 Part-owners of a ship are not necessarily partners *Helme v Smith* (1837) 7 Bing 709, but if they employ the ship in trade or adventure on joint account they are partners as to that employment and the profit made *Green v Brings*, (1847) 6 Ha. 395 Even the joint acquisition of property avowedly for purposes of profit does not make the matter necessarily one of partnership, *London Financial Association v Kelk*, (1884) 26 Ch D 107 Sharing gross profits will not result in a partnership *Lyon v Knowles*, (1863) 3 B & S 556

Just as common interest will not in itself create a partnership without a division of profits so sharing of profits will not unless there is really a common business Although a right to participate in profits is a strong test of partnership there may be cases where upon a simple participation of profits there is a presumption not of law, but of fact that there is a partnership yet whether the relation of partnership does or does not exist must depend on the whole contract between the parties and that circumstance is not conclusive *Ross v Parkyns* (1875) LR Eq 331, *Cox v Hickman*, (1860) 8 HLC 268 *Mollow March & Co v Court of Wards*, (1872) LR 4 PC 419 Where a coal merchant and an importer arranged informally that for some time the importer would invoice coal at cost and that half the profits made by the merchant would be given to the importer it was held that there was a partnership, *John Gardner and Bowring Hardy & Co v Commissioners of Inland Revenue*, 15 Tax Cases 602 On the other hand when the (outgoing) vendor of a doctor's practice gave the purchaser three months' introduction and the two worked together it was held that there was no partnership *Pratt v Strick*, 17 Tax Cases 459

It is not easy to draw the line between a partnership and a payment of salary by a share of profits *Steel v Lester*, (1877) 2 CPD 121 Sharing losses is a strong *prima facie* test of partnership, *Commissioner of Income tax v Baboo Sahib & Sons*, 2 ITC 502 But it is even possible for a person both to receive a share of the profits in another man's business and share his losses and yet be only a servant of the other person. It would all depend on the terms of the agreement between the two *Walker v Hirsch*, (1884) 27 Ch D 460

Many of the above rulings have now been codified in the Indian Partnership Act as below

Section 5 The relation of partnership arises from contract and not from status, and, in particular, the members of a Hindu undivided family carrying on a family business as such, or a Burmese Buddhist husband and wife carrying on business as such are not partners in such business

Section 6 In determining whether a group of persons is or is not a firm or whether a person is or is not a partner in a firm, regard shall be had to the real relation between the parties, as shown by all relevant facts taken together

Explanation 1—The sharing of profits or of gross returns arising from property by persons holding a joint or common interest in that property does not of itself make such persons partners

Explanation 2—The receipt by a person of a share of the profits of a business, or of a payment contingent upon the earning of profits or varying with the profits earned by a business does not of itself make him a partner with the persons carrying on the business and in particular, the receipt of such share or payment—(a) by a lender of money to persons engaged or about to engage in any business, (b) by a servant or agent as remuneration, (c) by the widow or child of a deceased partner, as annuity, or (d) by a previous owner or part owner of the business, as consideration for the sale of the goodwill or share thereof, does not of itself make the receiver a partner with the persons carrying on the business

A selling association which was formed by an agreement between certain ice manufacturing concerns in order to prevent under selling by constituent firms, and which had the entire control over manufacture, sales, etc., and distributed the profits between constituent members, was held to be a 'firm', and the fact that the constituent firms made heavy losses because of the controlled prices was held to be irrelevant, *Lucknow Ice Association v Commissioner of Income tax*, 2 ITC 156. A similar ruling was given by the Lahore High Court also in *Khushram—Dukhbanjan ran—Tekchand v Commissioner of Income tax*, 3 ITC 298

A deed of partnership purporting to show merely the shares of the partners (in this case a mother and her minor children) without disclosing the business or the assets or the source of income and with no indication as to how the infants combined their property, labour or skill was considered not to have brought a firm into existence. *In re Bai Sukmaboo*, AIR. 1932 Bom 116, 6 ITC 13

Where one man supplied all the capital and bore all the losses, and he and his attorneys had the control of the business including the power to alter the shares of profits of the other persons and even dismiss them, it was held that the relation was one of master and servants, and not a partnership, *Mahomed Kasim Routhier v. Commissioner of Income tax*, 54 MLJ 219 (FB). The mere fact, however, that a person shares only the profits and not the losses will not by itself negative the existence of a partnership, *British Cotton Growers' Association, Punjab, Ltd v Commissioner of Income tax, Punjab*, 1937 ITR 279

The law looks only to the shares in the partnership business and not to the actual receipts of each partner from it, therefore, a partnership under which the shares of the gumashta partners are specified but the actual allocation depends on other factors such as the time devoted to the business, is a valid partnership, *Commissioner of Income tax, Burma v Seth Mangumal Lunuda Singh*, 1939 ITR 208

The cessation of active business cannot of itself extinguish a firm if it continues for other purposes, e.g., collection of outstandings and payment of liabilities, *Gopu Balakrishnayya and others v Commissioner of Income tax, Madras*, 7 ITC 276

There can be no partnership between a Hindu undivided family and one of its own undivided members *Lokenath Prasad Dandhama v Commissioner of Income tax, B & O* 1940 ITR 369, nor between a guardian in his individual capacity and his minor wards represented by himself. In re *Mohanlal Shyamalal* 1942 ITR 219 (All). If a member of a Hindu undivided family makes a contribution from his separate funds to the family business that may be a loan advanced to the family and entitled to interest but there can be no partnership as a consequence. In re *Lackhmandas* 1944 ITR 335 (Lah).

Once a *wakf* is created all rights of property vest in the Almighty who, being non personal cannot enter into partnership with a material person a partnership therefore purporting to treat a *wakf* as a partner represented by the *muta'ali* is not a partnership in law *Hoosan Kaseem Dada v Commissioner of Income tax, Bengal*, 1937 ITR 182. A person cannot at one and the same point of time be a partner in a firm in his individual capacity and also a partner in it in his representative capacity 1937 ITR 162.

Prohibited partnerships—Both in England and in India the number of persons who may form an ordinary partnership is limited. See section 4 of the Indian Companies Act (VII of 1913). Under section 23 of the Indian Contract Act (IX of 1872) the consideration or object of an agreement is unlawful if it defeats the provisions of any law and the agreement is void. Therefore a partnership which is prohibited under the Companies Act will not be recognised as such by the Income tax Officer. But he can tax profits from illegal or unlawful transactions. See notes under sections 3 and 4 (3) (vi).

Firms as partners—After reviewing the following cases viz., *Seodoyal Khemka v Joharmull Moumull*, 50 Cal 549 *Brojo Lal Saha Banikya v Budh Nath Pyarilal*, 55 Cal 551 *Basant Bibi v Babulal Poddar* 1930 ALJ 1517 *Kader Bux Omer Hyat v Sukt Behari*, 36 CWN 489 the Allahabad High Court ruled in *Jaidayal Madan Gopal v Commissioner of Income tax* 1933 ITR 186 that a firm cannot legally be a partner in another firm. Therefore if there is a so called partnership between two firms and a Hindu undivided family and the share of members of the firm are not mentioned in the partnership deed the union as a whole is not a firm but an association of individuals for the purpose of taxation *Mian Channu Factories Union v Commissioner of Income tax, Punjab*, 1936 ITR 203 AIR 1936 Lah 48. The ruling in *Jaidayal Madan Gopal Case*, 1933 ITR 186 applies to all firms, whether registered or not, and there can be no partnership in strict law between a firm and a Hindu undivided family *Parbhu Lal Pyarilal v Commissioner of Income tax* 1935 ITR 197 (All).

In *Chandrikaprasad Ramswarup v Commissioner of Income tax*, 1939 ITR 269 the Allahabad High Court held that though a firm as such cannot enter into a partnership with another firm (because a firm as such is not a legal entity) the larger partnership formed by the two firms can be a partnership in law between the members of the two individual firms and that even if the larger partnership was illegal the income assessable

to tax is the actual income of the individual or of a firm irrespective of the manner in which the income was derived and of the legality or otherwise of that manner

Partnerships how taxed—Under section 3 a firm or its partners individually are chargeable under section 14 a partner in an unregistered firm is not taxable in respect of his share of profits if the firm has been taxed under section 23 (5) a registered firm as such (apart from the partners) is not ordinarily taxed and the Income tax Officer at his discretion may treat an unregistered firm as though it was registered.

Different partnerships—The same persons can enter into more than one partnership under the same deed and it is a question of fact of the construction of the partnership deed whether there is only one partnership or not *Krishna Ginning Co v Commissioner of Income-tax Punjab* 5 ITC 334 The mere fact that two different ventures belong to the same persons and in the same proportions does not necessarily make the two partnerships identical on the other hand the fact that the ventures were called by different names would not in itself make them separate. The test is whether in substance and in truth the business of the two ventures can be held to be so connected as to form a single business In re *Martin & Co* 4 ITC 478 A.I.R. 1929 Cal 753

Firm—Residence of—The residence of a firm under the law as it stood before 1939 was determined by the same considerations as the residence of a company *i.e.*, largely by the seat of the directing power behind the business and not by the physical residence of the individual partners See notes under section 4 (2) *T S Firm v Commissioner of Income tax*, 50 Mad. 847 2 ITC 310 Since 1st April 1939 section 4-A (c) lays down that a firm is resident in British India unless the control and management of its affairs is situated wholly without British India See notes under the latter section.

Notices on firms—Service of—As to the service of notice on a firm see section 63 (2)

Discontinuance of business by firms.—See section 25

Firm—Constitution of—Change in—See section 26

Partnership of Wife and Husband—In *re Asiblal Sarabhas* 1 ITC 234 it was held that a partnership between a husband and wife in which the husband was almost everything in the concern—having the sole control of the management the power of determining the partnership and of admitting new partners—was a valid partnership

Per Shah C.J.—There is nothing in the document to exclude the idea of combining her property labour or skill in the business of the firm. Indeed the papers sent up with the reference tend to show that she did agree to render herself liable to the Bank as a partner of this firm along with her husband. That involves the idea of contributing property to the business of the firm.

When the parties agree to become partners it is not necessary to state in terms that they agree to combine property labour or skill. That may be implied and in the present case I see nothing to exclude the idea of combining property labour or skill when and so far as necessary between the partners. The fact that the control is kept with Mr. Ambalal and that he has certain extra rights as a major partner does not in any sense negative a partnership according to law. It is open to two

partners to agree, on the lines on which they have agreed in this case, to allow the business of the partnership to be conducted by one of the partners"

If the Income tax Officer had found the partnership to be bogus in fact, he could presumably have ignored it

"This reference has been made on the footing that the document evidences a real transaction between the parties. The learned Advocate General has not suggested, and I do not think that on this reference it could be suggested, that the document does not evidence a real transaction between the parties to the document. But he contends that the question of law that arises is whether on a proper construction of this document the two persons are constituted partners in law," AIR 1924 Bom 182, 1 I T C. 234

Bogus firms—The Income tax Officer can refuse to recognise a firm if he has reason to think that the instrument of partnership is not genuine. There should be a firm before the Income tax Officer can register it, and the mere existence of an instrument of partnership will not in itself bring a partnership into existence if there is really no partnership, *Dickinson v Gross*, 6 A.T.C. 551, 11 Tax Cases 614, *In re Birwawarwal Brijlal*, 57 Cal 1336. On a question of fact the finding could not be questioned by the High Court so long as there is evidence to permit of such finding, see *Commissioners of Inland Revenue v Sansom*, 8 Tax Cases 20, *Jacobs v Commissioners of Inland Revenue (CS)*, 4 A.T.C. 543, 10 Tax Cases 1, *Commissioners of Inland Revenue v Whitmore (KBD)*, 5 A.T.C. 1, *Sir Dinshaw Petit v Commissioner of Income tax*, 2 I T C. 55, all cases of 'one man' concerns in which it has been held that the Income tax Officer can go behind the documents and accounts if the facts and circumstances of the case justify his doing so. See also *Hawker v Compton*, 8 Tax Cases 306, in which the Commissioners held that no partnership existed and *Morden Rigg & Co, etc v Monks*, 8 Tax Cases 450 in which the Commissioners held that a partnership existed. In all these cases the Courts declined to interfere on the ground that the findings were of fact. It is clear that in the absence of an instrument of partnership the onus falls on the assessee of proving the existence of a partnership.

An arrangement between a financier and an active worker to share profits and losses in developing a piece of land was held to be a partnership even though the relative correspondence stated in terms that the arrangement "shall not constitute a partnership" *Fluston v Johnston*, 19 A.T.C. 62 (K B)

"You do not constitute or create or prove a partnership by saying that there is one. The only proof that a partnership exists is proof of the relations of agency and of community in losses and profits and of the sharing in one form or another of the capital of the concern. Per *L. J. Clyde* in *Commissioners of Inland Revenue v Williamson*, 14 Tax Cases 335. In that case the facts were as follows. There was no deed of partnership. Father and sons leased a farm jointly. The father supplied capital, controlled the bank account which stood in his name and also purchases and sales. He gave moneys to the sons from time to time—not regular shares. No account was kept of the farm. The business was claimed to be a partnership at will, which the Commissioners accepted. The Court of Session held that there was no evidence to justify that there was a partnership.

Under a contract between a father and his children the latter who worked in the business were to share profits equally, the father's interest being limited to the sums advanced and interest thereon the children were to draw wages but no share of profits until the father's advances were repaid. The father had the sole control of the business and was the only person allowed to operate on the firm's bank account. *Held*, that the father was the sole owner of the business, *Ayrshire Pullman Motor Service and Ritchie v Commissioners of Inland Revenue*, 14 Tax Cases 754.

Whether or not a person is a partner in a firm is a question of fact. *Hukumchand Dunichand v Commissioner of Income tax Punjab*, 1941 ITR 616. The Court will not however, accept a finding based on mere suspicion. Where there were two closely connected firms with several common partners and close interconnection in respect of transactions, and in one of them the assessee and his minor son were among the partners and in the other two of his minor sons the Income tax Department claimed, without any further evidence beyond the fact of partnership, to treat the minor sons as mere nominees of the father but the High Court disallowed the claim. *Commissioner of Income-tax, Bombay v Gokulchand Hukumchand*, 1943 ITR 462.

In the case of an unregistered firm, which the Income tax Officer finds to be not genuine, that is, if the Income tax Officer finds that there is no firm in existence in fact but only in name, it would apparently be open to the Income-tax Officer to ignore the firm and treat the profits of the firm as the profits of the real proprietor of the firm. That is to say, in ascertaining the 'total income' of the partners, the Income-tax Officer will go by the real interests of the partners and not the alleged interests.

Whether a partnership has been dissolved or not is also a question of fact and it is open to the Income tax Officer to ignore an alleged dissolution if in fact it is not true. So, when an individual doing business in partnership with others claimed in the course of proceedings under section 34 against him that the partnership had been dissolved retrospectively for over six months and in support, produced a registered deed of dissolution of partnership dated two days before its production before the Income-tax Officer, and the deed contained false and contradictory statements, and the accounts showed that even after the alleged dissolution the partners were receiving their shares of the profits of the business, the Allahabad High Court held that there was evidence on which the Income tax authorities could find that the alleged dissolution was not true, *In re Lala Tribenram*, 1938 ITR 510. Rules 4 and 6-B as amended in 1939 incorporate the substance of some of the foregoing decisions.

Non-distribution of profits.—Notwithstanding the fact that certain as essees, three brothers who lived and messed together, kept no accounts no separate ledgers and did not draw on the profits more than to a limited extent for their maintenance, it was held in *Commissioner of Income tax v Kekabhai and others*, A.I.R. 1930 Nag 6, that the assesseees were entitled to be registered as a firm. The reasoning was as follows. It is not a necessary condition of partnership under section 239 of the Contract Act that the profits should be divided at a particular time, nor does the certificate in the application under the Income-tax Rules require the profits to be divided within a particular limit of time. If a firm is a firm under the Contract Act and if the certificate is given in good faith, the Commissioner of Income-tax should register the firm.

See, however, section 28 (2) which gives power to the Income tax Officer to levy a penalty if the profits of a registered firm have been distributed otherwise than in accordance with the instrument of partnership produced before the Income tax Officer as governing the distribution so that revenue is lost.

Both sections 14 and 16 make it clear that the share of profits of a partner is to be included in his total income irrespective of whether he has actually received them or not. The English Law on this subject (*see* proviso to section 20 Income tax Act 1918) is almost similar, *see also per Horridge J* in *Gaunt v Commissioners of Inland Revenue* (1913) 3 KB 395 and *Rowlatt J* in *Blott v Commissioners of Inland Revenue*, 8 Tax Cases at p 111. Further in British India the partners of a firm seeking registration have to certify under Rule 3 that they have received or will receive their respective shares of profits.

Evasion of tax—Unregistered firms—*See* section 23 (5) under which the Income tax Officer can treat an unregistered firm as though it was registered if he finds that the Crown will obtain more tax by treating it as registered.

(6 C) "Income" includes anything included in 'dividend' as defined in clause (6-A) and anything which under *Explanation 2* to sub section (1) of section 7 is a profit received in lieu of salary for the purposes of that sub section and any sum deemed to be profits under the second proviso to clause (vii) of sub-section (2) of section 10 and the profits of any business of insurance carried on by a mutual insurance association computed in accordance with Rule 9 in the Schedule.

History—This definition was first introduced in 1939 and the word 'company' altered to association in 1940.

Income—The word income in its ordinary usage excludes everything in the nature of capital and the special definition in this clause expands the ordinary meaning of the word so as to include four specific cases which in the absence of the definition would fall under capital or will be a mere repayment of excess paid *viz* (1) dividend as defined under clause (6-A) (2) profits in lieu of salary under the *Explanation* to section 7 (1) (3) sale proceeds of discarded machinery and plant and (4) profits of mutual insurance associations. Were it not for this definition the first three items would be capital and the last might be held to be a repayment of excess payments.

As regards (1) *see* notes under clause (6 A) as regards (2) *see Commissioner of Income tax Madras v Fletcher* AIR 1937 P.C. 261 1937 ITR 428 (under section 7) which is nullified by this definition as regards (3) *see* notes under section 10 (2) (vii) and as regards (4) *see* notes under section 3 as to Mutual concerns. *See also* section 10 (6) regarding the taxation of profits of trade professional or similar associations to which however there is no reference in this definition. As regards profits of business of insurance carried on by a mutual insurance association *see* notes under rule 9 of schedule [and section 10 (7)].

It will be seen that the Act, and more particularly the extensive amendments of 1939 use the word income sometimes as including income

profits and gains *i.e.*, in contradistinction to capital (and repayments in mutual concerns) and sometime as distinguished from profits and gains *i.e.*, the latter referring to a business profession or vocation and the former to most other sources. In this definition clause it is obviously used in the former more comprehensive sense.

As to rulings and dicta about Capital and Income generally *see* notes under section 3, and as to economic concepts on the subject *see* the Introduction.

(6-D) "Inspecting Assistant Commissioner" means a person appointed to be an Inspecting Assistant Commissioner of Income tax under section 5,

History—This clause was inserted in 1939 *See* notes under clause (3).

Functions—*See* sub sections (5) and (6) of section 5 sections 23 A 28 and 53. The main functions however are intended to be extra statutory *viz* inspectorial and advisory, as will be seen from the Enquiry Committee's Report 1936.

(7) "Income tax Officer" means a person appointed to be an Income tax Officer under section 5,

See notes under section 5.

(8) "Magistrate" means a Presidency Magistrate or a Magistrate of the first class or a Magistrate of the second class specially empowered by the Central Government to try offences against this Act,

Magistrate—The words "specially empowered by the Local Government to try offences against this Act" were introduced in 1918. The word "Central" was substituted for "Local" by the Government of India (Adaptation of Indian Law) Order 1937.

(9) "Person" includes a Hindu undivided family and a local authority.

Person—In the 1886 Act person was defined as including a firm and a Hindu undivided family. The definition was given up in the 1918 Act as being covered by the definition in the General Clauses Act. The Select Committee added the present definition in 1922 so as to make the position clear. *See also* notes under Assessee [section 2 (2)]. The reference to a local authority was added in 1939 in view of the liability of such an authority to tax under the revised clause (iii) of section 4 (3). As to a Hindu undivided family *see* below. As to whether a person includes an infant *see* notes under section 40 and *R v. Newmarket Commissioners* (Ex parte *Huxley*), 7 Tax Cases 49 (1916) 1 K.B. 788.

Family—Unit of taxation—A Hindu undivided family is a separate entity for income-tax purposes being ordinarily represented by the *karta* or manager. Under section 14 the income received from that of the family by a member is excluded from his total income. He is neither taxable on what he receives nor can what he receives affect the rates of tax on other income (*see* sub-section (1) of section 16). Nor can he get a refund of tax in respect of it. Under the Finance Act the rates of tax applicable

to a Hindu undivided family may be different from those applicable to an individual

Hindu Undivided Family—For the purposes of income-tax law the main questions of Hindu Law are what constitutes a Hindu undivided family and what kinds of property and income belong to such a family as distinguished from its individual members. No definition of a Hindu undivided family has been attempted in the Act nor is a simple definition possible. The law on the subject is governed by various sacred books of the Hindus, commentaries on and digests of these books, by custom and by rulings of Civil Courts, including of course those of the Judicial Committee of the Privy Council. The main feature about a Hindu undivided family is that it is a coparcenary or tenancy in common, but such coparcenary or tenancy arises by law among certain relatives of stated degrees including relations by adoption and cannot be created by voluntary contract among strangers or relatives not of the stated degree.

The Calcutta High Court held in *In re Moolji Sucka and others*, 1935 I T R 123, that the Hindu undivided family contemplated by the Income-tax Act was merely a Hindu coparcenary and not the family in its wider sense, and this view was dissented from by the Bombay High Court which in *Commissioner of Income tax, Bombay v Gomedali Lakshmi Narain*, 1935 I T R 367, following Madras, *Vedathanni v Commissioner of Income tax*, 1933 I T R 70, held that the expression referred to the family in the wider sense. Both the cases went up to the Privy Council who observed that the phrase 'Hindu undivided family' was used in the statute with reference, not to one school of Hindu Law but to all schools, and that it was, therefore, a mistake to paste over the wider words of the Act the words "Hindu coparcenary"—all the more that it is not possible to say on the face of the Act that no female can be a member. The Bombay High Court on the other hand having held that an assessee, his wife and mother, were a Hindu undivided family arrived too readily at the conclusion that the income was the income of the family.

A Hindu undivided family includes all persons lineally descended from a common ancestor and includes their wives and unmarried daughters, while a coparcenary includes only those who acquire by birth an interest in the joint or coparcenary property. Therefore a widow of a male member receiving maintenance is a member of the family. *Channan Devi v Commissioner of Income tax, Punjab*, 1944 I T R 153.

According to the Privy Council the words "income of" are simple words capable of a wider or a narrower meaning, and for the purpose of income tax and super tax under sections 3 and 55 income is not to be attributed, to any one of the five classes of persons mentioned, by any loose or extended interpretation of the words, but only where the application of the words is warranted by their ordinary legal meaning. The relevant meaning in the case before the Privy Council was the ordinary meaning in Hindu Law according to the Benares School. In an extra legal sense and even for some purposes of legal theory, ancestral property may perhaps be described as family property, but it does not follow that in the eye of the Hindu Law, it belongs, save in certain circumstances, to the family as distinct from the individual. By reason of its origin, a man's property may be liable to be diverted wholly or in part on the happening of a particular event or may be answerable for particular obligations or may pass at his death in a particular way but if in

spite of all this his personal law regards him as the owner the property is his property and the income, therefore, is his income, i.e. that of an individual. It would not be in consonance with ordinary notions or with a correct interpretation of the Mitakshara law to hold that property which a man has obtained from his father belongs to a Hindu undivided family by reason of his having a wife and daughter, *Kalyani Vithaldas, etc v Commissioner of Income tax, Bengal*, 1937 I.T.R. 90, (1937) 1 Cal 603, 64 I.A. 28, *Commissioner of Income-tax, Bombay v A P Swamy Gomedalli* 1937 I.T.R. 416, A.I.R. 1937 P.C. 239. See also *Commissioner of Income tax, Burma v Vednath Singh*, 1940 I.T.R. 222 in which a Hindu (Mitakshara) died leaving property to his only son whose mother and sister however, were still alive, and it was held, following *Kalyani Vithaldas's Case*, that the son was assessable as an individual.

As a consequence of the above Privy Council rulings the following instructions have been laid down by the Central Board of Revenue —

(a) The son of a Hindu (governed by any school of Hindu law) does not acquire by birth any interest in his father's self acquired property. In respect of the income of such property the father is to be assessed as an individual. (b) In the case of Hindus not governed by the Dayabhaga law the son acquires by birth an interest in his father's ancestral property and therefore after the birth of a son the income from ancestral property is to be assessed as the income of a Hindu undivided family. According to the Dayabhaga law however, the son does not acquire by birth any interest in ancestral property. His rights arise for the first time on his father's death. In the father's lifetime, therefore, the income from ancestral property is to be assessed as the income of an individual unless the father himself is a member of a coparcenary. (c) The income of a sole surviving male member of a Hindu undivided family governed by the Mitakshara law is to be assessed as his personal income if he has no son. The existence of a wife and daughters does not alter the position. Under the Dayabhaga law the position is different. According to that law a coparcenary is formed only when the inheritance opens, and there must be two or more male heirs before a coparcenary can be formed. But if any of these male coparceners dies leaving surviving him a widow or a daughter that widow or daughter would be admitted into the coparcenary in the place of the deceased coparcener. As for example, a Hindu governed by the Dayabhaga law dies leaving three sons A, B and C. The three sons, A, B and C, inherit the property jointly and form a coparcenary (although each inherits a defined share). If before partitioning their shares, B dies leaving a widow, BW and C dies leaving a daughter CD, then A, BW and CD will be members of the coparcenary originally formed by A, B and C. It will thus be seen that the Dayabhaga law differs from the Mitakshara in admitting females into the coparcenary in certain circumstances although they cannot originally form a coparcenary. A coparcenary is a *fortiori* an undivided Hindu family and the income from the coparcenary property will, according to the Dayabhaga law, be assessable as the income of an undivided Hindu family notwithstanding that such coparcenary consists of only one male member and one or more female members. (d) The income from ancestral property of a Hindu (governed by any school of law) with no son but with a wife and/or daughters is to be assessed as the income of an individual.

It would be inconsistent with the interpretation of the law of the Dayabhaga as of the law of the Mitakshara to hold that property which, a

man has obtained from his father belongs to a Hindu undivided family by reason of his having a wife and/or daughters. Indeed since under the Dayabhaga law a son has no greater right in his father's property than that of maintenance during his minority and the father is the absolute owner of property devolving upon him, even the existence of a son will not make the income of the property in the father's hands the income of an undivided family.

It will be seen that, where there is only one male member, he will be treated as an individual, and also that what a female member receives as maintenance is received by her as a member of the family within the meaning of section 14.

After the decision of the Privy Council in *Kalyani Vithaldas's Case*, the Hindu Women's Rights to Property Act became law. Whether section 3 of that Act makes a widow a coparcener in the full sense of the word or not she clearly obtains an interest in the joint family property. Therefore a family composed of a male member with a wife and undivided step mother is a Hindu undivided family and the male member must not be assessed as an individual. *Commissioner of Income tax, Madras v A V R MR M Lakshmanan Chethar*, 1940 ITR 545. In a case, anterior to the Hindu Women's Rights to Property Act in which a widow of the last surviving coparcener adopted a son, who also died issueless, leaving a widow, it was held that the two widows together did not constitute a Hindu undivided family and that the property was that of the mother-in-law individually, notwithstanding her liability to maintain the daughter-in-law. *Panna Bai v Commissioner of Income tax, C P*, 1943 ITR 154.

Non-Hindus—Jains are Hindus for the purpose of the income-tax law in the absence of custom or usage to the contrary. See the following rulings: *Chotoylal v Chunnolal*, L R 6 I A 15, *Bachhi v Mahantlal*, 3 All 55, *Ambabai v Govind*, 23 Bom 257 and *Nathu Sa Parsu Sa Lad v Commissioner of Income tax, C P*, 7 ITC 129. So also, Sikhs. If Jains or Sikh joint families do not wish to be treated as Hindu undivided families, it is for them (according to the Income tax Manual) to prove the existence of a custom or usage to the contrary. The Income tax Manual also directs that joint families of Moslems who follow Hindu Law in regard to succession, e.g., Khojas and Cutchi Memons are not to be treated as Hindu families for the purpose of this Act.

The members of a Mitakshara family after a preliminary decree for partition has been made and before partition, are in the same position as a Dayabhaga family and can be individually assessed in respect of their shares, *In re Keshardeo Channria*, 1937 ITR 246 (Cal).

The law assumes that the normal status of a Hindu family is one of jointness in residence and estate. The presumption in law, therefore, is that a Hindu family is undivided and it is for the person claiming any advantage for the purpose of tax to prove the contrary. The law also presumes that property once joint continues as such until the contrary is proved. Other presumptions are that property acquired by or in possession of a joint member is joint property, and that the property acquired with the nucleus of joint property is joint unless the acquirer has been separated from the family. All these presumptions, however, apply only in the case of male members of the family. If the property belongs to a female member, the position is different as will be seen in what follows about 'stridhanam'.

Section 25 A of the Income tax Act lays down in terms that unless an order has been passed by the Income tax Officer under that section that a Hindu family has been divided, such family shall be deemed to continue as an undivided family.

A partition can be effected in several ways by decree of a Court, by a Deed of Partition (which under the Registration and Transfer of Property Acts must be registered if it involves immovable property over Rs 100 in value) by a Deed of Release from a member relinquishing his right to the joint property by an agreement—oral or written—among the members to remain separate or even a formal declaration by one member that he will remain separate, by actually remaining separate for 12 years and by the conversion of a member to an alien faith. Self acquired property, however if it includes immovable property, e.g., buildings, of a factory (in India such property does not include machinery) cannot be transferred except by a registered instrument under the Transfer of Property Act. *In re Sir Sundar Singh Majithia*, 1938 ITR 336 (All.), ILR 1938 All 638 AIR 1938 All 452.

The family may be partitioned but not the properties which may be managed and shared in common. At the same time a family cannot be joint if the property has been divided. Even if the property remains joint if the family is divided in status the acquisition of the members is individual and not joint property. See however section 25 A under which for the purpose of income tax what matters is the division of the property, and not merely a divided status.

It is also open to a family to arrange to enjoy a portion of the family property jointly but in specific shares and the arrangement at once becomes a voluntary contract outside Hindu law and is no longer subject to the incidents of Hindu family coparcenership. There is also nothing to prevent a member of a Hindu undivided family from earning on his own account without putting the earnings into the common stock but once he puts it into the common stock it becomes the family property and not his own.

Income from separate and self acquired property not put into the common stock is the income of the individual even though he may have undivided sons since they have no interest in such income, *In re Kalyandas Vithaldas and others v Commissioner of Income tax, Bengal*, 1937 ITR 90, 64 I.A. 28.

The Income tax Manual instructs income tax authorities that where the income profits and gains of a member of a Hindu undivided family consist of his personal earnings and acquisitions by his own exertions, they must be treated as his personal income and not as joint family income, unless they flow from the employment in business or otherwise of the joint family property.

The following is an extract from the Calcutta High Court judgment, in the case of *In re Ganga Sagar Anandamohan Shaha* AIR, 1930 Cal 178 4 ITC. 55 33 CWN 1190 (FB).

Now every Hindu family is presumed to be joint in food worship and estate. Under the Dayabhaga law each coparcener takes a defined share. The essence of a coparcenary under the Mitakshara law is unity of ownership whereas under the Dayabhaga law the essence of a coparcenary is unity in possession. So long as there is unity of possession, no coparcener can say that a particular share of the property belongs to him. That he can say only after a partition. Partition then, according to the Dayabhaga law, consists in splitting up joint

possession and assigning specific portions of the property to the several coparceners. But there is no presumption that a family, because it is joint, possesses joint property or any property. Where there is joint estate and the members of the family become separate in estate, the family ceases to be joint. Mere severance in food and worship does not operate as a separation. Cesser in commensality is an element which may properly be considered in determining the question whether there has been a partition, but it is not conclusive, *Chowdhry Ganesh Dutt v Mt Jewach*, 31 IA 10 31 Cal 262, *Ranganatha Rao v Narayanasami*, 31 Mad 482. If, however, after cesser in commensality any member of the family is in possession of any portion of the property separately, the presumption referred to above is considerably weakened. No doubt it is true that the mere fact that a property is purchased in the name of a member of the family and that there are receipts in his name respecting it, does not render the property by itself, his separate property, but if in addition to the fact that certain property stands in the name of one of the members, there be these further facts, namely, that some other members of the family have properties standing in their separate names and are found to deal with the same as their own without reference to the rest of the family and that the members of the family are allowed to appear to the world to be the owners of the said separate properties, the presumption that the properties are joint is almost gone and the burden of proving that the properties are still joint will lie on those who allege that they are joint. If the family remains joint no charge can be made against any coparcener because in consequence of his having a larger family to maintain than others, a larger share of the joint income was spent on his family. Such expenditure is considered to be the legitimate expenditure of the whole family. If, however, the expenses of the marriages of the daughters and of the education of the children are paid for separately by the coparceners, that is a circumstance which must be taken into consideration for the purpose of finding out whether the family still remained joint", *Abhoy Chandra v Peyari Mohan* 5 B L R 347.

It does not, however, follow from the above ruling that it is not open to the members of a Dayabhaga family to become divided except by dividing the family property by metes and bounds, and that, even though the intention to separate had been unequivocally declared and everything else necessary to bring about the disruption of the family had been done, the family would still be joint in law merely because, there was no division by metes and bounds. An unequivocal declaration of intention, however, is necessary in all cases to prove division, *In re Mullick and Sons*, 1938 I T R. 99 (All). See, however, section 25-A as to the conditions to be satisfied before the Income tax Officer can treat a family as divided for the purpose of taxation.

Gifts from father.—According to a long course of rulings on the Madras High Court, where a father gives his self acquired property to his son, he takes it as ancestral property unless it is apparent that the gift was intended to be personal to the son. This view however, is not shared by certain other High Courts. See *Velayudhan Chettiar v Commissioner of Income tax, Madras*, 1945 I T R. 30.

Assessment after partition.—See section 25-A and notes thereunder.

Partition—Questions of fact and law.—It will be seen from the foregoing that the law merely lays down various presumptions which, of

course, can always be rebutted by stronger evidence to the contrary, *e.g.*, the partition might be a mere use for hoodwinking creditors and in fact the family might continue to be joint. The essential thing to remember is that it is always primarily a question of fact whether a Hindu family is divided or not, *Piyarelal, etc v Commissioner of Income tax Punjab*, 1933 ITR. 215, *Raja Singh Obera v Commissioner of Income tax, Punjab*, 1934 ITR. 331, and under the Income tax Act it is entirely for the Income-tax authorities to decide questions of fact and not for the Civil Courts. So long, therefore, as the Income tax authorities do not misunderstand the law or act without reasonable grounds, the High Court will not interfere with their conclusions.

If all the persons concerned agree that the family is divided the Income-tax Officer must concede that at that point of time when they so agree the family is divided *O L K K N Kannappa Chettiar v Commissioner of Income tax*, 2 ITC 381, unless the Income-tax Officer has evidence to show, that the agreed partition is a sham.

Where arbitrators appointed by the members of a family delivered the award in November, 1935 (which was made a rule of the Court in February, 1936) and the award stated that the partition would take effect from 1921 (from which date in fact there had been a private partition) it was held that the Income tax authorities acted rightly in giving effect to the partition from 1921, *In re Ratanchand Lallumal* 1936 ITR 189 (All), AIR 1936 All 279.

Where a joint family had no nucleus, a mere admission at one stage that all income was joint could not be conclusive of that fact in the face of stronger evidence to the contrary that may be adduced in a later year to show that a particular block of income had not been joint at all *S B Indra Singh v Commissioner of Income-tax, B & O*, 1943 ITR. 16. In the absence of anything on the record to suggest a contrary conclusion, an Income tax Officer is not justified in refusing to accept an affidavit by the assessee (that he had thrown into his family stock his self acquired properties) merely on the ground that the affidavit, being a confidential document under section 54, could not be used against the assessee by any other person. *In re Lakshminarain Gadodia*, 1943 ITR. 491 (Lah).

See also notes below under "Trading families"

Stridhanam—A difficult matter in Hindu undivided families from the point of view of the Income tax Officer is 'Stridhanam', *i.e.*, property belonging to a female and subject to special laws. Under the Hindu law a woman, whether married or not, has absolute right over her own property in certain cases. Presents from parents or from the husband, and property, which she has acquired for herself out of the above kinds of property, are all her own absolute property and the family has no claim of any sort upon it. See as to the nature and incidents of Stridhana Mayne's Hindu Law, 10th Ed, Ch XVI, pp 740, *et seq*. If she gives a portion of her income to others, such payments are gifts pure and simple and should be treated as such by the Income tax Officer. The right of inheritance in regard to Stridhanam is also peculiar. It is from mother to daughter. Under the Hindu law, a woman may also have a life estate in a property, but it makes no difference for the purpose of income-tax whether a person's interest is only a life interest or not, since what has to be taxed is only the income. A Hindu lady may have to maintain other members, in which case such main-

tenance expenses cannot be taxed again as the income of those maintained or deducted from her own income except in circumstances that would constitute a charge on the property. See *Raja Bejoy Singh Dudhuria v Commissioner of Income-tax, Bengal* 4 ITC 151, on appeal 60 IA 196, 6 ITC 449, 60 Cal 1029 1933 ITR 135

By a special provision in the Income tax Act, however, the income of a wife or of minor children whether of a Hindu or not is added on to the income of the husband or father in certain circumstances. See section 16

Benami—It is not uncommon, for Hindu undivided families—especially trading ones—to transfer *benam*, i.e., fictitiously the property of the family to one of the female members but actually keeping it as the family property. Cases of this type involve difficult questions of fact, which however are entirely for the Income tax Officer to decide on evidence, *Halder v Commissioner of Income tax, Burma*, 6 ITC 37. There is no presumption that a property standing in the name of a Hindu female who is a member of a joint family belongs to the family and is not her *Stridhanam*. The burden of proof lies upon the person who asserts that the apparent is not the real state of things. *Bhuban Mohini Das v Kumud Bala Das*, 28 CWN 131. *Ramkinkar Banerjee v Commissioner of Income tax, B and O*, 1936 ITR 108

Maintenance charges and assignments—An assessee governed by Mitakshara law had to pay under a decree of a Court a maintenance allowance to his step mother the allowance being a charge on his whole estate. The Calcutta High Court held that there was no provision under sections 8 *et seq* under which the allowance could be deducted. The Privy Council however decided that the allowance was not the assessee's income at all within the meaning of section 3 which seeks to charge only what reaches the assessee as income. *Raja Bejoy Singh Dudhuria v Commissioner of Income tax*, 60 IA 196 1933 ITR 135. A similar case was *Commissioner of Income tax Bombay v D R Naik*, 1939 ITR 362 (see notes under section 3 on income from encumbered property). It must be noted, however, that, in calculating the taxable income of a Hindu joint family, maintenance and residence allowances paid to a widow of a coparcener cannot be deducted merely because the amounts of the allowances have been fixed by a Court. In the *Dudhuria* case the Crown sought to tax the sole surviving member of a Hindu joint family as an individual, and in determining his income as an individual the allowance paid to a step mother under a Court decree had to be deducted. Where the assessment is made on a family as such, such allowances cannot be deducted. *Commissioner of Income tax Bombay v Makhan Lalji*, 1937 ITR 538 ILR (1937) Bom 827, AIR 1937 Bom 479

An allowance out of an assignment of land revenue by Government (*jagir*) made by the holder of the assignment (who has to be approved by Government) to a younger member of the family (the allowance being determined by Government) is not received by the younger member as a member of the family since the allowance is a gift of the Government and would not necessarily cease if the payee left the family and is not received out of the income of the family, *Kanwar Kartar Singh v Commissioner of Income tax, Punjab*, 1937 ITR 569 AIR 1937 Lah 905

A Hindu (assessee) succeeded to an estate of which he was not the reversioner, under a will, which provided, *inter alia*, for a payment of Rs 42,000 a year to the assessee's mother as a charge. The estate came

under the Court of Wards who by consent gave Rs 30,000 a year to the mother. The question arose whether or not the mother received the allowance as a member of a Hindu undivided family and it was held that she did because, irrespective of the source from which the son acquired the property he was bound to maintain his mother. What she received was therefore as a member of the family and not under the will. *Commissioner of Income tax U P v Ram Rudh Kumari* 1940 ITR 607 (Oudh). Where a widow leaves the family and surrenders her life estate in it in return for a monthly allowance the allowance is not received by her as a member of the family of which she was no longer a member having left it. *In re Kamalabala Das* 1940 ITR 404 (Cal).

Impartible estates—The position of impartible estates has been one of difficulty as the following rulings will show.

Income from Royalties from land assigned by the holder of an impartible estate to his younger brothers on the following conditions (a) The grant could be resumed on the death of the grantor by his successor or by the grantor on the death of the grantee (b) The grantor reserved to himself the right to a certain part of the Royalties and required the grantee to refer to him re-settlements of land surrendered by tenants—was held to be the income of the impartible estate because the holder had not parted with the lands irrevocably. The test of such irrevocable parting is not, who can sue the tenants for rent or grant acquittances for rent but whether the assignment represents a diversion by the owner of a part of his income in order to meet a liability of his or whether it represents a charge on the income at source i.e., a prior claim before anything can accrue to him leaving him only the residual share. *Raja Jyoti Prasad Singh Deo v Commissioner of Income-tax, Bihar and Orissa* 5 ITC 68 following *Hudson v Gribble* and *Bell v Gribble* 4 Tax Cases 522 (1903) 1 KBD 517. On the other hand in *Krishan Kishore v Commissioner of Income tax Punjab* 1933 ITR 143 14 Lah 255 AIR 1933 Lah 284 it was held that an allowance payable to a younger son in an impartible family was not part of the income of the family but of the nature of a charge on the estate that it was the separate property of the younger son and should therefore be excluded from the income of the family and taxed as the younger son's income. The question was again considered first by the Allahabad High Court in *In re Maharaja Kumar of Vikanagaram* 1934 ITR 186 and then by the Madras High Court in *Narayana Gajapathi Razu v Commissioner of Income tax*, 1934 ITR 288 both the Courts holding that the allowance due to and received by a junior member of an impartible Hindu family is received by him as a member of such family, and is therefore exempt both from super tax and income tax. The question is not whose income the allowance is but whether it is received by a member of a Hindu undivided family as such i.e. in accordance with custom and there having been no actual separation of the family. The Allahabad High Court distinguished *Krishan Kishore's case* on the ground that in that case the younger son had in fact become separate. Such separation in the case of an impartible family is indicated by a renunciation of the right to succession.

These decisions apply only to allowances claimable by the junior members and not to pure gifts by the senior member. It would appear from these decisions that such gifts should be included in the income of the family. See also section 14 and notes thereunder.

The Patna High Court held in *Raja Shrivaprasad Singh v King Emperor* 1 ITC 389 that the Finance Act contemplates the larger deduction for purposes of Super tax only if the income is that of a joint family in which all the members are jointly interested and not in the case of an impartible estate in which the income is the property of the holder for the time being. If the estate is impartible the other members have no rights of coparcenership and all that they have is a right of succession by survivorship. They cannot demand a partition or restrain alienation. The income of the estate is the income of the incumbent for the time being and the fact that he is bound to maintain others (e.g., sons) does not make the income that of a joint family.

On the other hand the Lahore High Court held in *Diwan Krishan Kishore's case* that the estate of an impartible Hindu family is not the sole property of the individual as the head of the family but the property of the family subject to all the incidents of impartibility and that super tax should be charged accordingly.

After reviewing certain authorities viz *Shrivaprasad Singh v Prayag kumari Devi* 59 Cal 1399 (P.C.) *Jagadamba Kumari v Wazir Narayan Singh* 2 Pat 319 (P.C.) *Parbati Kumari Devi v Jagdishchandar Debi*, 29 Cal 433 (P.C.) which lay down that the income of an impartible estate is the absolute property of the holder and in no way different from property gained by his own effort or come to him in circumstances entirely dissociated from the ownership of the estate, the Madras High Court held that there was no reason why the income of a holder of an impartible Hindu estate from that estate should for the purpose of taxation be treated differently from his income arising from his own personal exertions or other sources. All that *Krishan Kishore's case* decided was that there is no legal sanction for the proposition that an estate governed by primogeniture cannot belong to a Hindu undivided family but must be the sole property of the person who has succeeded by primogeniture and it does not lay down that income from an impartible estate is joint family income. *Raja of Bobbili v Commissioner of Income tax Madras* 1937 ITR 78.

In *Bisweswar Singh's case* 1935 ITR 216 (referred to under section 14) the only question raised was as to the nature of the income in the hands of the younger member who received the maintenance allowance and not as to the nature of the income in the hands of the holder of the estate and in a later case *Rajendra Narayan Bhanja Deo v Commissioner of Income tax B and O* 1938 ITR 536 the Patna High Court followed *Raja Shrivaprasad Singh v King Emperor* 1 ITC 389 and declined to follow the Lahore decision in *Kishan Kishore's case* 1933 ITR 143. The Lahore High Court reconsidered the decision in 1933 ITR 143 in the light of several rulings of the Privy Council and decided to adhere to its decision definitely dissenting from the Madras decision in the *Bobbili case* and the Patna decision in *Rajendra Narayan's case*. According to the Lahore view the holder of an impartible Mitakshara estate regulated by primogeniture is taxable as the head of a family and not as individual. *Commissioner of Income tax Punjab v Diwan Krishan Kishore* 1939 ITR 427. This decision was modified by the Privy Council on appeal. The income was to be taxed not as that of the family but as that of the head thereof except that income from property under section 9 should be taxed on the family since the family and not the head thereof individually was the owner of the property (see section 9). Though the co-ownership of the junior members may be in a sense only carrying no present right to joint possession if the ques

tion be whether the Hindu undivided family or the present holder is the owner of the estate, the answer in Hindu law is it is joint family property. There is a distinction between the ownership of the property which is joint and that of the income which is not. The income of the head of the family other than under section 9 can be added on to his income from outside the family. The question was left open whether though the house property belonged to the family the head could be charged individually under section 12 because in fact he received the income from the property.

Where a holder of an impartible estate had to pay allowances to the Ranis of his predecessor under the orders of a Court arising out of litigation in which the Ranis had challenged the successor's membership of the joint family of the predecessor, and such allowances were a charge on the estate the Income tax Department refused to deduct the allowances from the taxable income of the holder of the estate on the ground that the allowances were paid to members of a Hindu undivided family from its income. This view was not accepted by the High Court *Shivprasad Singh v Commissioner of Income tax, B and O*, 1942 ITR. 349 following *Raja Bejoy Singh Dudhuria v Commissioner of Income tax, Bengal*, 1933 ITR 135 (P.C.).

The payment, by the Court of Wards, as manager of an impartible Mitakshara estate, of a maintenance allowance to the mother of the holder thereof was held to be received by the mother as a member of the family. An impartible estate belongs to the family, though the holder for the time being may have absolute rights over its income. *Commissioner of Income-tax, B and O v Maharani Gyam Manjari Kauri*, 1945 ITR. 55. An allowance paid under the Oudh Estates Act out of the income of an impartible estate is not received *qua* a member of a Hindu undivided family, because the Act is not restricted to Hindus only. *Rani Ananda Kumari v Commissioner of Income tax, U P*, 1943 ITR 235 (Oudh). The Oudh Estates Act covers both Hindu and Muslim estates, and created or re-created as the case may be, certain estates and gave them legal form. Such an estate therefore, does not have all the incidents of a Hindu impartible estate, and an allowance for maintenance received by a younger member is not received by him *qua* a member of a Hindu undivided family. *Rananaya Singh v Commissioner of Income tax, U P* 1944 ITR. 159 (Oudh).

Trading families—The most important class of Hindu undivided family from the standpoint of the Income tax Officer is undoubtedly, the joint Hindu family firm. The law regarding these families is slightly different from that regarding non trading families. If the family carries on an ancestral trade or with the consent of all its members a new trade it is governed not by the ordinary Hindu law, but by such law as modified by the exigencies and usages of the trade. The business is not dissolved by the death of any of the members. No member can even when severing his connection with the family demand accounts of profits and losses. Any member not necessarily the senior male member, can be the manager of the business and as such can pledge the credit and assets of the family without being accountable for losses or gains. But a partnership based on only some of the members of the family, whether with outsiders or among themselves is not a business of the family. Even if a business is carried on by all the members of the family, if the profits are divided upon some agreed proportion, the trade is not that of the family but that of an ordinary firm under the ordinary law of partnership.

text of the Act, and references have been given in the notes under each section to the rules connected with that section

Till 1930, all the rules were made by the Central Board of Revenue. From that year some of the rules under Chapter IX-A (relief to certain classes of provident funds) are made by the Governor-General in Council

(11) "Previous year" means in respect of any separate source of income, profits and gains:—

(a) the twelve months ending on the 31st day of March next preceding the year for which the assessment is to be made, or, if the accounts of the assessee have been made up to a date within the said twelve months in respect of a year ending on any date other than the said 31st day of March, then at the option of the assessee the year ending on the day to which his accounts have so been made up:

Provided that where an assessee has once been assessed in respect of a particular source of income, profits and gains, he shall not in respect of that source exercise this option so as to vary the meaning of the expression 'previous year' as then applicable to him except with the consent of the Income-tax Officer and upon such conditions as the Income tax Officer may think fit; or

(b) in the case of any person, business or company or class of person, business or company, such period as may be determined by the Central Board of Revenue or by such authority as the Board may authorise in this behalf; or

(c) where a business, profession or vocation has been newly set up in the financial year preceding the year for which the assessment is to be made, the period from the date of the setting up of the business, profession or vocation to the 31st day of March next following or to the last day of the period determined under sub-clause (b), or, if the accounts of the assessee are made up to some other date than the 31st day of March, and the case is not one for which a period has been determined by the Central Board of Revenue under sub-clause (b), then, at the option of the assessee, the period from the date of the setting up of the business, profession or vocation to such other date:

Provided that when such other date does not fall between the setting up of the business, profession or vocation and the next following 31st day of March, it shall be deemed that there is no previous year; and

when the assessee is a partner in a firm, 'previous year' in respect of his share of the income, profits and gains of the firm

means the previous year as determined for the assessment of the income, profits and gains of the firm

History—There was 'no definition of previous year in the Act of 1886 but section 11 of that Act provided a similar definition [like clause (a)], in respect of Joint Stock Companies and in respect of other sources of income. The definition in the 1918 Act was the same as clause (a) of the present definition. Clause (b) was introduced in order to cover exceptional cases in which a commercial community (1) follows a year which is slightly over or under 12 months and (2) follows year which ends a few days or weeks after the financial year.

The following changes were made in 1939 (1) The words "in respect of any separate source of income, profits and gains" were inserted.

(2) The Proviso under (a) was substituted for the following—

Provided that if this option has once been exercised by the assessee it shall not again be exercised so as to vary the meaning of the expression 'previous year' as then applicable to such assessee except with the consent of the Income tax Officer and upon such conditions as he may think fit.

Item (2) is partly consequential on Item (1) and partly in order to avoid double assessment in certain cases as explained later in these notes.

(3) Clause (c) was added in order to avoid double assessment of a part of profits of new businesses etc and (4) the previous year of a partner in a firm was made clear.

Object of proviso in clause (a)—The discretion of the Income tax Officer is absolute and it is open to him to impose any conditions that he may think fit in order to safeguard the revenue. So long as his action is not *mala fide* or perverse or inherently unjust, the intervention of the Court cannot be invoked. The Income tax Manual says—

The Income tax Officer will not permit the assessee to exercise the option if that proviso applies unless he is satisfied that the change of 'previous year' in respect of any sum of income profits and gains is sought on substantial grounds other than that of avoidance of tax. When the Income tax Officer does give his consent under the proviso the full period from the end of the previous year for the preceding year's assessment to the end of the new accounting date will be taken as the 'previous year', whether such period is greater or less than a year. In no circumstances, however, will the rate of tax be adjusted so as to apply a rate to an income of a period greater or less than twelve months which would have been applied had the 'previous year' been exactly twelve months. On this matter the instructions given to Income tax Officer under the Act before amendment (in 1939) have been withdrawn.

As regards the changes made in 1939 at the beginning of the definition and in the proviso to clause (a), see the following extract from the Enquiry Committee's report—

(a) The practice, where the assessee has more than one source of income and closes his accounts therefor at different dates is to calculate the income from each separate source (separate businesses are intended to be treated as separate sources) according to the separate accounting year adopted for it. This practice has been recently approved by the Bombay High Court in the case of *Commissioner of Income tax v. Abu Baker Abdul Rehman*, 1936 ITR 232, and we suggest that it be reaffirmed by amendment of clause (11) of sect 23.

2 of the Act, by the addition after the words "‘Previous year’ means" of words such as "for each separate source of income"

(b) It has been represented to us that when an assessee exercises the option under section 2 (11) (a) for the first time after his first year of assessment, this involves double assessment of part of his profits in the normal case. To remedy this, we suggest that the proviso to that sub section be amended as follows — ‘Provided that where an assessee has been previously assessed in respect of the same source of income, he shall not exercise this option so as to vary the meaning of the expression ‘previous year’ as then applicable to him except with the consent of the Income tax Officer, and upon such conditions as he may think fit” This amendment would enable the Income-tax Officer to prevent double assessment in all cases of change of accounting date on the lines suggested in paragraph 6 (iv) of the Manual”

Any separate source—Though it can be argued that ‘source’ means one of the heads referred to in section 6 which uses the words ‘other sources’ in the residuary head, the word would appear to be used in its ordinary meaning of something from which income arises, *ie*, in the sense contemplated by the Enquiry Committee. Possibly each branch of a business would also be a separate source for this purpose. With reference to the words ‘income received from a source within’ an area, the Privy Council quoted with approval the opinion that ‘source means not a legal concept, but something which a practical man would regard as a real source of income’ *Rhodesia Metals Co v Commissioner of Taxes*, 1941 I T R (Sup) 45

Clause (b)—Delegation under.—The Central Board of Revenue has authorised Commissioners of Income-tax to recognise as the ‘previous year’ any commercial year, in usage, which is not less than 11 calendar months nor more than 13 months and also a year which does not terminate later than 30th April. The Central Board of Revenue can authorise any period as ‘the previous year’, *Nanakchand Fatechand v Commissioner of Income-tax*, 2 I T C. 167, 7 Lah. 223, A I R 1926 Lah 421

Neither the Commissioners nor the Central Board of Revenue can refuse without adequate grounds to exercise this discretion—see *Julius v Oxford*, (1880) 5 App. Cas. 214, and other cases cited in the Introduction.

In the absence of orders by the Commissioner of Income-tax or Central Board of Revenue the Income-tax Officer is bound by clause (a) of the definition, *ie*, must adhere to a year of 12 calendar months terminating on some day in the previous financial year

New business—As regards the object of the earlier part of clause (c), see the following extract from the Enquiry Report

“A difficulty arises in the case of a newly set up business, the accounts of which are made up to a date other than 31st March. Clause (11) (a) of section 2 of the Act provides that the “previous year” shall be the 12 months ending on the 31st March preceding the year for which the assessment is to be made, or, at the option of the assessee, the year ending on some other date within the said 12 months, if accounts were made up for a period of a year on that date, and does not provide specifically for the case of a new business

In some circles, it appears to be the practice in the case of a new business to take such proportion of the profits shown by the first account as corres-

ponds to the period from the date of the setting up of the business to the following 31st March for the purpose of the first assessment of the business, again taking a full 12 months proportion of the profits shown by that account for the second assessment. This may involve the assessment twice of the same profits. For example a business is commenced on 1st January, 1935, and the profits for its year's trading to 31st December, 1935 amount to Rs 10,000. There would be an assessment for the 3 months to 31st March 1935 of Rs 2,500 and an assessment for the 12 months to 31st December 1935 of Rs 10,000—a double assessment of Rs 2,500 for which no relief is provided.

This clause makes a part of the decision in *Nanakchand Fatechand v Commissioner of Income tax* 2 I T C. 167, 7 Lah 223 obsolete.

Two years' accounts in one year—An assessee need not necessarily adopt a method which avoids two 31st Marches falling within an accounting year for example that *Samvat* year, often adopted, varies in length and may have two 31st Marches within it. But he cannot incorporate two years' results in one year. Where the head office accounts for example, are by the *Samvat* year (starting on 19th March) covering more than 365 days and the branches close every year on 31st March he cannot accumulate the results of the main office, *Melamal Shiv Dayal v Commissioner of Income tax, Punjab*, 1937 I T R. 329. He can take into account only one year's results of each source or business.

Life Insurance Company—It was conceded by the Crown in *In re North British and Mercantile Insurance, Co., Ltd.*, 1937 I T R. 439 (Cal.) that the previous year in such cases meant the twelve months ending with the last day of the accounting year preceding the beginning of the year of charge. As to the position from 1st April, 1939 see section 10 (7) and schedule to the Act.

Temporary change in accounting period—If an assessee alters his accounting period even temporarily, the consent of the Income-tax Officer is necessary.

Partners in firms—A partner can have a 'previous year' for his other income different from that of the firm of which he is a partner, so far as his share of profits in the firm is concerned he must adopt the same 'previous year' as the firm. Consequently the different parts of his income in a given twelve months from different sources may be liable to assessment in different financial years.

Succession—Where there is a succession under section 26 the successor is clearly entitled to exercise the option allowed by clause (a) once and it is presumably not open to the Crown to contend that the successor takes over all the rights and liabilities of the predecessor. In this connection, see notes under section 26.

Firm—Change in constitution of—Under section 2 (2) an assessee means a person by whom income tax is payable, and sections 3 and 55 contemplate firms being assessee. The question therefore arises whether when there is a change in the constitution of a partnership, the partnership as newly constituted is a new assessee. A mere change in the constitution of a partnership will not in itself make the new partnership a separate assessee from the old partnership. It would depend on the facts of each case whether a change in constitution involves the dissolution of partnership and the formation of another or not.

(12) "Principal officer," used with reference to a local authority or a company or any other public body or any association means—

(a) the secretary treasurer, manager or agent of the authority, company, body or association, or

(b) any person connected with the authority, company, body or association upon whom the Income tax Officer has served a notice of his intention of treating him as the principal officer thereof,

History—This definition has been practically the same since 1886.

The word any after public body or' was inserted by the Income-tax Amendment Act (XI of 1924) Otherwise the adjective public would qualify association

Practice—The Income tax Manual formerly contained the following instructions Income tax Officers should treat as the principal officer in the first instance, the officials specified in clause (a), it is only in cases where the Income tax Officer has no information regarding the persons who discharge the functions of the officers mentioned in clause (a) or where such persons cannot be found that he should use the powers conferred by clause (b) of treating as the principal officer any other person connected with the company, etc They have been withdrawn, presumably as being superfluous

'Local authority'—For definition see notes under section 1

'Connected with' is vague and might include almost anybody If the question of imposing any penalty on the person arose a Court would probably whittle down the meaning of the words connected with so as to cover only responsible officers of the company

Manager—The word would include the liquidator of a company, In re *Agra Spinning & Weaving Mills Ltd*, 1934 I T R. 79

Notice—No form has been prescribed for this notice but the service of a notice is obligatory in cases falling under clause (b)

Objections—Though there is no express provision as for example in section 43 giving the person served with notice an opportunity of being heard by the Income-tax Officer it is evidently incumbent on the latter to hear the objections of the person if the latter has any before deciding finally to treat him as principal officer

(13) "Public servant" has the same meaning as in the Indian Penal Code,

Public Servant—This definition was introduced in 1922 in order to make it clear that the expression includes all income tax employees and is not restricted to the particular authorities mentioned in section 5 The words 'public servant' according to the Indian Penal Code denote a person falling under any of the descriptions hereinafter following namely—

Ninth—Every officer whose duty it is, as such officer to take receive, keep or expend any property on behalf of Government, to make any survey assessment or contract on behalf of Government, or to execute any revenue-process, or to investigate, or to report on any

matter affecting the pecuniary interest of Government, or to make, authenticate or keep any document relating to the pecuniary interests of Government, or to prevent the infraction of any law for the protection of the pecuniary interests of Government, and every officer in the service or pay of Government or remunerated by fees or commission for the performance of any public duty.

Tenth.—Every officer whose duty it is, as such officer to take, receive, keep or expend any property, to make any survey or assessment or to levy any rate or tax for any secular common purpose of any village, town or district or to make, authenticate or keep any document for the ascertaining of the rights of the people of any village, town or district.

Explanation 1—Persons falling under any of the above descriptions are public servants, whether appointed by the Government or not.

Explanation 2—Wherever the words 'public servant' occur, they shall be understood of every person who is in actual possession of the situation of a public servant whatever legal defect there may be in his right to hold that situation."

(14) "Registered firm" means a firm registered under the provisions of section 26-A.

History—The present definition dates from April, 1930 (Act XVI of 1930), and the corresponding earlier provisions are of little interest now. The reason originally for not treating all firms as if they were registered was that, as pointed out by the Joint Committee of 1922 taxation at the maximum rate and subsequent refund would inflict hardship on the smaller assesseees even though they might eventually have to suffer less tax, but this argument is no longer valid since, under the Amending Act of 1939, the profits of registered firms are now directly assessable in the hands of the partners and the firm as such is not ordinarily taxed, formerly, a registered firm was taxable at the maximum rate and the partners were eligible for a refund, though, in practice, registered firms and the partners were assessed simultaneously and the assessment of the firm was purely formal. See also section 23 (5) (a). The option to register, being one-sided, furnishes an incentive to persons to evade tax, and a check has been provided against such evasion by section 23 (5) which gives discretion to the Income-tax Officer to tax an unregistered firm as if it were registered if in his opinion the aggregate tax payable by the partners on the latter assumption would be greater.

Registered firm—How taxed—Comparison with unregistered firm—The position of a registered firm at present is as below. First as regards income tax. No tax is payable by the firm as such except in respect of the shares of non resident partners, and the shares of profits of resident partners are assessed directly on them [section 23 (5) (a)]. An unregistered firm, on the other hand, is assessed like an individual, i.e., depending on the income of the firm. The partners are not entitled to refunds, nor are they taxed on the profits from the firm unless the firm is not taxed, but their shares in the profits of the unregistered firm are taken into account in their 'total income' for fixing the rate at which they should pay tax on their income [section 16 (1)]. See notes thereunder.

If an unregistered firm as such pays no tax, e.g., on the ground that its income is below the taxable limit, the partners are liable to pay tax on

their respective shares along with the tax on their other income [section 14 (2) (b)] See notes thereunder

Next as regards super tax A registered firm as such is not liable to super tax. The share of each partner in the firm's income is added on to his other income and he is then individually assessed to super tax. An unregistered firm on the other hand, is taxed just like an individual and super tax is not payable on the shares of the profits received by partners unless the firm was not assessed to super tax (proviso to section 55)

Set off—Partners—Income of—As regards the set-off of profits against losses of partners in firms—whether registered or unregistered—see section 24 and notes thereunder

Registered firms—Advantages of—The partners are ordinarily not only better off than those in unregistered firms but also better off than the shareholders in a company. In the latter while shareholders are entitled to refunds in respect of income tax paid by the company it was held under the pre 1939 law that the super tax paid by the company was not paid on behalf of the shareholder and that the latter was not therefore entitled to a refund *Maharajadhiraj of Darbhanga v Commissioner of Income tax* 1 ITC 303. This has been made clear by the amendments to sections 18 (5) and 58 in 1939.

English Law—In England no distinction is made between registered and unregistered firms. Otherwise the law is in its essential features the same and partnerships are treated very much like registered firms in India but the details of procedure differ e.g. as to which partner is liable to make a return etc. No partnership is liable to super tax in England that tax being levied on individuals only. See sections 4 14 (3) (c) and 20 and Rule 10 Cases I and II of Schedule D of the English Income tax Act of 1918.

Rules—As regards the rules regulating the procedure in connection with registration see section 26-A and rules thereunder

Cancellation of registration—See section 23 (4) and Rule 6-B regarding the power of the Income tax Officer to cancel the registration of a firm.

(15) "Total income" means total amount of income profits and gains referred to in sub section (1) of section 4 computed in the manner laid down in this Act, and 'total world income' includes all income profits and gains wherever accruing or arising except income to which, under the provisions of sub section (3) of section 4, this Act does not apply,

History—There was no definition of total income in the Act of 1886. A definition was first introduced in 1918 and was modified in 1922 to read as below means total amount of income profits and gains from all sources to which this Act applies computed in the manner laid down in section 16. This definition was altered to its present form in 1939.

Total income—The first part of the new definition is merely a drafting improvement on the old one and contemplates no change of substance.

Total World income—There was a corresponding definition in section 48 (4) for regulating refunds to certain classes of non residents.

In view, however, of the radical change in section 4 which makes 'residence' one of the conditions of liability in certain cases, this definition has been made more general and inserted at this place.

This definition is of importance in regulating the rate of tax on non-resident non aliens on their British Indian income. See section 17.

The sum of Rs 4,500 referred to in the third proviso to section 4 (1) (c) is not to be deducted from total world 'income', though it may not be taxed under that proviso.

Total income—Significance of—The expression 'total income' occurs in sections 3, 4, 15 (3), 16, 17, 22, 23, 24-A, 24-B, 25, 30, 55, 56, 58-G, 58-H and 58-J. 'Total income' determines the rate or rates of tax applicable to successive slices of income though certain parts thereof may be exempt on one ground or another, e.g., interest from tax-free securities (section 8) or premia paid for insurance, etc. (section 15)—both exempt from income-tax on certain conditions—or share of a partner's profits in an unregistered firm (section 14 (2) and proviso to section 55)—exempt from both super tax and income-tax if the firm has been taxed. The income received as a member of a Hindu joint family is neither taxed again nor included in the member's own total income, if any. Income from dividends is included in the shareholder's total income but credit is given for the tax paid by the company.

Income—Before an item can be included in 'total income' it must be income, profits and gains, i.e., of the nature of 'income'. See notes under sections 2 (6-C) and 3.

Special definitions—Note that 'total income' has been defined differently in the Finance Act—see notes thereunder.

(16) "Unregistered firm" means a firm which is not a registered firm.

See notes under registered firm—section 2 (14), where the difference between a registered and an unregistered firm has been brought out.

CHAPTER I.

CHARGE OF INCOME-TAX.

3 Where any Act of the Central Legislature enacts that income-tax shall be charged for any year at

Charge of income tax any rate or rates tax at that rate or those rates shall be charged for that year in accordance with, and subject to the provisions of, this Act in respect of the total income of the previous year of every individual, Hindu undivided family, company, and local authority, and of every firm and other association of persons or the partners of the firm or members of the association individually.

History.—This section dates from 1922 when it was decided to make the Income-tax Act a mere Act of machinery and procedure, leaving the actual charge of tax to be made by the Annual Finance Acts.

The words "and other association of individuals" were inserted by the Amendment Act XI of 1924. The word 'Central' was substituted for

'Indian by the Government of India (Adaptation of Indian Laws) Order, 1937. The following changes were made in 1939, the words 'applicable to the total income of an assessee after the word 'rates' occurring for the first time were omitted, for the words 'all income, profits and gains the words 'the total income' were substituted, and for the words company, firm and other association of individuals' the words 'company and local authority, and of every firm and other association of persons or the partners of the firm or members of the association individually' were substituted.

Finance Act—Effect of—Before section 67-B was added to the Income tax Act, and in the absence of any general Act authorising the provisional collection of income tax etc., as in the case of Customs and Excise Duties, difficulty arose about the collection of such tax when there was delay in the passing of the Finance Act. S 67-B has now removed this difficulty. The Income Act levies tax each year, 'for that year'.

The Income tax Act has no operative effect except so far as it is rendered applicable for the recovery of tax imposed for a particular fiscal year by a Finance Act. Consequently the provisions of the Income-tax Act applicable to a given case include the amendments incorporated therein before the Finance Act is passed. *Maharajah of Pithapuram v Commissioner of Income tax, Madras* 1945 ITR 221 (PC).

Slab system.—The adoption of the slab system which results in successive slices of income bearing different rates of tax rendered the words 'applicable to the total income of the assessee' inappropriate.

Total income.—The substitution of this expression for 'all income, profits and gains' is merely to bring it in conformity with the revised structure of section 4 and the revised definition in section 2 (15). There is no change of substance.

Previous year.—See section 2 (11). As to each year being self contained, see sections 10, 13 and 24 and notes thereunder.

Association of persons.—The reference to 'persons' instead of 'individuals' used prior to 1939 is to make clear beyond doubt the liability to tax of Chambers of Commerce and the like which are not associations of individuals but associations of associations. See, for example, the definition in section 58-A.

Firms or partners (and associations or members).—The object of the reference alternatively to the above classes of assessee is to make it clear that in some cases firms will be assessed and in others partners and that both the firm and the partners (or the association and the members) will not be taxed on the same income. See section 23 (5) and also sections 14 and 55.

Scheduled Districts.—The Act applies to such districts under section 1, and a notification under section 3 is not necessary in order to extend the Act to such areas. *Sobhagmal Neemchand v Commissioner of Income tax, Bombay*, 7 ITC 100. Unless the Finance Act has been applied to an excluded area under section 92 (1) of the Government of India Act, 1935, no tax can be levied even though the Income tax Act may apply to that area. *Commissioner of Income tax, B and O v Abdul Rauf*, 1944 ITR 76. See however section 67-B of the Income tax Act.

Meaning of words.—All that the word 'charged' means is that the tax 'is payable' or that the assessee is commanded to pay the tax—see *Direct Spanish Telegraph Co v Shepherd*, 13 QBD 202 and *Kensington Income-*

tax Commissioners v Aramayo, (1916) 1 A C 215 The United Kingdom law, however, uses, generally speaking, a more unsatisfactory terminology in this respect than the Indian law and words like assess, 'charge' are used in varying senses, and the English decisions are therefore not of much help.

As regards the meaning of the words 'Hindu undivided family', 'company', 'firm', see section 2 and the notes thereunder. In *Commissioner of Income tax v Trustees of Sir Currumbhai Ebrahim Baronetcy*, A I R. 1932 Bom 106, it was held by the Bombay High Court that the Corporation constituted by the Baronetcy Act was an individual and not an association of individuals.

As regards the question whether a foreign State can fall under any of these categories of persons mentioned here, see *Introduction*.

For the definition of 'total income', see sections 2 (15) and 16 for that of 'previous year', see section 2 (11). See, however, sections 24-A, 25, 25-A, and 26 regarding cases in which assessment is made on a basis other than that of the 'previous year'. 'In respect of' means really 'on'. See per the Master of Rolls in *Kennard Davis v Commissioners of Inland Revenue*, 8 Tax Cases 341, (1923) 1 K.B. 370.

Deemed to be income—See sections 2 (6-A) and (6-C) (definitions of 'dividend' and 'income') and sections 10 (2) (vi) and (xi) (excess sale proceeds of discarded plant and machinery) and (excess collection of bad debts written off), section 16 (inclusion of items taxed at source or of income of other persons), section 18 (5) (Tax collected at source) section 23 A (undistributed profits of certain companies), section 41 (income of beneficiaries), section 44-D *et seq* (income from assets transferred abroad and from certain kinds of sales and purchases of securities) 58-E (annual accretion in recognised provident funds), 58-J (3) (non-exempt part of transferred balances in the above funds) and section 58-S (returned contributions in superannuation funds). See also notes under section 4 as regards "constructive remittances" and under section 13 as regards method of accounting.

See also sections 4 (1) and (2), 7 (2), and 42 as to income deemed to accrue, arise or be received in British India.

Computation of income—The tax is on total income, i.e., 'income, profit and gains', see section 2 (15), and not on gross receipts. With this end in view, the sections which deal with each of the different heads of income (see sections 6 to 13) contain specific provisions regarding the permissible deductions and allowances and the taxable balance, *Raja Prabhat Chandra Barua v Commissioner of Income tax, Assam*, 5 ITC 1, 57 I A 228, A.I.R. 1930 P C 209 (P.C.).

Section 3 is 'subject to the provisions' of the Act, and therefore to section 4 and section 23 (5), consequently, it is not open to a partner of a registered firm to claim that the free allowance of Rs 4,500 of the remitted foreign income under section 4 (1) belonging to his firm should be given at Rs 4,500 to each of the partners instead of to the firm as a whole. See also notes under sections 4 (1) and 23 (5). *Mohanlal Hirralal v Commissioner of Income tax, C P*, 1943 ITR 259.

HOW EACH CLASS OF ASSESSEES IS TAXED

Hindu undivided family—As to how a Hindu undivided family is taxed, see notes under section 2 (9), section 14 and the schedules to the Finance Act.

Company—As to how a company and its shareholders are taxed, *see* sections 2 (6), 16, 18 (5), 48, 49 B, 49 C and the schedule to the Finance Act

See also section 23 A and notes under it

Firm—As regards the taxation of firms, *see* sections 2 (14) and (16), 14, 16, 23 (4) and (5), 26 A 48 and 55 and notes thereunder

Discontinuance of business, etc—*See* section 25 and notes

Succession or change in constitution—*See* section 26 and notes

Association of persons—Not being a company or firm or a Hindu undivided family or a local authority Specific reference has been made in the Act to such associations in various sections in the Act, *e.g.*, sections 3, 55, 2 (12), 14 63 (2) and 56 Chambers of Commerce, Clubs, Co-operative Societies, Buying and Selling pools and associations for profit which are not partnerships all fall under this class Chambers of Commerce for example are associations of associations and not associations of individuals, hence the use of the words 'association of persons' and not of 'associations of individuals' Associations cannot be taxed on profits made from among the members themselves (*see* notes on Mutual concerns, *infra*) but they can be taxed in respect of profits made from outsiders and in certain circumstances if incorporated profits made from shareholders also Trustees of Provident Funds are obviously associations of persons

From the grouping of classes of assessee in section 3, it can be argued that the expression 'association of persons' should be construed *ejusdem generis* with the previous words in that section the common generic qualities being presumably (1) joint interests and (2) the right to sue and the liability to be sued as an association The definition of 'principal officer' in section 2 (12) and the procedure laid down in section 63 regarding the service of notices may also be taken to give some clue as to the nature of the associations contemplated by the Act The Madras High Court however in *Commissioner of Income tax v Saldanha*, 55 M 891, rejected the contention that the associations of individuals (now persons) contemplated by the Act were institutions like unincorporated companies On the other hand, in the case of the *Currimbhai Ebrahim Baronetcy Trust*, 5 ITC 484, 58 Bom 317, 2 ITR 118, the Bombay High Court held that the Corporation brought into existence by the Baronetcy Act was an individual and not an association The words 'association of individuals' should according to the Calcutta High Court be construed in their ordinary plain meaning 'Associate means, according to the Oxford Dictionary, 'to join in common purpose or to join in an action, and if persons join together, and remain so joined for the purpose of buying and holding properties they constitute an association of individuals'; *In re Ehas and others*, 1935 ITR 408 (Cal) The Allahabad High Court however, have preferred to construe the words *ejusdem generis* with the immediately preceding words, *i.e.*, the association must have some at least of the attributes of a firm or partnership, though not in the strictly legal sense of the term Persons, therefore, with undivided, though specified shares in an income producing asset cannot be taxed as an association even if they appoint a common agent to collect the income. It might be a different question, however if they had a common scheme of management and an agent for this purpose, *Muhammad Aslam v Commissioner of Income tax*, U P, AIR 1936 All 817 The Court attached some importance also to the absence of a comma after the word firm and to the transposition of 'Hindu undivided family' to a higher place in the section as it then stood.

In a later case *In re Keshardeo Chamria*, (1937) ITR 246, the Calcutta High Court construed the words *eiusdem generis* with reference to the word 'firm' and held that they did not cover the case of members of a Mitakshara Hindu undivided family after a preliminary decree for partition has been made before actual partition. But the Bombay High Court has followed *In re Elias and others*, (1935) ITR 408 (Cal) and dissented from *Muhammad Aslam v Commissioner of Income tax, U.P.*, (1936) ITR 412, that is, has construed the words in their plain and ordinary meaning and not *eiusdem generis*, the only limit imposed on the words being that the association should be one producing income profits or gains, since there is very little in common between a Hindu undivided family, a company and a firm, and it is, therefore, difficult, if not impossible to find a fourth class of association having the common feature with these three, *Commissioner of Income tax, Bombay v Laxmidas Dadas and others*, (1937) ITR 584, *Commissioner of Income-tax v Dwarkanath Harishchandra*, (1937) ITR 716. In *Commissioner of Income tax v Bapooria and others*, (1939) ITR 225, the Rangoon High Court was inclined to construe the words *eiusdem generis* not only with 'firm' but with all the other groups.

Seven separated members of a partitioned Hindu family jointly purchased a plot of land and built a house on it which was managed jointly, the income being alleged to be divided between the seven members but without any accounts to support the statement. It was held that the seven members constituted an association of individuals *Commissioner of Income tax, Sind v Chotalal Mohanlal*, 1940 ITR 114. Cohere of a deceased Muslim, inheriting specific shares of property and managing it jointly through a clerk and distributing the income among themselves were held not to be an association. *In re Nizamuddin Amiruddin* 1934 ITR 443 (Lah). In a slightly different case in which the rents were realised jointly and credited in a joint account, the contrary view was taken and the High Court declined to interfere. *Haji Ghulam Husain v Commissioner of Income tax, N-WFP*, 1942 ITR 405. Trustees of a wakf can be taxed as an association. *Ibrahimji Hakimji v Commissioner of Income tax, Sind*, 1940 ITR 500.

The above quoted decisions are not entirely obsolete, even though the word "persons" has been substituted for 'individuals', *sic*, however, section 9 (3) introduced by the Amending Act of 1939 which provides for the taxation of members of an association individually in respect of income from house property under certain circumstances.

Members of an 'association of persons' are exempted from tax a second time in their hands, of their share of profits received by them if the profits have been taxed in the hands of the association. As regards their right to refund of tax paid by the association, see notes under section 48 which *prima facie* gives them no right to refund.

As to whether the members of a partnership prohibited under the law would form an "association of persons", see notes under section 2 (6-B). There is nothing to prevent the individual members of such prohibited partnerships being taxed in respect of income ultimately obtained by each individually.

Whether there is an association or not is a question of fact. For example, where a person inherits a share in a property, he may either remain in association with other co-sharers or become separate, and in

either case, the actual position is a question of fact to be determined on evidence, the mere inheritance by itself not necessitating either conclusion. Accordingly, when certain co heirs appointed one of themselves as agent to realise the shares of property left to them by their parents (under Muhammadan Law) and the Income tax authorities held that the co-heirs constituted themselves into an association, the High Court declined to interfere, *Commissioner of Income tax, Burma v Bapooria & others*, 1939 ITR 225

Individual—In *Ahmedabad Millowners' Association v Commissioner of Income tax, Bombay* (1939) ITR 369, it was held that the word 'individual' referred only to a human being and that the particular association, of which several of the members were companies could not be an association of individuals. The ruling of the Privy Council in the case of *Currimbhoy Ebrahim Baronetcy*, 5 ITC 484, in which it was held that the trustees together could be treated as an individual, was not considered in the above judgment or the case of *Ram Ratandas and Madanagopal*, (1935) ITR 183 in which it was said that 'it cannot be denied that the word individual is wide enough to include a group of persons forming the unit'. The Madras High Court preferred to follow *Currimbhoy Trust v Commissioner of Income tax, Bombay*, 5 ITC 484, rather than the *Ahmedabad Millowners' case*, 1939 ITR 369, and held that the Salem District Urban Bank an association composed both of individuals and of Co-operative Societies was an association of individuals. *Commissioner of Income tax Madras v Salem District Urban Bank*, 1940 ITR 264. The Madras Bar Council was held either to be an individual or association, 1943 ITR 1

Assessment of Income tax on married women—In the absence of a specific provision to the contrary in the Act, e.g. section 16 (3) a married woman has to be separately assessed in respect of her separate income. On this point the Income tax Manual contains the following instructions

Pensions received from funds such as the Indian Military Service Family Pension Fund by a widow on account of her children and on account of herself are distinct and separate from one another. The pension of a minor orphan paid to his or her mother or a duly appointed or recognised guardian should not be included in the taxable income of the mother or guardian for the purposes of income tax assessment

Composition not permissible—Composition of taxes was given up in India in 1916

In this connection see *Gresham Life Assurance Society v Attorney General*, 7 Tax Cases 36 in which the Society produced correspondence with the Surveyor of Taxes and asked for a declaration that the correspondence amounted to a valid and binding agreement for the composition of tax for a certain number of years. It was held that the construction put by the Society on the correspondence was not correct and that even if it was the agreement would be *ultra vires* and invalid.

Source of income—Existence of—In year of assessment—In India the subject of charge is not the income of the year of assessment but the income of the previous year, in the United Kingdom on the other hand the subject of assessment is the income of the year of assessment though the amount is measured by a yardstick based on previous years. *Maharajah of Puthapuram v Commissioner of Income tax, Madras*, 1945 ITR 221 (PC)

In *National Provident Institution v Brown and Provident Mutual Life Assurance Association v Ogston* 8 Tax Cases 57, it was held by the House of Lords, under the United Kingdom Income tax Acts that in order to be chargeable to income tax for a particular year in respect of income from a source, a person must possess that source of income in that year. In *Whelan v Henning*, 10 Tax Cases 263, it was held by the House of Lords that not only should the source exist but that income from the source should exist during the year of assessment. In *Grainger v Maxwell's Executors*, 10 Tax Cases 139, it was held by the Court of Appeal that War Bonds were a different source of income from Exchequer Bills. None of these decisions, however, will apply to India. In *re Beharilal Mullick*, 54 Cal 630, 2 ITC 328, *Commissioner of Income tax, UP v Tehri Garhwal* 1934 ITR 1 (PC), *Maharajah of Pithapuram v Commissioner of Income tax, Madras*, 1945 ITR 221 (PC). The United Kingdom Income-tax Acts are materially different in this respect from the Indian Income tax Act. The law in the United Kingdom has however since been amended so as largely to get over these decisions of the House of Lords—see section 22 of the Finance Act of 1926.

Though the present tense is used in certain sections of the Indian Act e.g., sections 9 and 10, it is clear, both from the charging sections and the general scheme of the Act, that the tax is levied on the income of the previous year and has to be levied independently of the existence of the source of income or income from that source during the year of assessment. The only anomaly in the scheme is in regard to deductions at source in respect of income from salaries and securities. Though section 18 requires the tax to be deducted in certain cases before it can be known since the tax can be imposed only by the Finance Act of the next year it is clear from the general arrangement of the Act that tax is collected in advance in anticipation of its imposition by the next Finance Act. Therefore in *In re Beharilal Mullick*, 54 Cal 630, 2 ITC 328 Rankin, C J, observed that, the following words would better express the intention of the section—

‘Where any Act of the Indian Legislature enacts that income tax shall be charged for any year at any rate or rates applicable to the total income of an assessee—

(1) tax at that rate or those rates shall be charged for that year in accordance with, and subject to the provisions of, this Act, in respect of all income, profits and gains of the previous year of every individual, company, firm, and Hindu undivided family,

(2) tax at that rate shall be deducted in accordance with and subject to the provisions of, this Act from all salaries payable in that year on account of the income tax, if any, to become chargeable in respect thereof for the following year, and

(3) tax at the maximum rate shall be deducted in accordance with and subject to the provisions of this Act from all interest upon securities payable in that year on account of the income-tax, if any, to become chargeable in respect thereof in the following year.”

The above ruling was followed by the Madras High Court in *Karupiah Kanganis Case* 55 M L J 844 A L R. 1929 Mad 35, but dissented from by the Allahabad High Court in *Commissioner of Income tax v Tehri Garhwal* 66 M L J 127, A I R 1934 P C 34 (1934) ITR 1. In the latter which went up on appeal, the Privy Council referred with approval to the Calcutta ruling of *In re Beharilal Mullick*, though the appeal was dismissed on another point.

Losses in Burma—The Income tax Act cannot be treated as a statute passed annually. Therefore when an assessee had incurred a loss in Burma in 1936-37 he was allowed to set it off against his profits in British India in respect of his assessment for the year 1937-38. The income of the previous year is not merely a guide to the ascertainment of the income of the assessment year but is the actual income to be assessed. *Commissioner of Income tax, Madras v Vallabhaiah* (1938) 1 ITR 720. *In re Rowan Dlang & Co* 1940 ITR 1 (Bom).

Profits from unlawful or illegal businesses—It is a fallacy to say because the taxing authority levies from a person who is carrying on a profitable business but an improper and illegal business or profession that therefore the authorities are countenancing such a profession * * * Their permission is not required and is not given and cannot be withheld to a person who chooses to carry on an illegal business * * * The mere fact that the business is speculative or even gaming and wagering within the meaning of that expression does not make it any the less business. For example supposing the question was one of profit made by a book maker as to whose business there can be no doubt whatever that it is entirely gaming and wagering * * * In the year 1886 the English Courts decided and the decision has never been called in question that a book maker attending a race course was carrying on a vocation. *Partridge v Mallandaine* (1886) 18 QBD 276. Where both the words business and vocation are used it may be appropriate to describe a book maker's business as a vocation but the latter includes the less and it is clearly included in the word business in our opinion. The same view seems to have been taken in the text books on the subject with regard to the vocation of singer or prostitute and the Calcutta High Court in the case of *Birendra Kishore Manikya v Secretary of State for India* 43 Cal 766 held that illegal cesses were assessable to income tax. * * * A large number of merchants and other people carry on extensive business of a speculative nature which is not hit by the section in the Contract Act with regard to gaming because although the transaction may result in differences the legal effect of the contract may be not to entitle the party to actual delivery. It is nonetheless speculative in character and anybody concerned with the daily business of the courts knows how difficult it is sometimes to ascertain whether a speculative transaction is really a gaming one or not. All such transactions in our opinion are business and the profits arising therefrom are taxable under the Act. *In re Chum ulal Kalyandas* 1 ITC 418 47 All 372.

The question whether profits from illegal sources can be taxed was raised but not decided in *Commissioner of Income tax v Mohideen Sahib* 2 ITC 472 AIR 1927 Mad 1052 the High Court holding that no illegality had been proved in the case in respect of the source of income in issue.

The question has been before English Courts in several cases.

Per Scrutton LJ—I rather think that Mr J. Denman's language is used in a case as to betting which was invalid or unenforceable not illegal. If he (Denman J. in *Partridge v Mallandaine* 2 Tax Cases 179) meant to say that the Income-tax Acts recognise illegal businesses in the sense of businesses which it was not legal to carry on because they were punishable I at present very much doubt whether any such extension of the Acts is possible. *Commissioners of Inland Revenue v Von Glinn & Co* 12 Tax Cases 232.

In an appeal to the Privy Council from Canada regarding the assessability of profits derived within Ontario from operations in illicit traffic in liquor which were prohibited by provincial legislation in that respect Viscount Haldane delivering the judgment of the Board referred to the above remarks of Scrutton, L. J., in *Von Glehn's case* and refused to assent to the suggestion that Income tax Acts are necessarily restricted in their application to lawful businesses only. So far as Parliaments with sovereign powers are concerned they need not be so. The question is never more than one of the words used. It would not be appropriate to impart any assumed moral or ethical standard as controlling the literal interpretation of the language employed. It was ruled therefore that profits from 'boot legging' were taxable, *Minister of Finance v Smith*, (1927) A.C. 193.

The Supreme Court of the Irish Free State distinguished *Canadian Minister of Finance v Smith*, (1927) A.C. 193, and held unanimously that profits from an illegal and criminal business were not liable to income tax.

Per *Kennedy, C.J.*—"It is competent for the sovereign legislature to require crime to yield a quota out of its profits to national revenue. The question is whether on the construction of the statute, the legislature has done so. I have, after much consideration of the matter come to the definite opinion that income derived from criminal enterprises that is to say, from enterprises prohibited by law and punishable as offences against the State is not within the contemplation of the income tax legislation and while not expressly brought within that legislation cannot be supposed to be contemplated by it. The legislature cannot be supposed to contemplate the carrying on of that which it has prohibited and made criminal. I wish however to make it clear that this judgment is limited to the case of profits derived from a wholly unlawful business or enterprise or transaction. I am not prepared as at present advised, to follow the view suggested by Scrutton L.J., in *Commissioners of Inland Revenue v Von Glehn & Co.* as to the case of lawful businesses carried on in whole or in part in an unlawful manner. As it does not arise in this case I reserve it for future consideration.

That (the Privy Council Canadian case above) was a case of Dominion legislation taxing profits from a source which in a particular province was illicit under the local legislation, a different question from that we have to determine.

Per *Fitzgibbon, J.*—"the carrying on of a lottery of sweepstakes is a criminal act punishable by indictment and not merely a business which may be carried on subject to penalties. I can see a broad distinction between cases in which the profits (of a lawful business) may have been derived from illegal methods of conducting it and cases such as the present one where the entire transaction or trade is illegal *per se*. I hold as Scrutton L.J. was inclined to do in *I.R. Commissioners v Von Glehn & Co.* that the Income tax Acts are to be confined to lawful businesses though I am not prepared to add 'to the businesses carried on in a lawful manner'."

Per *Murnaghan, J.*—"there is a clear distinction between the carrying on of a lawful business in the course of which acts prohibited by statute may or may not be committed and the setting up of an enterprise every act and step of which is a criminal offence. I do not believe that any well-ordered state can consider that its own criminal-

the company was not a mutual concern. The fact of incorporation could not be neglected, and the fact that some of the shareholders were members of the club was immaterial. In *re Dibrugarh Club, Ltd*, 2 ITC 521, 55 Cal 971. Following this ruling, the Judicial Commissioner's Court at Nagpur, decided in *The Maharaj Bagh Club, Ltd v Commissioner of Income tax*, 5 ITC 201, that the club in which the majority of the using members were not members of the owning company was not a mutual institution.

Where a member of an unincorporated club orders a dinner there is no sale, the point is that the whole property is vested in all the members. Where, however, there is a separate entity, e.g., a company, the test whether the club is mutual may depend on whether the persons who pay and the persons who benefit are identical. On the other hand, where there is no such entity, as in an ordinary club, you cannot isolate the dining room, library and so forth, since while the members have a right to participate in the whole each participates only in a part. So, when profits were made by an unincorporated association from a holiday camp to which visitors were admitted on payment, tax was confined to profits made from non members. *National Association of Local Government Officers v Watkins*, 13 ATC 268, 18 Tax Cases 499.

The Mylapore Hindu Permanent Fund consisted of shareholders who subscribed one rupee per month on which a certain rate of interest was guaranteed and the funds were lent out among the shareholders themselves, or occasionally invested in securities or Bank deposits. The profits consisted of (1) the interest paid by borrowers, (2) penalties levied on shareholders, (3) interest on securities and Bank deposits. It was held by the Madras High Court following *New York Life Insurance Co v Styles*, 2 Tax Cases 460, and distinguishing *Leeds Permanent, etc., Society v Mallandaine*, 3 Tax Cases 577, that (3) was taxable but (1) and (2) were not, *Board of Revenue v The Mylapore Hindu Permanent Fund, Ltd*, 47 Mad. 1, 1 ITC 217.

A company, partly with permanent capital divided into 'shares' and partly with fluctuating capital called 'subscriptions', received deposits from its 'shareholders' and 'subscribers' as well as from outsiders, and lent moneys to all the three classes, the greater part of the transactions being with outsiders. Held, that the society was not 'mutual' and that its entire profits were taxable, *Trichinopoly Tennore Permanent Fund, Ltd v Commissioner of Income tax*, 53 MLJ 881 (FB). The company, thereupon, altered its memorandum by creating a new class of shares of small value and allotting them to the persons who would, under the old scheme, be non member borrowers, but, while a substantial part of the profits was made out of the interest received from these borrower members of the new class, the bulk of the dividends was paid to the other classes of members. It was held, therefore, that the real nature of the society had not changed and that it was still not mutual, *Trichinopoly Tennore Permanent Fund, Ltd v Commissioner of Income tax*, 1937 ITR 703, ILR. 1938 Mad 183, AIR. 1938 Mad 148.

A society, though including among its members Co-operative Societies, which does ordinary banking business with non members is not a mutual concern. *Commissioner of Income tax, Madras v Salem District Urban Bank*, 1940 ITR 269.

After reviewing the following authorities, viz., *New York Life Insurance Co v Styles*, 2 Tax Cases 460, *Fact v London Assurance Corporation*,

10 A.C. 438, *Equitable Life Assurance Society v Bishop*, 4 Tax Cases 147, *Liverpool Corn Trade Association v Monks* 10 Tax Cases 442, *Thomas v Richard Evans & Co* 11 Tax Cases 790 *Cornish Mutual Assurance Co v Commissioners of Inland Revenue*, 12 Tax Cases 841 the Madras High Court held in the case of the *English and Scottish Joint Co operative Society*, 3 ITC 385 (not registered in British India under the Co-operative Societies Act 1912) that the so-called profits derived from the sale of produce to the only two members of the Society who were also Co-operative Societies were merely the return of excess payments, and that the fact that a part of this return took the shape of a fixed rate of interest on capital subscribed by the two member Societies while the rest took that of a *pro rata* dividend on the purchases made no difference to the true nature of this notional profit. The profit was therefore not taxable. The Crown's argument was that it was open to the Society to take other Societies also as members and that the interest paid to each member which was really like a preference dividend bore no relation to the purchases made by that member.

In *Commissioner of Income tax v Madura Hindu Permanent Fund, Ltd*, 56 Mad 415, 1933 ITR 46, a Full Bench of the Madras High Court again reviewed the authorities and held that the *Mylapore Fund*, 47 Mad. 1, *supra* and the *English and Scottish Joint Co operative Society's cases*, 3 ITC 385 were rightly decided though strictly speaking they were not governed by the *New York case* the facts being materially different. The guaranteed interest was interest earned by the fund and not a return of a surplus arising from an overestimate. These funds were not really companies but mutual benefit societies and the subscriptions were not really share capital though called as such. Moreover, even if a profit was considered to be earned by them from the transactions with members, the guaranteed interest paid to shareholders ought to be deducted since it is paid on capital borrowed for the purpose of the business and is not dependent on its earning of profits. See however Explanation under section 10 (2) (iii).

In a later case in which the facts were similar, the same High Court explained that there was no conflict between the decisions in the *Mylapore* and the *Madura Fund cases*. These funds though registered as companies were really mutual benefit societies, with fluctuating capital and the Court was not therefore prepared to re-open the decision in the *Mylapore Case*, *Tanjore Permanent Fund Ltd v Commissioner of Income tax, Madras*, 1937 ITR 160.

Where a Nidhi transacted business *viz* taking deposits and giving loans both with members and with outsiders and the share capital was payable in a lump sum though it carried a guaranteed interest, it was held that the business was not mutual. *Commissioner of Income tax, Madras v Sriman Madhwa Siddhanta Nidhi Ltd*, 7 ITC 317, 58 M 8, 13.

Collister, J., observed with reference to the *Mylapore Fund Case* 'The question does not seem to have been considered whether a mutual concern can trade with its members and whether the payment and receipt of interest on loans advanced might not amount to a money lending business between the association and its members', *Chamber of Commerce Hapur v Commissioner of Income tax, UP*, 1936 ITR 397 58 All 1003.

A golf club, not a 'company', and admittedly a *bona fide* members' club, was bound under a clause in its lease to admit non members to play

on its course on payment of green fees to be fixed by the lessors but subject to a minimum fixed in the lease. These green fees were paid by the non members and entered into the general accounts of the Club, which showed an annual excess of receipts over expenditure. *Held*, that the Club, in so far as it admitted non members, carried on, for income tax purposes, a concern or business capable of being isolated and defined and in respect of which it received profits that were liable to tax, *Carlisle and Silloth Golf Club v Smith*, 6 Tax Cases 198, (1913) 3 K B 75

Per Kennedy, J J—' It is not, therefore, the common case of a golf club which admits to the use of its accommodation players who are introduced by a member or are approved by the club committee, and who upon such introduction or approval, and upon payment according to the rules of the club are admitted to the privileges of members according to the rules of the club for some specified period. It is not necessary to decide the point but in such a case, I am inclined to think the persons to whom such privileges are accorded might fairly be regarded as becoming for the time, members of the club, subscribing to its funds. But upon the facts appearing in the case it appears to me that this club is really carrying on the business of supplying to the public for reward a recreation ground fitted for the enjoyment of the game of golf and that the receipts derived from this business are in the nature of profits and gains in respect of which it is liable to assessment for income tax. *Carlisle and Silloth Golf Club v Smith*, *supra*

The local golf clubs and the Town Council in a certain town entered into an agreement and vested the control of the golf links in a Committee. The town Council contributed towards a part of the upkeep of banks and bridges. The subscriptions leviable from users were fixed except as regards visitors. *Held*, that the Committee carried on a trade. The case was not like that of a club, and the fact that the Committee could not increase the fees was no reason to hold that there was no trade, *Carnoustie Golf Course Committee v Commissioners of Inland Revenue*, (1929) S C 419, 8 A.T.C. 205, 14 Tax Cases 198

In *Commissioners of Inland Revenue v Stonehaven Recreation Ground Trustees*, 8 A.T.C. 523 15 Tax Cases 419 the grounds were open to all members of the public who had to take season tickets of varying duration. Six of the nine trustees were appointed from year to year by the season ticketholders. The rates for tickets were so regulated as to cover the expenditure and not to make any surplus. *Held*, that the institution was not 'mutual' since the ticket purchasers were not received into any body corporated or incorporated.

A mutual life insurance company had no members except the holders of participating policies to whom all the assets of the company belonged. At the close of each year an actuarial valuation was made and the surplus, if any, was divided between the participating policyholders who received their dividends in the shape either of a cash reduction from future premiums or of a reversionary addition to the amount of their policies. The surplus divided consisted partly of the excess of the premiums paid by the participating policyholders over and above the cost of their insurances and partly of profits arising from non participating policies the sale of life annuities, and other business conducted by the Society with non members. *Held*, by the House of Lords, *per* Lords Watson, Bramwell, Herschell and

Macnaghten (Lord Halsbury, L.C., and Lord Fitzgerald, dissenting), that so much of the surplus as arose from the excess contributions of the participating policyholders is not profit assessable to the income-tax, *New York Life Insurance Company v Styles*, 2 Tax Cases 460, 14 A.C. 381

The principle of this decision is, in the words of Lord Watson, that "when a number of individuals agree to contribute funds for a common purpose, such as the payment of annuities or of capital sums to some or all of them on the occurrence of events, certain or uncertain, and stipulate that their contributions so far as they are not required for the purpose shall be paid back to them, the contributions so returned should not be regarded as profits"

In distinguishing this case from *Last v London Assurance Corporation*, 2 Tax Cases 100, 14 Q.B.D. 389, Lord Watson said

"In *Styles' case* there are no shares or shareholders in the ordinary sense of the term, but each and every shareholder of a participating policy becomes *ipso facto* a partner in the company with a voice in the administration, entitled to a share in the assets and liable for all losses incurred by it"

The fact that the New York Insurance Company was incorporated did not make any difference. It is seen from Lord Herschell's judgment that the Attorney General conceded that the incorporation did not affect the issue. Lord Macnaghten pointed out that, so far as participating policyholders are concerned, the company was not formed for making profits, every member taking a participating policy becoming *ipso facto* a member of the company.

This decision makes it clear that the business done with the members by such a Society is of a different nature from the business done with non-members. It should not be inferred from this, however, that in every case the profits resulting from business with members should be separated from the profits from business with outsiders and the latter taxed. If this were so it would be necessary, for instance, to exempt from taxation profits made by a Bank in lending to its shareholders or by a Railway in carrying its shareholders. The test is not whether the corporate body deals with its individual members or not but whether the body is in its essence a 'mutual' body. That is, does it so arrange with its members that the surplus is automatically returned to the members? And does it primarily do business with its own members and only incidentally with outsiders?

Under the law of the State of New York a share capital of \$100,000 is required to be subscribed by every Life Insurance Society and to be invested in securities. The shareholders of a society established under this law were, by their Charter, entitled to receive a dividend not exceeding seven per cent per annum. The earnings of the Society over and above the dividends, losses and expenses, were to be accumulated, and every five years after actuarial valuation each participating policyholder was to be credited with a portion of the available surplus. The Society was managed by Directors appointed by the shareholders. The Charter gave power to the Directors to provide that each policyholder of \$5,000 should be entitled to vote at the annual election of Directors, but this power had not been exercised. The Society granted non-participating policies as well as participating, and did other business, the profits from all sources going to form the surplus. The Society had a branch in London, and it was claimed that the profits of the branch were not assessable to income tax. *Held*,

that the profits were assessable the case being governed by *Last v London Assurance Corporation*, 2 Tax Cases 100, 14 Q B D 389 (set out under section 10, *infra*) *Equitable Life Assurance Society of United States v Bishop*, 4 Tax Cases 147, (1900) 1 Q B 177

An annuity or other recurring payment, *e.g.*, sums paid during disablement, is taxable irrespective of whether the concern paying it is 'mutual' or not. The fact that the payments may be variable or contingent would not affect the liability to tax (*Forsyth v Thompson*, 1941 I T R. (Sup) 5 (K B D))

In *National Mutual Life Association of Australasia v Commissioner of Income tax, Bombay*, (1936) I T R 44 A I R 1936 P C. 55, it was accepted by both parties before the Privy Council that the principles laid down in *Styles' case* apply in India, and the Privy Council therefore, expressed no opinion in the matter. The law in British India as from 1st April, 1939, is governed by the special definition in section 2 (6-C) which makes profits of mutual insurance taxable

A Building Society whose members consisted of investors and borrowers made advances to the latter upon the security of their properties. In all cases the advance was made in respect of one or more shares which the borrower took in the Society, and upon each of which he paid 2s 6d per week in repayment of the advance together with interest thereon. The Society refused to allow deduction of income tax by the borrowers in respect of the interest included in the repayments, on the grounds that the interest could not be distinguished, and that it was not "annual" interest. *Held*, that the Society was liable to assessment on the interest received, whether it be annual or not. *Leeds Permanent Benefit Building Society v Mallandaine*, 3 Tax Cases 577 (1897) (referred to in the *Mylapore Fund case*)

A dividend or rebate received by a member of a Co-operative Society on his purchases therefrom is taxable as part of the receipts of his own trade for the purpose of which he makes the purchases from the society. *Pope v Beaumont*, (K B D) 1943 I T R 33 (Sup)

A Co-operative Society which buys milk from its members and sells it to outsiders is making taxable profits, *Commissioners of Inland Revenue v Sparkford Vale Co-operative Society*, 12 Tax Cases 891, 133 L T 231

Per Rowlatt, J— It has no profit from buying milk from its own members and if the public to whom they sell do not pay for it, they do not get any profits at all. The profits are made by the selling of the article, not by the buying of it at all in the meaning of this subsection "

The question in the above case arose with reference to the Corporation Profits Tax Act which exempted profits of such societies arising from 'trading with its own members', but the principle enunciated by Rowlatt, J, is capable of extension to income tax also. No profits would arise, if the Society bought from outside and sold to its members only

A company was formed to take over a Social Club. There was no share capital and the members of the company were the same as the members of the Club. In substance the incorporation had not affected the members *inter se* or their relations to the Club. *Held*, that a business or trade or undertaking of similar character was not being carried on by the company.

Commissioners of Inland Revenue v Eccentric Club, Ltd, 12 Tax Cases 657, (1925) A C 476 This decision, however, was overruled in *Commissioners of Inland Revenue v Cornish Mutual Insurance Co*, 12 Tax Cases 841 (1926) A C 281 (H L)

A company limited by guarantee was formed for carrying on insurance other than life insurance. The number of members was unlimited. Every person taking out a contract became a member automatically and remained as such during the currency of the contract. Each new member paid an entrance fee. The directors were empowered to set aside sums for reserve and make calls on shareholders for general expenses. There was no subscribed capital. The sums insured were adjusted according to risk so as to make the contributions of members equitable. *Held*, that for the purposes of the Corporation Profits Tax the Act regulating which specifically said that the surplus of mutually trading concerns was to be deemed to be profits the company was carrying on a trade though it was not liable to income tax *Cornish Mutual Assurance Co v Commissioners of Inland Revenue* 12 Tax Cases 841. In the *New York Insurance case* 2 Tax Cases 460 all that had been decided was that the profits were not taxable not that a Mutual company could not do business. On the other hand *In re Arthur Average Association*, 10 Ch D 542 and *In re Padstow Total Loss and Collision Assurance Association*, (1882) 20 Ch D 137 (both cases under Companies Act) are authorities for the position that a mutual association could do business. These two cases had not been considered in *Last v London Assurance Corporation*, 2 Tax Cases 100 or *New York Insurance Society v Styles*, 2 Tax Cas 460.

In the case of the *Commissioner of Income-tax v National Mutual Life Association of Australasia*, A I R 1931 Bom 448 55 Bom 637, it was held by the Bombay High Court that while profits from the participating branch of a mutual life insurance company in which the members are the participating policyholders are not taxable, the profits from the non participating policies and from investments (less expenses) were taxable. On a later occasion however in the case of the same association, it was held by the same Court 57 Bom 519 A I R 1933 Bom 427 (1933) I T R 350 following the *Cornish Mutual Case* that though a mutual institution, it nevertheless did business and that as a consequence being a non resident company, it was liable to be taxed under section 42 on its income from investments abroad of the premia from participating policies in British India, such income arising from business connection in British India. This judgment, however, was overruled by the Privy Council, (1936) I T R 44. Any claim as to liability under section 42 was outside the Commissioner's reference and irrelevant to the questions submitted, and the Privy Council were, therefore, not concerned with the question on the merits of which they expressed no opinion. They overruled the judgment on the ground that it ignored the principle of *Styles' case* and taxed profits from participating policyholders. See however section 2 (6-C) which renders these rulings obsolete.

The Liverpool Corn Trade Association was a company formed to promote the interests of the corn trade by Parliamentary and other action, to adjust disputes between persons engaged in the trade, to provide, regulate and maintain an exchange, market and room for the corn trade in Liverpool, and to establish and maintain a clearing house for the clearance of contracts. Shares could be held only by persons engaged in the corn trade and

no member could hold less than one or more than two shares. The second share could be requisitioned by the company for a new member if no shares were otherwise available. In addition to the members there were also subscribers who were elected from time to time by the directors but had no shares and no right to vote and merely enjoyed the services and facilities provided by the Association. All the fees and subscriptions belonged to the Association absolutely and were disposed of at the discretion of the directors. The directors could set aside sums to the credit of a reserve fund and recommended the payment of dividends which had to be declared by the Association in a general meeting but as a matter of fact no dividends had been declared for nearly 20 years. It was contended by the Association that the transactions with the members were mutual and the resulting profits not liable to tax. The profits made from non-members were admitted to be liable to tax. *Held* that the profit was assessable to tax even though it resulted from transactions with the members.

Per Roalatt J — where as in the *New York Life Insurance case* there is no share capital and no shareholders but the policy holders are called members of the company so that they may vote at meetings then it does not matter whether or not there is an incorporation because * * * the corporation is merely an entity which stands at the back and all it is doing is to collect from the policy holders certain funds and hand them back again so far as they are not wanted. [In a case like that it does not matter whether there is an incorporation or not because there is nothing belonging to the corporation which is severable from what belongs to the aggregation of individuals.] But in a case of this kind where there is a company with a share capital and share holders with a right to dividends if declared, upon the share capital coupled with a dealing by the company with the persons who happen to be the owners of the share capital affording benefits to those persons individually for which they pay money by way of subscriptions and by way of entrance fees as a sort of over riding subscription if I may use that word which opens the door to subscriptions there is no reason at all for disregarding the fact that the company is incorporated or for regarding otherwise than as profits the difference which is obtained by dealings between that corporation and the persons who happen to be its members. *Liverpool Corn Trade Association Ltd v Monks* 5 A T C 288 10 Tax Cases 422 (1926) 2 K B 110 at p 123

The income of a Chamber of Commerce (of corn merchants) registered as a limited liability company consisted of (a) admission fees and subscription from members (b) registration fees of grain pits and (c) commission on forward contracts (c) being the most important. If a non member was a party to a contract he had to register it through a member whom alone the chamber recognised. The Income tax authorities exempted (a) but not (b) and (c) which they taxed not as income from business but as income from 'other sources'. It was held that (1) the company was not exempt merely because it had been registered under the Companies Act under section 26 thereof, i.e. as an association not formed for earning profits (2) the income from (b) and (c) was not from any source other than business but as the Income tax authorities had found otherwise it could not be differentiated from (a) and was therefore exempt *Chamber of Commerce, Hapur v Commissioner of Income tax U P*.

(1936) ITR 397, 58 All 1003 The Karachi Chamber of Commerce, registered under section 26 of the Indian Companies Act in which no bonus or dividend was payable and the property of which on dissolution, was to pass to similar institutions maintained a Public Measurer for whose work which was done both for members and for outsiders the Chamber received fees. There was no dispute as to the non-taxability of the members' subscriptions or as to the taxability of the profits made from outsiders, and the dispute was confined to the taxability of profits made from members. The Crown failed. *Commissioner of Income tax Bombay v Karachi Chamber of Commerce*, 1939 ITR 575. In *Commissioner of Income-tax Bombay v Karachi Indian Merchants' Association* 1939 ITR 594, the Association had no transactions with outsiders and the following items were held to be not taxable: (1) fees on delivery orders recorded by the Chamber Clearing House; (2) sale proceeds of samples tendered to the Clearing House for analysis against delivery contracts; and (3) penalties received from members for trading in contravention of the rules of the association. It should be noted that all these rulings were given before the insertion in the Act of sub-section (6) of section 10 which seeks to tax 'a trade, professional or similar association performing specific services for its members for remuneration definitely related to those services'.

In another case the assessee was a company formed to indemnify the members against claims on account of workmen's compensation. The members were colliery owners. Each member had to contribute on the basis of the wages paid by him. The contributions went into a general fund from which sums were from time to time transferred to a reserve fund. The general fund was the primary fund for meeting claims. Part of the risk was reinsured. Members could retire on giving six months notice and a retiring member was entitled to take with him his proportion of the reserve fund minus his proportion of the expenses and liabilities of the association up to the date of his retirement. The Special Commissioners felt some difficulty in reconciling the *New York Life Insurance Case* 2 Tax Cases 460, with *Salomon v Salomon & Co Ltd* (1897) A.C. 22. *Held*, that the profits made by the company were not taxable.

Per Lord Atkin J—It is true to say that a person cannot make a profit out of himself if what is meant is that he may provide himself with something at a less cost, than that at which he could buy it or if he does something for himself instead of employing some one to do it. He saves money in those circumstances, but he does not make a profit. But a company can make a profit out of its members as customers although its range of customers is limited to its shareholders. If a railway company makes a profit by carrying its shareholders, or if any other trading company by trading with its shareholders even if it is limited to trading with them, makes a profit, that profit belongs to the shareholders in a sense but it belongs to them *qua* shareholders. It does not come back to them as purchasers or customers, it comes back to them as shareholders upon their shares. Where all that a company does is to collect money from a certain number of people—it matters not whether they are called members of the company or participating policy holders—and apply it for the benefit of those same people not as shareholders in the company but as people who subscribed it, then, as I understand *Stylers' case*, there is no profit. If the people were to do the thing for themselves, there would be no profit and

the fact that they incorporate a legal entity to do it for them makes no difference there is still no profit. This is not because the entity of the company is to be disregarded it is because there is no profit, the money being simply collected from those people and handed back to them not in the character of shareholders but in the character of those who have paid it. That as I understand is the effect of the decision in *Styles' case*. The money subscribed by the Colliery Company is used for its protection, the fund belongs to it and a large amount is kept in hand. No doubt as the money is not distributed year by year and the calls are not limited to the actual losses but to enable a fund to be built up it may in a sense be said that the Association has a fund which it holds as a company and which it does not divide among all the people who have built it up inasmuch as members may come in when the fund has been legally built up and so there is a fund which does not go back to those people who subscribed it individually. That however must I think have been so in *Styles' case* too because there was there a reserve fund which involves that when a life dropped and the assured's representatives were paid the amount due upon the policy with bonus additions there was still something left in the hands of the company beyond what was necessary to pay the claims as they become due. The broad principle was there laid down that if the interest in the money does not go beyond the people or the class of people who subscribed it then just as there is no profit earned by the people subscribing if they do the thing for themselves so there is none if they get a company to do it for them. — *Jones v South West Lancashire Coal owners Association* and *Thomas v Richard Evans & Co* 6 ATC 641 11 Tax Cases 790 (1927) 1 KB 33 at p 47.

Both the House of Lords and the Court of Appeal confirmed Mr Justice Rowlatt's judgment. The House of Lords considered that *Styles' case* covered cases of this kind (1927) AC 827.

A company consisting of representatives of local authorities was formed primarily to enable such authorities and other public bodies by co-operation to insure against fire and other risks on the most favourable terms. No part of the company's income or property could be paid or transferred as dividend or bonus or otherwise by way of profit to the members who were liable in the event of winding up to contribute a certain amount under certain conditions. The company carried on (a) fire insurance (b) employees liability and (c) miscellaneous insurance. The Crown conceded that (a) was mutual because (i) under the constitution the members of the company were in effect the fire policy holders and (ii) on a winding up they alone were entitled to the surplus assets. The company on the other hand conceded that (b) and (c) were not mutual in so far as business was done with other than fire policy holders. The question in issue therefore was whether profits from (b) and (c) in so far as the business was done with fire policy holders was taxable. In view of the following facts *viz.* (1) premia for (b) and (c) were fixed and not fluctuating while premia for (a) were varied from time to time (2) ineligibility of (b) and (c) class policy holders as such to surplus assets in the event of winding up (3) surpluses from (b) and (c) class policies were dealt with on the same footing whether the policies were with fire policy holders or not it was held that the business under (b) and (c) was not mutual. *Municipal Mutual Insurance Co Ltd v Hills* 16 Tax Cases 430 (HL) 48 TLR 301.

The above ruling was distinguished in a case in which the articles of association of a Company formed for the purpose of insuring its members who were mullowners provided *inter alia* that the directors may after a certain time ascertain and distribute the profits among the members. The power was however not exercised and the Bombay High Court held that the existence of the power was immaterial and that the general principle enunciated by the *New York* case covered such a case the Company being mutual and the profits in question not being taxable. In *re Mullowners' Mutual Insurance Association Ltd* 135 I.C. 813 33 Bom I R 158.

Where shareholders are different from policy holders an insurance business cannot be mutual and its income is not exempt from tax on that account however small the interests of the shareholders as against those of the policy holders. *Commissioner of Income tax v Central Popular Assurance Co Ltd* 1939 ITR 293. *Commissioner of Income tax v Sind Central Provident Funds Society Ltd* 1939 ITR 333. *Commissioner of Income tax v Indian Relief and Benefit Insurance Co Ltd* 1939 ITR 341.

United Kingdom Law—Section 31 of the United Kingdom Finance Act of 1933 makes liable to tax the profits of companies arising from transactions with their members on the same basis as profits from transactions with non members and permits at the same time the deduction from profits of discounts rebates dividends and bonuses paid to members so long as these are paid on the transactions and not on the shares or other interest of the members. The question arose in *Ayershire Employer's Mutual Insurance Association v Inland Revenue (CS)* 1944 whether this change in the law which was primarily intended to cover co operative societies makes liable to tax the profits of a mutual insurance company from such insurance and was answered in the negative. Mutual insurance is exempt not because the transactions are with members but because to quote Lord Cave in *Jones v South-West Lunar Coal Association*, 11 Tax Cas 790 sooner or later in meal or in malt the whole of the company's receipts must go back to the policy holders as a class though not precisely in the proportions in which they have contributed to them and the association does not in any true sense make a profit out of these contributions. Section 31 of the Finance Act of 1933 did not say that all transactions between a company and its members are to be taxed but only that these transactions should be treated as though they were with outsiders and it is not indisputable that transactions of a mutual nature should be carried on only with members.

The definition of section 2 (6 C) of the Indian Act which uses the words the profits of a mutual insurance association avoids all these difficulties and the profits of such an association will be caught irrespective of whether the transactions are with members or others.

Destination of profits—Does not affect liability to tax.—The destination of the income profits or gains is immaterial so long as it is income profits or gains to the assessee which is sought to be taxed. See *Paddington Burial Board v Commissioners of Inland Revenue* 2 Tax Cases 46 13 QBD 9 (Profits applied in aid of poor rates). *Mersey Docks v Lucas* 2 Tax Cases 25 8 App Cases 891 (Profits applied to creating a sinking fund for extinguishing debts).

Per the Lord Chancellor—The word profits does mean the incomings of the concern after deducting the expenses of earning and obtaining them before you come to an application of them even to the payment of creditors of the concern. The gains of a

trade are that which is gained by the trading for whatever purposes it is used, whether it is gained for the benefit of the community, or for the benefit of individuals . . . ”

Also *Sourey v King's Lyn Harbour Moorings Commissioners*, 2 Tax Cases 201, 3 T.L.R. 516 and *City of Dublin Steam Packet Company v. O'Brien*, 6 Tax Cases 101 In *Blake v Imperial Brazilian Ry*, 2 Tax Cases 58 it was held that the whole of the guaranteed interest received from Government devoted to payment of debenture interest and to payment of sinking fund was taxable *Nizam's Guaranteed Railway v Wyatt*, 2 Tax Cases 584 is a case exactly similar to the *Brazilian Railway case* above

See also *Webber v Glasgow Corporation*, 3 Tax Cases 202, 30 Sc.L.R. 255 (application of profits to the common good of the burgh), and *Armstrong v Moore*, 4 Tax Cases 199, (1900) 2 Q.B. 363 (application for the benefit of creditors)

The compulsory application of income to a specific purpose does not prevent it from being income *Tennant v Smith*, 3 Tax Cases 158 at p. 165, *Harris v Corporation of Irvine*, 4 Tax Cases 221 at p. 232, *Smyth v Stretton*, 5 Tax Cases 36 nor does it relieve the income from liability to taxation, *Mersey Docks v Lucas*, 1 Tax Cases 385 *Trustees of Mary Clark Home v Anderson*, 5 Tax Cases 48 (1904) 2 K.B. 645

“Profits” should be understood in its natural and proper sense which no commercial man would misunderstand, per *Halsbury, L.C.* in *Gresham Insurance Co v Styles* 3 Tax Cases 93 and when once an individual (or a company) has ascertained the profits in the proper sense, it is immaterial what becomes of the profits—whether any charge has been made on these profits by previous agreement or otherwise *Pondicherry Railway Co, Ltd v Commissioner of Income tax, Madras*, 58 I.A. 239, 54 M. 691 (P.C.) The same view was repeated by the Privy Council in *Bharat Insurance Co, Ltd v Commissioner of Income tax, Punjab*, (1934) I.T.R. 63 (P.C.), A.I.R. 1934 P.C. 45

See also *Royal Calcutta Turf Club v Secretary of State*, 1 I.T.C. 108; 48 Cal. 844 (an Excess Profits Duty Case)

Trusts—See sections 40 and 41 and notes thereunder as to who should be taxed, whether trustee or beneficiary, and on what basis

Income, profits or gains withheld at source—Difficult problems arise when a portion of the income profits or gains is withheld at the source before the income reaches the assessee. The test to be applied in such cases is whether the withholding merely represents the payment of a personal debt or liability of the assessee, i.e., a diversion of his income or represents a share in the income itself to which the assessee has only a residual claim after the prior claims have been met. In the former case the withheld income clearly belongs to the assessee and is taxable, while in the latter case it is not. In other words, the test is whether there is an effective alienation of the income at the source, i.e., before the assessee can claim it. The test however, is a difficult one to apply as will be seen from the decided cases

Salary attached to pay a debt is liable to tax. See *Income-tax Manual*

Tax withheld at source—Income of assessee—The income tax which is withheld at source is clearly part of the assessee's income and of this there can be little doubt. *Ex majore cautela*, however, section 18 (4)

makes this quite clear. The tax is a personal liability of the assessee and it is only the convenience of the administrative machinery that is responsible for the tax being collected at source.

Encumbered property—Income from—Per Lord Davey in *London County Council v Attorney General*, 4 Tax Cases 265—It was no doubt considered that the real income of an owner of incumbered property or of property charged, say with an annuity under a will is the annual income of the property less the interest on the incumbrance or the annuity.

This was explained by Lord Macnaghten in *Attorney General v London County Council* 5 Tax Cases 242 to mean that the charge for the interest or the annuity ought to be a *real burden*.

If the interest or the annuity is discharged by some person other than the incumbered owner or deviser without recourse to such owner or deviser the burden is nominal.

The decree of a Court charging the whole resources of an assessee with a specific payment for maintenance to his step-mother does to that extent divert his income from him and direct it to his step-mother. What he received for her is not his income. It is not a case of the application by the assessee of a part of his income in a particular way; it is rather the allocation of a sum out of his revenue before it becomes income in his hands. The charge had not been created for the payment of debts voluntarily incurred, and the position was the same as if he had received a bequest with an annuity charged on the property. The all income referred to in this section (now 'total income') is what reaches the assessee as income and the view is confirmed by the absence of provision in the Act to allow of deduction of tax at source (the provisions of section 18 of the Indian Act are restricted and not general like similar provisions in the United Kingdom Law). It is not reasonable to postulate an intention to impose, without right of reimbursement, a tax on what is only a charge on the income. *Raja Bejoy Singh Dudhuria v Commissioner of Income tax, Bengal*, (1933) ITR 135 (PC) 60 Cal 1029. Where a sole surviving male member of a Hindu undivided family came into possession of immovable property as a residuary legatee, subject, by decree of Court to payments for maintenance of widows who were members of the family, it was held following *Bejoy Singh Dudhuria v Commissioner of Income tax, Bengal*, 60 I A 196 that the net income only was taxable in the hands of the male member as an individual. *Commissioner of Income tax, Bombay v D R Naik*, 1939 ITR 362. A similar view was taken in *Raja Shiva Prasad Singh v Commissioner of Income tax, B and O*, 1942 ITR 249, in which the owner of a Hindu impartible estate paid maintenance allowances to the widow of the predecessor, under the orders of a Court. And, generally, when an annuity is charged by a testator on property bequeathed, the annuity is not part of the income of the residuary legatee but if the legatee himself creates the charge the annuity would be a diversion of his income. *Jagdishchandra v Dhanpati Singh*, 1945 ITR 64 (Pat).

In applying the principle of the ruling in *Raja Bejoy Singh Dudhuria v Commissioner of Income tax, Bengal*, 1933 ITR 135 (PC), it should be remembered that a Hindu widow's claim to maintenance does not in itself constitute a charge on the estate of the deceased husband for this purpose. Such a charge will arise only if there is a decree of a Court or an

agreement between the widow and the representative of the husband's estate or if the will of the husband creates such a charge, *In re Charusila Das*, 1937 ITR 1. Where a will directs certain payments to be made "out of the income of my property" the payments can be made by the executors only out of what they receive as the income of the property. Such payments, consequently are not a deduction of income in favour of some one else before it reaches the executors who are therefore taxable on the whole income without deduction of the payments. *In re Malik and D C Aich*, 1940 ITR 236 (Cal). Where the owner of a mine mortgaged it to his creditor for a debt to whom at the same time he leased it for a royalty and the arrangement was that the excess of the royalty over a stipulated minimum payable to the mortgagor was to be utilised by the lessee gradually in repayment of the debt, it was held that the entire royalty was the income of the mortgagor. This was a case of application by him of his income in a particular manner, *Commissioner of Income tax, B & O v Manager, Katra's Estate*, 1934 ITR 100.

In Macdonald & Co v Commissioner of Income tax, Bombay, 37 Bom LR 128, 1935 ITR 459, where the assessee had covenanted to pay a person a share of his own gross income (not a share of profits), and there was no charge on the estate, it was held that the payment was not deductible, the position being nearer to that in the *Pondicherry Railway case* than to that in the *Dudhura case*. The correctness of this decision has however been doubted in *Tata Hydro Electric Agencies v Commissioner of Income tax, Bombay*, 1937 ITR 202, 64 IA 215, 1937 A.C. 212.

Where income from mortgaged property has in no sense been earmarked or allocated for the purpose of paying the interest, the income from the property continues to be that of the mortgagor, *In re Amulya Dhone Addy and others*, 1936 ITR 164, 63 Cal 1157, AIR 1937 Cal 369. That case, however, was under section 9, and the main question was whether a deduction could be claimed for interest on mortgage of a part of the property of a Hindu undivided family by one of its members.

A distribution of dividend on condition that an equivalent loan is made by the shareholder to the company is not a distribution of income at all *Inland Revenue v Marbob*, 18 ATC 257 (KB).

As to how far a charge on land can give rise to 'agricultural income', see notes under section 2 (1), and as to how far maintenance allowances can be deducted in respect of impartible families, see notes under section 2 (9).

Where, under a trust deed, the widow of the person who created the trust was entitled to maintenance out of the income of the trust and the estate vested in a Hindu undivided family, it was held that notwithstanding the absence of any specific amount fixed for maintenance by the deed the allowance paid to the widow should be deducted from the income of the family. Whether there is a charge or not is a matter primarily of determination of the legal position of the allowance paid out, *In re Madan Mohan & Bros*, 1938 ITR 315 (Cal).

Where a widow who was also administratrix of her husband's estate claimed successfully before the Income-tax authorities that certain expenditure incurred by her for her own benefit from the income of the estate in accordance with her husband's will should be excluded from the taxable

income of the estate and the Income-tax Officer thereupon taxed her in her personal capacity on the amount excluded from the income of the estate, she claimed that the amounts spent for her benefit were not her income since she merely received lodging, board, etc. which could not be converted into money. It was held, in view of her attitude in respect of the assessment of the estate, that the case was one of her spending what she received from the estate on her board lodging, etc., and not one of her receiving such board, lodging etc., in such a manner that she could not convert it into money. *In re Charusila Das*, 1937 I T R 1 (Cal)

An allowance paid by the Court of Wards to the grandson (daughter's son) and prospective heir of a Hindu proprietrix of an estate is not an expenditure incurred by the Court of Wards on his maintenance but his income, *Kedar Naram Singh v Commissioner of Income tax, U P*, 1938 I T R. 157 (All)

In taxing the executors of a will the cost of probate, etc., cannot be deducted from the taxable income even though the will expressly directs that the expenses shall be paid out of the income of the estate, so also, expenses on *sradh* and funeral ceremonies. These are not cases in which a portion of the income is by an overriding title diverted from the person who would otherwise have received it (as in *Dudhuria's case*) but of expenditure by persons who, having received the whole income, spend a part of it in accordance with the directions of the testator in whose shoes they stand. *In re P C Mallick & Aich*, 1936 I T R. 369 affirmed by the Privy Council in *P C Mallick v Commissioner of Income-tax*, 1938 I T R. 206 (P C)

"The payment of interest on estate duty was not an outgoing necessary for obtaining the income from investments. The interest on estate duty was not legally charged upon or payable out of the sum received for dividends but was payable out of any moneys in the hands of the appellants as trustees

Mr M suggested that when a tax payer collects an income and is subject to the obligation of diverting it into two streams, one of which stream is to flow into the coffers of a creditor, then he must be considered to have collected that part of his income for and on behalf of the creditor. In my view the taxpayer in such a case collects the whole income for himself and then (if he is an honest man) pays his debts to his creditor", *per Viscount Cave in Lord Inverclyde's Trustees v Miller*, (1924) A.C. 580, 9 Tax Cases 14

A testator left an annuity for his widow, certain settled legacies and the residue to his sons. For convenience of administration, the trustees earmarked certain investments to meet the annuity and invested the estimated residuary funds separately for each account. When the income from the earmarked investments was not enough to pay the annuity the trustees first combined the incomes of the annuity and residuary funds but even this was not enough, and, rather than sell the corpus of the residuary funds in a depressed market, borrowed money on the security of these funds and paid the annuity. One of the sons claimed to reduce his income on the ground that the repayments of the loan were compulsory debts charged on his income. The claim was allowed by the High Court but disallowed by

the Court of Appeal. The son was entitled only to what was left after the annuity, and the fact that the trustees had, for convenience of administration earmarked funds for different purposes made no difference to the relative rights of the beneficiaries, *Cowen v Commissioners of Inland Revenue*, 16 A T C 1 (CA)

A mere covenant to pay a servant a salary would not make it the less the income of the master. Where, however, the payment is of such a nature that it has to be paid irrespective of whether the servant remains in the employer's service or not, e.g., a pension and is also charged on the payer's income, then it would not be his income but that of the payee, *Duke of Westminster v Commissioners of Inland Revenue*, 19 Tax Cases 490, (1936) A C 1

An assessee and his brother were partners in a business of which the property and goodwill had been bequeathed by their father's will upon trust for his two sons for life upon condition that they should enter into partnership. In order to preserve the assets of the business the trustees under the will compelled the partners to enter into an agreement under which a certain percentage of the net profit of the business was to be set aside in each half year to create a reserve fund to meet any losses arising out of the business. Subject to this condition the reserve fund remained the property of the partners. *Held*, that the sum set aside was an annual payment reserved or charged upon the net profits of the partners whereby the income of each of the partners was diminished, *Stocker v Commissioners of Inland Revenue* (1919) 2 K B 702, 7 Tax Cases 304

The income there, the *Wemyss case supra*, [8 Tax Cases 551, see notes under section 41] in question was not applicable for payment of a debt of the person to whom it otherwise would have belonged the object of the destination of that part of the income was the increase of the settled funds.—Per *Warrington, L J*, *Commissioners of Inland Revenue v Paterson*, (1924) 9 Tax Cases 163

"The question is whether when a debtor buys a property with borrowed money and charges the proceeds of the property in favour of creditors to repay the debt these proceeds are income of the debtor and I may ask if they are not income of the debtor whose income are they? If it is not the debtor's income it must be the creditor's income and I am not sufficiently topsy turvy to think of a creditor discharging debts due to him out of his own income'—Per *Scrutton L J ibid*

'If a person has alienated his income so that it is no longer his income, he is not super taxed on it but if he merely applies the income so that it passes through him and goes on to an ulterior purpose, even although he may be obliged to do that it still remains his income the line is very hard to draw between what is an alienation and what is a binding application. From that point of view it is very important to look and see what the purpose of the application is. Whether it is to pay a man's own debt or for some other purpose but logically the purpose of an alienation, if it is an alienation, does not matter and the purpose of an application if it is an application, does not matter

The *Wemyss case* was clearly a case of alienation . . . (In it) a man, resettling funds in which he had a reversionary interest, resettled them so as to exclude himself from the enjoyment of any part of the income . . . the Court of Appeal held (in *Paterson's case*) that it was merely a case of a lady entering into an arrangement to apply her income to the satisfaction of a certain demand which demand happened to be a debt owing by herself which perhaps made the consideration of the transaction easier, but which I do not believe can be a necessary circumstance —Per *Roulatt J, Perkins' Executor v Commissioner of Inland Revenue*, (1928) 13 Tax Cases 851 7 A.T.C 183 (K B D)

In the *Wemyss Case*, (1924) Sess Cases 284, 8 Tax Cases 551 the surplus income belonged to the trustees, who paid the assessee's debts while in the *Paterson case*, 9 Tax Cases 163, the money was the debtor assessee's own income and in the *Perkins' Executor case*, (1928) 13 Tax Cases 851 7 A.T.C 183 (K B D), the wife was a part-owner of the income and the surplus was to pay debts on shares of which she had the equity of redemption

Guaranteed profits—Profits received by a company from an independent guarantor guaranteeing to the shareholders a certain dividend are not the profits of the company, the latter being merely the vehicle for handing over the guaranteed money to the shareholders. In *re South Llanharan Colliery Co*, 12 Ch D 503. But where there is no such outside guarantee profits received by a company in the course of its business even though held in trust for debenture holders etc. are profits of the company. *Commissioners of Inland Revenue v City of Buenos Ayres Tramways*, (1926) 12 Tax Cases 1125 6 A.T.C 195

The subsidy paid by Government to a Railway Company in order to make up a guaranteed rate of interest on the capital of the company is the income of the company even though the guaranteed interest is payable to the shareholders. Such a subsidy is in lieu of monies which might have been earned by the company and is of the same nature as such monies. It is in the coffers of the company and is available in the same way as earnings for the payment of interest or dividend, *Ahmedpur Katwa Railway v Commissioner of Income tax, Bengal*, 1935 I.T.R. 277 63 Cal 109, 8 I.T.C 280

If a company *A*, guarantees the dividends of another Company *B*, the amount paid by *A* as guarantee to *B* is the income of the latter. The fact that the dividends are cumulative (preference) and that such guaranteed payments discharge a future liability of *B* will not make the guarantee payments any the less the income of *B*, *Aeolian Company v Commissioners of Inland Revenue*, 20 Tax Cases 547 (1936) 2 All E.R. 219

Separated wife—Obligatory payments to—Under an agreement between an assessee and his wife he had to pay her a weekly sum of £30 for her separate use during their joint lives. Held, that the payments could be deducted in computing the assessee's income for super tax purposes

Per Roulatt, J—"Although he is separated he cannot deduct it if he is separated not on the terms of paying the money, or if he is under no obligation to pay it, but merely sends it because he thinks it is the right thing to do, or, for some other reason, voluntarily sends it week by week. . . . If he had not paid I do not think he could have

defended an action for a moment, if an action had been brought against him. He would have been beaten . . . He went on paying the money because he was legally compelled to do so, and was under an obligation to do so. Therefore he is entitled to deduct it," *Eadie v Commissioners of Inland Revenue*, (1924) 2 K B 198, 9 Tax Cases 1.

Weekly payments to a wife under a Magistrate's maintenance order have been held to be "annual payments" liable to deduction of tax at source under Rule 19 of the UK General Rules, *Clack v Clack*, 14 A.T.C. 250, (1935) 2 K.B.D. 109.

On the other hand where the husband of a patient in a mental institution was appointed receiver of the latter's estate and undertook without legal obligation to make good out of his own money the difference between the wife's income and the cost of her maintenance, it was held that the husband could not deduct from his own income what he paid for his wife's maintenance. The *ratio decidendi* was that though the absence of a legal obligation did not make any material difference, the payments by the husband did not really form part of the wife's income *Watkins v Commissioners of Inland Revenue*, (1939) 3 All E.R. 165 K.B.D.

An allowance given under an order of a Court to a divorced wife for the maintenance of a minor child is not the income of the child but that of the mother *Servius v Tirard*, 18 A.T.C. 305 (C.A.).

Lunacy percentage—Lunacy percentage is a payment out of income of the lunatic after it becomes his income, *Committee of A.B. v Simpson*, (1928) 14 Tax Cases 29, 7 A.T.C. 222, *Commissioners of Inland Revenue v Sneath*, 17 Tax Cases 149, (1932) 2 K.B. 362.

Legacy Duty paid by trustees—An assessee was entitled under a will to a share of the net annual income of the testator's residuary estate. Legacy Duty was chargeable on the sums so payable from year to year, and was duly paid to the Crown by the trustees, who deducted it from their remittances to the assessee.

Held that, although the trustees were primarily accountable for the Legacy Duty, it was, in effect, a personal obligation of the assessee, and that the income receivable under the bequest had been rightly included in the computation of his total income for the purposes of super-tax in the full amount of his share of the net residuary income plus the income tax applicable thereto, without deduction of the Legacy Duty paid by the trustees on his behalf, *Colville v Commissioners of Inland Revenue*, 60 Sc.L.R. 226, 8 Tax Cases 442.

Payments free of tax—Wills—Marriage settlements—Other contracts—Under the English law there is an express provision, Rule 23 General Rules (all schedules), declaring that "every agreement for payment of interest, rent, or other annual payment in full without allowing any such deduction shall be void." This has been construed to mean that the agreement would be void only as regards the particular stipulation for the payment without deduction see *Gaskell v King*, (1809) 11 East 165, *Wigg v Shuttleworth*, (1810) 13 East 87, *Readshaw v Balders*, (1811) 4 Taunt 57, *Fuller v Abbott*, (1811) 4 Taunt 105, *Trickler v Prentice*, (1812) 4 Taunt 549.

There is a very large number of English cases regarding the effect of provisions in wills, marriage settlements and other contracts that payments should be made 'free of income tax'. The decisions are somewhat

conflicting but the following general principles can be deduced. Unlike other duties income-tax is a personal tax, not a tax on an estate see *Lithbridge v Thurloes*, (1851) 15 Beav 334 and *Sadler v Richards*, (1858) 4 K. and J 302. Therefore the courts have generally held that all payments under such provisions are taxable in the hands of the recipient (by deduction at source) but if there is clear indication that the object of the testator or other person making the contract was to make the payment free of income tax the payment should be made free of such tax see *Turner v. Mullineux*, (1861) 1 John and H 334, *Festing v Taylor* (1862) 7 L.T. 429 *Abadam v Abadam*, (1864) 33 Beav 475. A direction in general words such as 'a clear annuity' (In re *Loveless*), or free of all duties (In re *Saillard*), or clear of all taxes and deduction, *Gleadow v Leatham*, (1882) 22 Ch D 269, is not enough, still less if the words are 'such sum as will bring the amount to £X per annum', In re *Skinner Milbourne v Skinner*, 1942 I T.R. 82 (Sup.) Ch D 1 there must be either express provision that the income tax should be borne by the trustees and not by the legatee or provisions which will bear no doubt as to that having been the intention of the testator.

If a will directs the payment of an annuity or other sum free of income tax the direction must be carried out *Lovat (Lord) v Duches of Leeds*, (1862) 31 L.J Ch 503, 6 L.T 307, 10 W.R 397.

'It is simply a matter of construction whether the testator has given the annuity together with a sum equal to the income tax to the annuitant so that the annuitant may receive the annuity free of tax or has simply given an annuity and left the annuitant to bear his own income tax'. Per Swinfen Eady, L.J., in *In re Sillard Prath v Gamble*, (1917) 2 Ch 401.

It was also held in *Festing v Taylor*, (1862) 3 B & S 217, 7 L.T. 429, that bequests free of income tax were not void as wills had not been referred to in section 103 of the 1842 Act (corresponding to Rule 23, General Rules now) and the omission could not be accidental. This is due to the fact that under a will the parties 'take their respective rights from the bounty or the forbearance of the testator'. Even as regards non testamentary payments it has sometimes been held that contracts to pay free of tax are not void see *Brooke v Price*, (1917) A.C. 115 (a settlement on dissolution of marriage), *Beadel v Putt*, (1865) 11 L.T. 592 (lease).

See also the following cases—*Murdock's Trustees v Murdock and others*, (1918) 55 Sc.L.R. 664, *Smith's Trustees v Gaydon*, (1918) 56 Sc.L.R. 92, *Wilson's Trustees v Wilson*, (1919) 56 Sc.L.R. 256, In re *Loveless Farrer v Loveless G.A.*, (1918) 2 Ch 1, In re *Bowring Wimbles v Bowring*, (1918) W.N. 265.

A bequest free of income tax is not free of super tax, see In re *Crawshaw Grawshaw v Crawshaw*, (1915) W.N. 412 also In re *Bates Selmes v Bates*, 4 A.T.C. 518. Similarly 'free of all deductions including income tax' has been held to exclude recoupment of super tax *Pentices Trustees v Pentice*, 13 A.T.C. 612 (C.S.). See also *Rowan's Trustees v Rowan*, (C.S.) 18 A.T.C. 378, In re *Coulshaw Coulshaw v Coulshaw*, 18 A.T.C. 377, following In re *Shrewsbury Estates Act*, (1924) 1 Ch. 315.

The authorities were reviewed by the Court of Appeal in *In re Reckett Reckett v Reckett*, (1932) 2 Ch. 144, 1933 I.T.R. 1, and the conclusion reached was that close attention should be paid to the actual words used in

the will. In the particular case, the relevant words used were "the annual sum of . . . free of income tax", and it was held that the annuity should be paid free of sur-tax also, the latter being merely an additional duty of income-tax. In *re Bates* was distinguished on the ground that the words used by the testator in that case intended to confine the exemption only to income tax proper.

Even if the words are clear that the bequest is to be 'free of tax', the reference can only be to the taxes in the testator's country and not to foreign taxes unless the latter are specifically referred to. In *re Fraser, Fraser v Hughes*, 1941 I T R. 137.

In considering these rulings it should be noted that under section 7 and 18 of the Indian Income tax Act it is only annuities that are paid by Government, etc., or a private employer that can be taxed at source. Annuities under wills can be taxed only under section 12, *i.e.*, by the Income tax Officer making an assessment on the annuitant, and his liability to tax will not be affected even though under the will he may be entitled to be reimbursed this tax from the estate, or if the payment is not under a will, from the person paying him the annuity.

So many complicated cases have arisen in the United Kingdom because under the law there the trustee is often taxed on the gross income and is authorised to recoup himself by deducting tax from the annuitant.

Where the tax is payable by the trustee, the share payable by him would ordinarily be the proportion of tax payable by the beneficiary equal to the proportion borne by the annuity (or other payment from the trust) plus tax thereon bears to the total income of the beneficiary, see *Richmond's Trustees v Richmond*, 14 A T C. 500 (C S), (1935) S C. 585 following *Re Browning (an English Case)*, 34 T L R. 575.

Contracts—Free of tax—Though there is no provision in the Indian Statute corresponding to Rule 23 of the English General Rules, section 23 of the Indian Contract Act provides that an agreement not to deduct tax where it has to be deducted is not enforceable. This, however, would not prevent a person so contracting as to pay the other party so much as would after deduction of tax leave him a specified net amount. That is, the consideration for the contract would be the gross amount, see *North British Railway Co v Scott*, 8 Tax Cases 332, (1923) A.C. 37 and *Hartland v Diggins*, 10 Tax Cases 247, (1926) A.C. 289, *South American Stores v Commissioners of Inland Revenue*, 12 Tax Cases 905.

CAPITAL AND INCOME

Till 1939 the tax was on all "income, profits and gains" and now it is on "total income". This does not, however, involve a change of substance and the tax is still on income, profits and gains (see section 6) and not on capital except to the extent included by the special definition in section 2 (6-C). Capital receipts would be exempt under section 4 (3) *(viz)* as they would *ex hypothesi* be casual and non recurring, nor could they be "income, profits or gains" even if they arose out of business or the exercise of a profession, vocation or occupation.

Anything which can be properly described as income is taxable unless it is exempted, *Kedar Naram Singh v Commissioner of Income tax, U.P.* (1938) I T R. 157 (All).

In this respect, *viz.*, that of taxing 'income, profits and gains' and not 'capital' there was, no difference between the Indian law and the English till sub-section (6-C) was added to section 2 in the Indian Income-tax Act

though the Calcutta High Court at one stage (*Turner Morrison's Case*, 56 Cal 211) was inclined to hold otherwise. See the decision of the Privy Council in *Shaw Wallace's Case*, A.I.R. 1932 P C 138, 59 I A 206. "Income-tax is a tax on income", per Lord Macnaghten—*London County Council v Attorney General* 4 Tax Cases 265

'I think it cannot be doubted upon the language and the whole purpose and meaning of the Income tax Acts that it never was intended to tax capital as income at all events', per the *Earl of Halsbury* in *Secretary of State for India v Scoble*, 4 Tax Cases 618, (1903) A C 299

It has to be repeated, however, that the special definition in section 2 (6 C) inserted in 1939 makes an exception to these principles

Similarly the law does not permit losses or expenditure of a capital nature to be deducted from taxable income or profits—see sections 9 to 13

As to what constitutes the distinction between capital and income it is almost impossible to give a satisfactory definition. As Pollock M.R., said—

"What is capital and what is attributable to revenue account I suppose is a puzzling question to many accountants and I do not suppose that it is possible to lay down any satisfactory definition", *Atherton v British Insulated and Helsby Cables, Ltd* 10 Tax Cases 155

'Whether something is income or not is *prima facie* a question of fact and not of law, for after all, the distinction between income and capital is one of convenience and there is no real substance in it." Per the Lord President in *I D Laird v Commissioners of Inland Revenue*, 7 A T C 422, 14 Tax Cases 395

Generally speaking, income cannot arise out of appreciation of fixed capital but only out of the turning over (or appreciation) of floating or circulating capital. There is no clear definition, however of what constitutes fixed or floating capital, and what is fixed capital in the hands of one person, *e.g.*, spinning machines of a spinner, may be circulating capital in the hands of another, *e.g.*, the same machinery in the hands of the manufacturer of the machinery

Income—"Income" signifies "what comes in", per *Selborne, L C*—*Jones v Ogle*, 42 L J Ch 336 "It is as large a word as can be used" to denote a person's receipts, per *Jessel, M R*—*Re Huggins*, 51 L J Ch 938

A person's "income"—even "total income from all sources", section 8, 39 & 40 Vict, c 16,—means, money, or money's worth, received by him and (in this connection, at least) money's worth must be something that 'can be turned into money', per *Halsbury, L C*—*Tennant v Smith*, (1892) A.C. 150, the tax, whether under Schedule D or E is, "not on what saves a person's pocket but, on what goes into his pocket" (per Lord Macnaghten, *ib*) Therefore, an employee, though of so superior a character as a Bank Manager, who as part of the terms of his employment has to reside on his employer's premises, which residence he gets rent free but cannot sub-let or turn to pecuniary account, does not thereby get any addition to his income, any more than does the Master of a Ship who is spared the cost of house rent while afloat, *Tennant v Smith*, (1892) A.C. 150 (Stroud) But this decision does not apply in its entirety to India—see section 7

As regards income *in kind* generally see notes under section 13

'Profits' and 'income' are sometimes used as synonyms, but, strictly speaking, 'income' means that which comes in without reference to the outgoing, whilst 'profits' generally means the gain which is made when both receipts and payments are taken into account, *People v Niagara Supervisors*, 4 Hill 23. If properly used for creating new shares, they, i.e., profits, are 'Capital Bouch v Sproule, 12 App Cases 385, *Sythe Re Nothage*, 63 L J Ch 488 *Vh, Re Paget*, 9 Times Re 88, *Re Malam*, (1894) 3 Ch 578, *Re Arncliffe* (1893) 3 Ch 337 (Stroud)

Decisions about capital and 'income' under Companies Acts however cannot be applied in their entirety to Income tax matters, though according to Lord Atkinson *Scottish North American Trust v Fairner*, (1912) A.C. 118 5 Tax Cases 693 'there is nothing to show that that word should bear a different meaning in the Income-tax Acts (from that in the Companies Act) when applied to the proceedings of Joint Stock Companies.'

See also *Fletcher Moulten, L.J.*, in *In re Spanish Prospecting Co, Ltd*, (1911) 1 Ch 92 'The word 'profits' has in my opinion a well-defined legal meaning, and this meaning coincides with the fundamental conception of profits in general parlance, although in mercantile phraseology the word may at times bear meanings indicated by the special context which deviate in some respects from this fundamental signification. "Profits" implies comparison between the state of a business at two specific dates usually separated by an interval of a year. The fundamental meaning is the amount of gain made by the business during the year. This can only be ascertained by a comparison of the assets of the business at the two dates. For practical purposes, these assets in calculating profits must be valued and not merely enumerated. A depreciation in value, whether from physical or commercial causes which affects their realizable value is in truth a business loss. But though there is a wide field for variation of practice in these estimations of profits in the domestic documents of a firm or a company this liberty ceases at once when the rights of third persons intervene. For instance, the revenue has a right to a certain percentage of the profits of a company by way of income-tax. The actual profit and loss accounts of the company do not in any way bind the Crown in arriving at the tax to be paid." This however, was a ruling under the Companies Act and not under Taxation Acts.

The question of applying the principle of the above ruling to taxation cases was examined and negatived by all the three Courts in *Naval Colliery, Ltd v Commissioners of Inland Revenue*, 12 Tax Cases 1017, 136 LT 28

Gains—"Although" in the Income-tax Act 1842 (Schedule D and section 100), 'profits' and 'gains' are really equivalent terms, yet the use of the word 'gains' in addition to the word 'profits' furnishes an additional argument for excluding the contention that you are to introduce into the word 'profits' some ideas connected, not with the nature of the thing but, with the manner and rule of its application. What are the 'gains' of a trade? If it could be reasonably contended that the word 'profit' in these (Income tax) Acts, has reference to some advantage which the persons carrying on the concern are to derive from it, it might be said perhaps that the same argument might have been raised upon the word 'gains' but to my mind, it is reasonably plain that the gains of a trade are that which is gained by the trading, for whatever purpose it is used whether it is gained for the benefit of a community or for the benefit of individuals'.

per the Lord Chancellor—*Mersey Docks and Harbour Board v Lucas*, 2 Tax Cases 25, 8 A.C. 891

Income—‘Without giving an exhaustive definition it may be described as the annual or periodical yield in money or reducible to money value arising from the use of real or personal property or from labour or services rendered bearing in mind that in some cases e.g. income derived from house property the yield must be taken as the *bona fide* annual value and not necessarily as the actual yield per *Dawson Miller C.J.* in *In re Raja Jyoti Prashad Singh Deo* 1 I.T.C. 103 A.I.R. 1921 Pat 81 58 I.C. 836

The word income is not a term of art, and what forms of receipts are comprehended within it and what principles are to be applied to ascertain how much of these receipts ought to be treated as income must be determined in accordance with the ordinary concepts and usage of mankind except in so far as the Statute states or indicates an intention that receipts which are not income in ordinary parlance are to be treated as income or that special rules are to be applied for arriving at the taxable amount of receipts per *Jordan C.J.* in *Scott v Commissioners of Taxes (N.S.W.)* 1935 S.R. (N.S.W.) 215 see also *Attorney General of British Columbia v Ostrum* 1904 A.C. 147 and *Lamb v Commissioners of Inland Revenue* 18 Tax Cases 212

Profits or gains mean something which is in the nature of interest or fruit as opposed to principal or tree per *Rowlatt, J.* in *Ryall v Hoare* (1923) 2 K.B. 447 8 Tax Cases 521

The expansion of ‘income into income profits and gains’ (as the section stood before 1939) is more a matter of words than of substance. Income in this Act according to the Privy Council *Commissioner of Income-tax, Bengal v Sharf Wallaci & Co.*, 59 I.A. 206 see also *Commissioner of Income-tax Bengal v Mercantile Bank of India and others* 1936 I.T.R. 289 (P.C.) I.L.R. (1937) 1 Cal 180 connotes a monetary return coming in with some sort of regularity or expected regularity from definite sources. The source need not be continuously productive but its object must be the production of a definite return—as distinguished from windfalls. Thus income has been likened practically to the fruit of a tree or the crop of a field. It is essentially the produce of something which is loosely spoken of as capital. But capital though possibly the source in the case of income from securities is in most cases hardly more than an element in the process of production. The use of the word ‘income’ in section 4 (3) as comprehending at first sight capital sums is merely due to the over anxiety of the draftsman to make it clear—by explicitly putting in clause (1) of section 4 (3)—that the sums referred to in that clause which could not in any scheme of taxation be regarded as income were exempt. Section 4 (3) therefore cannot be invoked to enlarge the meaning of the word ‘income’ in section 3 so as to induce all kinds of receipts—irrespective of their nature—which have not been specially exempted.

Picturesque similes—like tree and fruit however cannot limit the true nature of income. *Commissioner of Income-tax B & O v Kailashya Narain Singh* 1943 I.T.R. 513 (P.C.) in which it was held that a royalty from a coal mine is income. Income is not necessarily the recurrent return from a definite source though it is generally of that character. Income may again consist of a series of separate receipts as it generally does in the case of professional earnings. The multiplicity of forms which income may

assure is beyond enumeration. Generally however, the fact that income flows from some capital assets of which the simplest illustration is the purchaser of an annuity for a lump sum does not prevent it from being income though in some analogous cases the true view may be that the payments though spread over a period are not income but instalments of purchase price payable at future specified dates.

the word income is an expression of elastic ambit and Courts when considering whether any particular sum can be said to be the income of (an) assessee have attempted either to bring it in or to exclude it from a certain description which they have chosen to give to the word income but they have always qualified the said description by saying that it is not exhaustive. *Kedar Narain Singh v Commissioner of Income tax U P*, 1938 ITR 157 (All)

While when contrasted with capital there is no difference *inter se* between income profits and gains, an examination of sections 6 to 12 will show that income refers to a periodical return coming in and accruing to the recipient independently and not as the proceeds of a business or profession. In this view income connotes incoming without outgoing, while profits and gains are the surplus of the receipts from business, etc. over the expenditure necessary to earn them. *Commissioner of Income tax Burma v Bengalee Urban Co operative Society* 1934 ITR 127 *cf* also *People v Niagara Supervisors* 4 Hill 23. Income is not only more general than profit or gain but is often more appropriate *eg* in respect of a mining lease. *Commissioner of Income tax B & O v Kamakshya Narain Singh* 1940 ITR 563 1943 ITR 513 (PC)

The words profits and gains are an amplification of the word income and not a limitation on it all that is implied is that profits and gains are varieties of income. *Commissioner of Income tax Bihar and Orissa v Gopalsaran* 1934 ITR 267 1935 ITR 237 (PC). The words profits and gains do not really add anything to the word income. In *re Laler Indra Sen* 1940 ITR 187. According to another view the words are really used in a disjunctive sense. *Kedar Narain Singh v Commissioner of Income tax U P* 1938 ITR 157 (All)

All these dicta and rulings however must be read with reference to the special definition in section 2 (6 C) inserted in 1939 which deems certain capital sums to be income.

Burden of proof—It is for the taxpayer who seeks exemption to prove that a particular item of receipt is capital and not income. In *re Indra Sen* 1940 ITR 187.

USA—The distinction between capital and income is of importance under the taxation laws in the USA. As one writer says

What is needed is an authoritative definition of income. It can not be found in the Supreme Court decisions because there are too many differentiations and limitations to make it at all clear what a decision will be in any future case. Another defines income as the money value of the net accretion to one's economic power between two points of time. This of course will not fit in with the Indian or the English law neither of which taxes the appreciation of capital values—whether realised or not.

The meaning of that word (income) is not to be found in its bare etymological derivation. Its meaning is rather to be gathered from the implicit assumptions of its use in common speech. The implied distinction, it seems to us is between permanent sources of wealth

and more or less periodic earnings. Of course the term is not limited to earnings from economic capital, i.e., wealth industrially employed in permanent form. It includes the earnings from a calling as well as interest, royalties or dividends. yet the word unquestionably imports, at least so it seems to us, the current distinction between what is commonly treated as the increase or increment from the exercise of some economically productive power of one sort or another and the power itself, and it should not include such wealth as is honestly appropriated to what would customarily be regarded as the capital of the corporation taxed, *U S v Oregon R & Nav Co*, 251 Fed 211

In *Macomber v Eisner*, 252 U S 189, Pitney, C.J., said 'Enrichment through increase in value of capital investment is not income in any proper meaning of the term that is if unrealised by the persons who are taxed. Again, after examining dictionaries in common use (Boue L D Standard Dictionary, Webster's International Dictionary, Century Dictionary) we find little to add to the succinct definition adopted in two cases arising under the Corporation Tax Act of 1909, *Stratton's Independence v Howbert*, 231 U S 399, 415 *Doyle v Mitchell Bros Co*, 247 U S 179 185 'Income may be defined as the gain derived from capital, from labour or from both combined' provided it be understood to include profit gained through a sale or conversion of capital assets to which it was applied in the *Doyle case*'

The decisions that have been set out below refer to capital receipts. The decisions about capital expenditure have been set out under section 10 (2) (vi) which prohibits the deduction of capital expenditure from taxable profits

As regards Capital Receipts, see also the decisions that have been set out under 'Business—section 2 (4), Income—section 2 (6-C), and Casual Receipts—section 4 (3) (vi)'. These subjects overlap each other

Investments—Appreciation of—"It is quite a well settled principle in dealing with questions of assessment of income tax, that where the owner of an ordinary investment chooses to realise it, and obtains a greater price for it than he originally acquired it, at the enhanced price is not profit assessable to income tax. But it is equally well established that enhanced values obtained from realisation or conversion of securities may be so assessable, where what is done is not merely a realisation or change of investment but an act done in what is truly the carrying on, or carrying out, of a business. The simplest case is that of a person or association of persons buying and selling lands or securities speculatively, in order to make a gain, dealing in such investments as a business, and thereby seeking to make profits. There are many companies which in their very inception are formed for such a purpose, and in these cases it is not doubtful that, where they make a gain by a realisation the gain they make is liable to be assessed for income tax.

What is the line which separates the two classes of cases may be difficult to define, and each case must be considered according to its facts, the question to be determined being—is the sum of gain that has been made a mere enhancement of value by realising a security, or is it a gain made in an operation of business in carrying out a scheme for profit making? Per *Lord Justice Clerk in Californian Copper Syndicate v Harris*, 5 Tax Cases

159 see also *Northern Assurance Co v Russell*, 2 Tax Cases 551 26 Sc L R 330

An Investment Trust Company had powers in its Memorandum of Association to vary its investments and generally to sell or exchange any of its assets held that the net gain by realising investments at large prices than were paid for them constituted profits chargeable with income tax, *Scottish Investment Trust Company v Forbes* 3 Tax Cases 231 31 Sc L R 219

For the Lord President—The varying the investments and turning them to account are not contemplated merely as proceedings incidentally necessary for they take their place among what are the essential features of the business. My view of this company is therefore that its position in the present question is entirely distinguished from that of a private individual or an ordinary trader. Accordingly I think that it is wrong in its contention that increases on realisation of stocks of the company are capital sums.

In *Commissioners of Inland Revenue v Scottish Automobile & General Insurance Co Ltd* 16 Tax Cases 381 it was held (Lord Morison dissenting) that there was evidence on which the Commissioners could find that profits from changing investments were of the nature of capital appreciation. The company did not deal in life insurance and the contracts were for one year only. The power to invest—which the company possessed—was only subsidiary to its business of insurance and the changes in investments were comparatively rare. The investments moreover were of surplus capital. See also *Royal Insurance Co v Stephen* 14 Tax Cases 22 44 T L R 630 and *Westminster Bank v Osler* 17 Tax Cases 381 (1933) A C 139 referred to under section 13.

Whether profits or losses from investments should be included in the computation of taxable profits will depend on whether the investments are of the nature of stock in trade or of the nature of fixed capital e.g. permanently excluding a certain sum from the floating capital and keeping it as an emergency reserve. The finding on this point would be one of fact and one of the relevant considerations would be the intention of the assessee as to the object of the investment. Accordingly when a produce exchange which did business of a quasi banking nature received large deposits from clients and invested them in securities and made profits on the sale of these securities and the Income tax authorities assessed these profits the High Court declined to interfere. In *re Amritsar Produce Exchange Ltd* 1937 I T R 307 (Lah). So also in a case in which a Bank which held large blocks of securities as part of its general floating capital without earmarking any part thereof for the purpose of anything in the nature of fixed capital. The fact that profits from the sale of securities were taken not to revenue Account but en bloc to a Reserve was not held to be conclusive and it was held that the question whether profits arose from trading or from the appreciation of capital investments is always a question of fact to be determined by the Income tax authorities. *Punjab Co-operative Bank Ltd v Commissioner of Income tax Punjab* 1938 I T R 355 I L R 1938 Lah 526 A I R, 1938 Lah 852.

In order to tax profits on the sale of investments it is not necessary that the assessee should be carrying on a separate business of investment. It is sufficient if the buying and selling of investments is a part of some business or other. The appreciation of the investments of a Bank was therefore held to be taxable—*Punjab Co-operative Bank v Commissioner*

of *Income tax, Punjab, 1940 I T R. 635 (P C)* The profit made by a company from its surplus funds by the purchase and sale of shares of a sister concern was held to be income and not of a capital nature, being profit arising from one of the objects of the memorandum of the company *Dalmia Cement v Commissioner of Income tax, B & O 1944 I T R 50* Where a person with plenty of forward transactions in the Stock Exchange, also had two ready transactions in each of which he bought large blocks of shares and sold them within three or four months it was held that the profits from the ready transactions were not appreciation of capital but taxable income *Commissioner of Income tax Bombay v Sir Homi Mchta, 1943 I T R. 142*

Treasury Bills—Appreciation of—The National Provident Institution bought certain Treasury Bills of which some were held by it until maturity others were sold in open market during their currency and the remainder were converted into War Loan *Held*, that the whole difference between the price paid for a Treasury Bill and the sum realised by the purchaser whether by holding the Bill until maturity or by selling it or converting it before maturity represented a profit chargeable to income tax and that no part of that profit was an accretion of capital (2) that profits so made constituted income of the year in which it is received.

*Per Lord Haldane—*By a majority, Lord Justice Warrington dissenting the Court of Appeal held that the whole or the difference between the amount contracted for and the amount received for a bill which was sold or converted into War Loan during its currency was not necessarily taxable as a profit on a discount. The difference did not necessarily represent only a profit by way of income but might in part represent an accretion to capital. Such an accretion might be due to the state of the money market and the rise or fall in the value of money and the rates of interest by which the price of the Treasury Bill might have been caused to rise or fall without strict correspondence with its progress towards maturity. The only amount to be taxed as profit on a discount in such a case was therefore the amount by which its value had increased merely by reason of its advance towards maturity. The assessment was therefore ordered to be remitted for adjustment by elimination of the elements of profit due to accretion of capital on this principle.

My Lords, on the question I am unable to agree with the view of the Court of Appeal. I see no answer to the argument as stated by Lord Justice Warrington [(1920) 3 K.B. 35, 55]. It is concise and I will adopt his words. 'When a holder whether the original purchaser or not, realizes during currency, he really receives a proportion of the total profits resulting from the fact that the bill was brought at a discount. It is true that that proportion may not bear an exact relation to the period of currency but may be determined by variations in the value of money, in the public credit and so forth. But it seems to me that the total of the profits received by the various sellers after deducting losses if any, cannot exceed the difference between the price originally paid and the sum receivable at maturity and that the considerations I have referred to merely affect the distribution of that difference between the various holders. Profits made by discounting bills seem to me to rest on the same footing and conversion into War Loan also. This last is simply a sale on certain

terms fixed by the Government and investment of the proceeds' My Lords I do not think this reasoning is really answerable", (1921) 2 A.C. at p. 231-232

Per Lord Sumner — It is to be remembered that this is a case of a company which carries on a business and employs its funds for and in that business. The case stated finds no fact to distinguish these transactions from any other business use of money. It is not the case, as to which I say nothing, of a private person who, not in the course of any business at all, realises an investment and comes well out of it. Similarly, I see no warrant for trying to discriminate between the capital used in the transaction and the income obtained from its use. The Statute says nothing about it. To discount a Bill, even a Treasury Bill, you must have money or money's worth, but whether an accountant would say that it came out of or should be debited to capital or income makes no difference to the fact of discounting. The excess of what is got back to-morrow over what is put in to-day is profit and it is but rarely that even an economist can tell what is appreciation of capital and what is not", *The National Provident Institution v Brown and The Provident Mutual Life Assurance Association v Ogston*, 8 Tax Cases 57 (1921) 2 A.C. 222-256.

Realising assets — A company which was formed of solvent contributors of a Bank acquired from the liquidators the outstanding assets of the Bank including sums expected to be recovered from estates of contributories paying therefor a sum sufficient to enable the liquidators to discharge the liabilities of the Bank. From time to time the company sold portions of these assets at prices exceeding the values at which they were estimated in the books of the liquidators. *Held*, that the case as stated did not contain materials for a decision whether profits liable to assessment to income tax had been made. But the judgment set out general principles.

Per Lord Young — 'Now what about recoveries from debtors? The company took them over. I should say that I have really no doubt that any person or any company, making a trade of purchasing and selling investment, will be liable to income-tax upon any profit which is made by that trade. It is quite an intelligible business.

But it is another proposition altogether that, where there is not a trade, a gain or loss upon the purchase and re-sale of property comes within the meaning of the Income tax Acts. Take even proper traders: if proper traders sell their old premises and buy new ones and sell the old premises at a higher price than they paid for them.

I should say it was a totally untenable proposition that anything in excess of what they had paid for the old premises is income within the meaning of the Act. I do not think it is at all. It is no more so in the case of a trader's income than in the case of a private individual selling his house at more than he had paid for it. They were not making a trade of buying and selling debts.

The proposition that where anybody purchases a doubtful debt and makes more than he paid for it—one purchase, he not being a trader in that kind of thing—that that is income is, I think, a proposition which cannot be sustained. *Assets Co., Ltd v Forbes*, 3 Tax Cases 542, 34 Sc.L.R. 486.

"Thus the profit realised in a sale of shares may be capital if the seller is an ordinary investor changing his securities but in some instances

at any rate, it may be income if the seller of the shares is an investment or insurance company. *Commissioner of Income tax, B & O v Kamakshya Narain Singh*, 1943 ITR 513 (PC)

Property—Sale of—Receipts from.—A company formed for the purpose *inter alia*, of acquiring and re-selling mining property, first acquired and worked various properties. After some time it re-sold the whole to a second company receiving payment in fully paid shares of the latter company. *Held*, that the difference between the purchase price and the value of the shares for which the property was exchanged was a profit assessable to income tax. The company's contention was that the case was one of substitution of one kind of capital for another and that in any case no tax should be levied until the value of the shares had been realised in money. The Court held that the company was formed with the object of making profit from the sale of its property and that therefore the profits in question were liable. *Californian Copper Syndicate v Harris* 5 Tax Cases 159. This case was cited with approval in *Commissioner of Taxes v Melbourne Trust* (1914) AC 1001.

A company was formed with the object of acquiring estates in the Malay Peninsula and developing them by planting and cultivating rubber trees. Power was taken in the Memorandum of Association to sell the property and such a sale was contemplated in the prospectus issued at the inception of the company. Two estates were purchased but the original capital being insufficient to develop them the whole of the undertaking was sold to a second company for a consideration (mainly in shares of the second company) in excess of the capital expended. At the date of the sale a considerable acreage had been planted but no rubber had yet been produced or sold. *Held*, that the profit on the sale was not a profit assessable to income-tax but was an appreciation of capital.

Per Lord Salvesen—The only difficulty arises from the decision in the *Californian Copper Syndicate v Harris*, 5 Tax Cases 159. This case was cited with approval in *Commissioners of Taxes v Melbourne Trust*, (1914) AC 1001. The facts in that case were not unlike those which occur here but the grounds of the decision appear to me not to be applicable. Lord Trayner said (in that case)—I am satisfied the appellant company was formed in order to acquire certain mineral fields or workings—not to work the same themselves for the benefit of the company but solely with the view and purpose of re-selling the same at a profit. *Tebrau (Johore) Rubber Syndicate, Limited (in Liquidation) v Farmer*, 5 Tax Cases 658, (1910) Sess. Cases 906 47 ScLR 816.

The Hudson Bay Company established by Charter were the owners of large territories in Rupert's Land, North America. In 1869 they surrendered to the Crown their territory and rights of government in exchange *inter alia*, for a money payment and for a right to claim, within fifty years a twentieth share in certain lands in the territory as from time to time the lands were settled. The lands granted to the company in pursuance of this agreement were sold by the company from time to time and the proceeds applied partly in payment of dividends and partly in reduction of capital. *Held*, that the proceeds of the sales of the lands so granted were not profits or gains derived by the company from carrying on a trade of dealing in land, and were not assessable to income tax.

Per the Master of Rolls — The real question is whether this money can be regarded as profits or gains derived by the company from carrying on a trade or business. In my opinion it cannot. The company are doing no more than an ordinary landowner does who is minded to sell from time to time as purchasers offer, portions suitable for building of an estate which has devolved upon him from his ancestors. I am unable to attach any weight to the circumstance that large sales are made every year. This is not a case where land is from time to time purchased with a view to its sale, the company are only getting rid by sale as fast as they reasonably can of land which they acquired as part of a consideration for the surrender of their Charter.

Per Farwell, L.J. — It is clear that a man who sells his land or pictures or jewels is not chargeable with income tax on the purchase-money or on the difference between the amount that he gave and the amount that he received for them. But if instead of dealing with his property as owner he embarks on a trade in which he uses that property for the purposes of his trade then he becomes liable to pay, not on the excess of sale prices over purchase prices but on the annual profits or gains arising from such trade in ascertaining which those prices will no doubt come into consideration.

A landowner in England may establish a game farm on part of his estate and make profits thereby which would be liable to income tax, and he may also sell parts of his estate for building purposes but his trade as a game farmer does not bring his sales as a landowner within the Income tax Acts and I see no difference in this respect between his position and that of the company. Again a landowner may lay out part of his estate with roads and sewers and sell it in lots for building but he does this as owner not as a land speculator.

Landoning Hudson Bay Coy., Ltd v Stevens & Tax Cases 424 25 TLR 709

A company was incorporated in 1904 with the primary object of acquiring, managing and developing with a view to ultimate sale certain lands which were held in trust for various persons who were interested therein either as owners, joint owners or as trustees. Subject to an extraordinary resolution the company had power to deal in other lands but it had not at any time exercised that power. The share capital of the company was fixed at a nominal amount solely to facilitate division among the beneficiaries and was not determined by reference to the value of the lands acquired. All the ordinary shares had been allotted in consideration of the conveyance of the lands to the company and these shares had been continuously held by the original allottees or their representatives. Working capital had been provided by the issue to ordinary shareholders of preference shares for cash. In 1908 the company created and allotted to persons other than the ordinary shareholders deferred shares in return for services which enhanced the value of the lands. Held that the surplus arising from the sale by the company of portions of the lands was not the profits of a trade or business and that the function of the company was merely to realise the capital value of the respective interests in the land under the trust.

Per Rowlatt J. — In this case the question is whether the company which was formed for what I may call family reasons is liable for income-tax on what it makes by selling the lands. Now the question

is whether the company has really only realised some property held as capital by those who became its shareholders namely the people entitled under the trust or who started or founded the trust or whether it has got to the point of embarking in a trade or business of which these receipts are the resulting profits. Now the company proceeded in a very enterprising way undoubtedly. It cleared the land and formed roads. It sold parts of it and kept some of the money and put it back into the land and so on and it gave a share in its capital to certain people who were instrumental in bringing a railway there. Undoubtedly it has done very well. Under these circumstances the Attorney General and the Revenue contend that it has gone beyond the stage of merely realising the property and has embarked upon a business in land which it has not in the real sense bought but in land which came to it. The Commissioners have held that it is not so and I am not prepared to differ from the Commissioners. If this had been an individual he need not have had a company, he might have done all these things and if he had been a prudent or a public spirited man he would have done all these things. If a landowner finding his property appreciating in value sells part of it and uses part of his money still further to develop the remaining parts and so on he is not carrying on trade or business he is only properly developing and realising his land. *C H Rand v The Alberni Land Coy, Ltd* 7 Tax Cases 629.

A company was incorporated with the primary object of acquiring, developing and turning to account certain concessions in German South West Africa which included (i) mineral rights (ii) railway rights and (iii) the right to the freehold of some 3 000 000 acres of land to be selected by the company. The company had power under the concession to transfer any or all of its rights to other persons or companies and in particular had the right to turn the land granted to it to any account it might think most beneficial for its interests though it was understood between the company and the German Government that the colonization of the country should be encouraged by the sale of land to settlers. From time to time throughout the life of the company sales of land were made to settlers and considerable tracts were also sold to other companies. The proceeds of the land sales were always carried to capital account but the profits made on the sale of shares received from one of the companies in consideration of land transferred to it was distributed by way of dividend. Apart from the acquisition of the original concession the company never purchased for itself any land or land rights. Held that the profits derived by the company from sales of land were not of a capital nature and should be taken into account in computing for income tax purposes the profits arising from the trade adventure or concern in the nature of trade exercised by the company.

The question that we have to determine is whether the moneys derived from these sales of land fall into income or are to be treated as capital of the company. The conclusion that I come to on reading the documents presented to us is this—that there is no definite segregation of the moneys received from the sales of land for the purpose of capital. In *Hudson's Bay Coy v Stevens* 5 Tax Cases 424 what is decided by the Court is this that inasmuch as the Commissioners found the facts and had drawn the inference negating the fact that the company were

carrying on a trade in buying and selling land, therefore they were not liable to income-tax for such profits or gains by the sale of land, they are not derived by trading or carrying on business but by the sale of an old possession", *Pollock, M R—Theo v South-West Africa Company, Ltd*, 9 Tax Cases 141, 131 L.T. 248

In *The Alabama Coal, Iron, Land and Colonization Co, Ltd v Mylam*, 11 Tax Cases 232, the facts were as follows. In 1870 the State of Alabama raised a loan for the purpose of constructing a railway. In 1876 the State defaulted and transferred to certain trustees for the benefit of bondholders certain lands. The trustees were to sell the property, pay 10 per cent of the proceeds to the State till the State had received all interest paid by it on the bonds before the default, and to distribute the balance amongst the bondholders. At the end of 10 years all bonds not presented or surrendered were to be barred from the benefits of the trust and to carry no claims against the State. A Company was formed with the object of putting into a marketable form the interests of the bondholders who had surrendered the bonds. The capital of the Company was 10,000 Preferred A Shares of £10 each to be subscribed at par and 26,000 Deferred B Shares of £1 each to be issued fully paid two B Shares being given as bonus on each A share subscribed for. The bondholders were given the first option of subscribing for the preferred Shares and they were also given the choice of surrendering to the Company their interest in exchange for non interest bearing Instalment Certificates equal to the amount of the bond plus accrued interest thereon plus three B shares for each bond. Of the original issued capital 56 per cent belonged to bondholders and 44 per cent to others. After paying off the State 70 per cent of the net proceeds from the sale of lands was applied in paying off the Instalment Certificates and 30 per cent in paying dividends on A Shares and redeeming them at par. By 1886 the State had been fully paid off. The interests of all bondholders except those who had not surrendered the bonds within the 10 years' limit had also been acquired by the Company. Also an American Company had been formed to hold the trust lands in place of the trustees whose term had expired and the whole of the shares in this American Company had been allotted to the assessee Company. The assessee Company purchased certain other lands to develop the trust property. In 1904 all the Preferred Shares had been paid off and by 1912 two-thirds of all the Instalment Certificates had been repaid. In that year, however, further Deferred Shares were issued and the capital thus raised was used in paying off the bulk of the remaining Instalment Certificates. *Held*, that the Company was carrying on a trade. (*The Hudson Bay Co, Ltd v Stevens*, 5 Tax Cases 424, 25 T.L.R. 709 and *Rand v The Albermar Land Company, Ltd*, 7 Tax Cases 629 distinguished.)

Per *Roulatt, J*—'There were these lands in the hands of the bondholders, it is not as if a band of speculators outside the bondholders had come and bought these lands. . . the bondholders themselves as individuals said " . . . let us take these lands from the body which we are, and we can get some other people to come in with us . . . we ourselves can put up some more money, and we will take these lands, and give for them certain preferential rights, . . . We will not launch out widely but we will launch out. We will embed the realization of these lands in an undertaking, which must be wider than the bare realization, with the minimum of nursing and the minimum of necessary expenditure which a land-

owner himself might be inclined to indulge in', *The Alabama Coal, Iron, Land and Colonization Co., Ltd v Mylam*, 11 Tax Cases 232.

In a case in which all that appeared in the books of a money lender were entries to the effect that he had purchased a property in 1919 and again another in 1924 and that they were both sold in 1926-27 and there was nothing in the accounts or other documents to show that the income derived from these properties and the expenses incurred on them were included in and made part of the accounts of the money lending business, the Income tax Officer treated the difference between the cost and sale prices as a business profit acting on the general presumption that money-lenders of the particular class generally buy and sell such properties in the course of their business. The Madras High Court held that there was no evidence to justify the findings of the Income tax Officer *R M V R M Virappa Chettiar v Commissioner of Income tax Madras*, AIR 1930 Mad 123, 4 ITC 204.

On the other hand profits arising from the sale of land taken over in satisfaction of debt are profits from business if the creditor's business is that of lending money on the mortgage of land. The business is analogous to that of pawn broking, *S L S Chettiappa Chettiar and S L Rm Ramasami Chettiar v Commissioner of Income tax Madras* AIR 1930 Mad 119, 31 LW 215, 4 ITC 188.

Where property is bought by a banker or money lender from a debtor, in discharge of a loan with the object of reselling it at a profit as soon as a suitable opportunity arises the profit that arises is not a capital appreciation but income, *In re Amritsar Produce Exchange Ltd*, (1937) ITR 307 18 Lah 706, AIR 1938 Lah 44.

A money lender received in settlement of an account the right to certain simple debts, to certain mortgage debts and a rubber plantation. The plantation was subsequently sold at a profit, and the question arose whether the profit was or was not casual. Having regard to the facts of the case, viz. all the accounts being kept together, the loss under the simple and mortgage debts being claimed as a business loss, the debit of the maintenance expenses of the plantation to the business account and the credit of income from the plantation to the business account, it was held that there was evidence to justify the finding of the Department that the income arose from business and that the profit was not a capital appreciation, *O R M O M S P Lakshmanan Chetty v Commissioner of Income tax, Madras*, AIR 1930 Mad 121, 4 ITC 200.

Whether you are trading or realising a capital accretion is a question of fact. Even though a company may under its articles of association be empowered, *inter alia*, to trade in a particular manner, there is no natural presumption that it is doing so, and every transaction must be examined on its merits with a view to deciding whether it is trade or only the realisation of capital, *Commissioners of Inland Revenue v Hyndland Investment Co*, 8 ATC 378, 14 Tax Cases 694.

A builder and an architect formed an *ad hoc* partnership and bought certain blocks of land which they 'feued' to a private company under their control, the latter building houses on the lands and selling the houses to the public. The transactions were all *bona fide* and the question arose whether the partnership carried on a trade in buying the lands and feuing them to the company. On the facts, the Commissioners answered the question

in the negative and the Court declined to interfere *Inland Revenue v Dean Property Co*, 18 ATC 219 (C.S.)

An association was formed under arrangements between the British and Australasian Governments to realise the value of surplus wool acquired during the Great War. Trade was not the object of the association and neither the wool nor the money realised was used for trading purposes. The Privy Council held accordingly that the wool was so to speak the fixed capital of the association *Taxes Commissioners v British Australasian Wool Realisation Association* 9 ATC 449, (1931) AC 224

A company managing developing and dealing in real property got an option to purchase land and some years later agreed with another party to form a company for developing a part of the land. Later on the shares of the company in the new company were sold to a third party. It was held that the sale proceeds of the shares were trading receipts of the old company, since the capital of the new company was in effect the stock in trade of the old company *Associated London Properties v Henriksen* 1944 (C.A.)

Securities—Sale of—Surplus—When taxable—Per Lord Dunedin in *Commissioner of Taxes v Melbourne Trust* (1914) AC 1001

In the present case the whole object of the company was to hold and nurse the securities it held and to sell them at a profit when convenient occasion presented itself

Their Lordships therefore come to the conclusion that there is ample evidence here that the company is a trading company and that the surplus realized by it by selling the assets at enhanced prices is a surplus which is taxable as profit

Interest—The difference between what a person receives and what he lends is not necessarily income. The first thing is to look at the contract. If the rate of interest is reasonable having regard to all relevant circumstances e.g. the market rate the duration of the loan and the nature of the risk the discount or premium—as the case may be—on the loan, whether on issue or on redemption is not of the nature of interest. A good example is a contract for repayment on a gold standard basis involving heavy discounts and premia which clearly are not interest. The question always is one of fact to be determined by the Revenue authorities. Where however, no interest as such is charged the discount or premium will *pro facie* be of the nature of interest or revenue loss. In a case therefore in which a British newsprint company had advanced money to a foreign wood pulp company (in which it was wholly interested beneficially) and the advances were funded into notes (debentures) issued at a discount and redeemable over a long period carrying interest and also a premium on redemption it was held that the difference between the issue price and the redemption price was not income but capital *Lomax v Peter Dixon & Co*, 25 Tax Cas 353 1924 ITR. (Sup.) 1

The Hudson's Bay Company owned large tracts of land in Canada and from time to time sold plots or blocks of land to purchasers desiring to take up and occupy land for settlement in that country. The company entered into agreements with purchasers unable to provide the whole purchase-money in one sum under which the purchaser paid a certain sum down when the contract was signed and the balance by equal annual instalments each with interest calculated on the balance of the purchase money remaining unpaid. The company agreed on completion of payment of the

purchase money and interest to convey the land to the purchaser, and meanwhile permitted the purchaser to occupy the land until default be made in payment of the sums of money agreed upon, in which case it reserved the right to cancel and determine the agreement and to re enter upon or to resell the lands, all payments therefor made on account being forfeited to the company. *Held*, that the interest on unpaid purchase money was income as the interest was income arising from a security and not capital, *Hudson's Bay Co v Thew*, 7 Tax Cases 206, (1919) 2 L.B. 632

Coal bings—Slag. Sale of—Receipts from.—Certain bings of colliery dross which had been lying on an estate for many years were disposed of by the landowner to various parties who contracted to remove the whole of the dross within a limited period (3½ months). *Held*, that the payments were capital receipts and not profits

Per Lord Cullen—'It is not suggested that Lord Belhaven traded in bings, the transaction was a contract of sale of the contents of a capital asset consisting of the bing and the price received represented merely a change in the form of capital', *Roberts v Lord Belhaven's Executors*, 9 Tax Cases 501, (1925) Sc L.T. 466

A firm of iron masters and coal masters closed down business but the partnership was not dissolved, and the properties were conveyed to trustees to sell or hold in trust for the firm. One of the properties had a heap of slag which, at the time, was valueless but some years later, was sold as roadmaking material to a company which was given the exclusive right to remove the slag on a royalty basis. It was held that no trade was being carried on and that the royalties were therefore not taxable, *Shingler v Williams and Sons*, 17 Tax Cases 574 (K.B.D.) 49 T.L.R. 221

A company—of iron masters and coal miners—took over from another Iron and Coal Company, *inter alia* certain heaps of slag as part of the undertaking. The iron and steel operations, barring one blast furnace, were given up after a few years during which period the slag was added to. Later on, the remaining furnace also was closed and the company confined itself to coal. Still later, slag, which previously had no value, found a market in road making and the question arose whether the sale proceeds of slag were capital or income. The Commissioners held that they were income and the Court declined to interfere, *Beams v Weardale Steel Coal and Coke Co, Ltd*, 16 A.T.C. 158

Premium—Mining Lease—Rent—Royalty—'Salami' or premium paid at the beginning of a mining lease for a long period represents the purchase price of an out and-out sale of the property and the sum received is 'capital and not 'income'. But 'rent' or 'royalty' paid periodically is income, *Raja Shree Prasad Singh v Rex*, 1 I.T.C. 384, 4 Patna 73, A.I.R. 1924 Pat. 679, *Commissioner of Income tax, B & O v Kamakhya Narayan Singh*, 1943 I.T.R. 513 (P.C.)

See also dicta in In re Gooptu Estates, Ltd, A.I.R. 1930 Cal. 1, 57 Cal. 910, 4 I.T.C. 146. If the letting out of property upon lease for premium and for rent is the business of an assessee, then the premium will be assessable as income either under section 10 or under section 12. But when a premium is received merely as an incident in the possession of property (even if leasehold) and there is no finding that letting out property is the business of the assessee, the premium received is capital.

Where, under a lease for an indefinite period, which was expressly made to be binding on the successors both of the lessor and of the lessee, the lessor had power to increase the rent, and to eject the lessee if in arrears, and a premium was received in addition to the recurring annual rent, it was held that the lease was permanent and that the premium was capital, *Commissioner of Income tax, B & O v Visheshwar Singh*, 1939 ITR 536 Whether *Salam* or *Nazarana* in respect of a lease is capital or income depends on the facts of the case, viz, whether in truth it is payment of rent in advance or a lump sum payment for the transfer of the lease hold *Ram Bhubanesvari v Commissioner of Income tax, B & O*, 1940 ITR 550 *Prima facie*, however it is not income, and it is for the taxing authorities to show that it is income, if they seek to tax it, *Bihar v Pratap Udainath*, 1941 ITR 313

Two brothers following a partnership sold a cotton ginning business of theirs to a private company belonging, in substance, to them. They had been ginning cotton for a public company (under their management and influence) and the new private company in return for a ten-year contract agreeing to gin for the public company at lower rates, received 20,000 shares of the public company which in turn also received 1,000 shares of the private company. The Income-tax Officer treated these 1,000 shares as capital but assessed the private company on the market value of the 20,000 shares of the public company as income being in essence an advance receipt of profits over the ten years. The High Court upheld the assessment. *Commissioner of Income tax Madras v A & F Harvey*, 1940 ITR 307

Business closing down—Sale of stock—Whether the realisation of the value of stock of a business which is closed down is a capital receipt or a profit depends on the answer to the question—when does a business which is being closed down cease to be a business which is being carried on? That is, it is a question of fact

Per Lord Atkinson—“A trader who wishes to retire from business may wind up his business in several ways, he may sell his concern as a going concern, or he may auction off his stock. But there is another way quite as effectual, and that is by continuing to carry on his business in the ordinary way, but not replenishing his stock which he has accumulated as it is sold. Then he will leave himself with no stock, and, therefore, he can retire from business. But the fact that he realises stock in the process of carrying on the trade as he has hitherto done will effectuate both purposes”, see *J and R O’Kane and Company v Commissioners of Inland Revenue*, 12 Tax Cases 303, 126 LT 707

See also *Doughty v Commissioner of Taxes (a Colonial case)*, (1927) A.C. 327, 43 TLR. 207

“Income tax being a tax upon income, it is well established that the sale of a whole concern which can be shown to be a sale at a profit as compared with the price given for the business, or at which it stands in the books, does not give rise to a profit taxable to income tax. It is easy enough to follow out this doctrine, where the business is one wholly or largely of production. Where however a business consists as in the present case entirely in buying and selling, it is more difficult to distinguish between an ordinary and a realisation sale, the object of either case being to dispose of goods at a higher price than that given for them. The fact that large blocks of stock are sold

does not render the profits obtained anything different in kind from the profit obtained by a series of gradual and smaller sales. This might even be the case if the whole stock was sold out in one sale. Even in the case of a realisation sale, if there were an item which could be traced as representing the stock sold the profit obtained by that sale, though made in conjunction with a sale of the whole concern might conceivably be treated as taxable income"—*Lord Phillimore in Doughty v Commissioner of Taxes*, (1927) A.C. 327, 331

A realisation sale of stock-in-trade belonging to a trader need not necessarily be a sale in the course of trade irrespective of circumstances. If it were, cases like those of *O'Kane & Co*, 12 Tax Cas. 303, *Edwards v Old Bushmill Distillers*, 10 Tax Cas. 285, *Inland Revenue v Ibid*, 12 Tax Cas. 1148, and *Hillerns and Fowler v Murray*, 17 Tax Cas. 77 would all have been decided more easily. In the last case, for example there would have been no need for the Court to send the case back to the Commissioners for a specific finding as to whether the assessee was trading at the time of sale of stock. So where a whisky broker with large stocks bought at low prices decided to retire on account of ill health compelling his absence from the business, and sold his assets after some time viz, his stock, trade name, furniture and fittings at a heavy profit, and the Commissioners held that he had ceased to trade long before the sale the Court declined to interfere, *Inland Revenue v William Nelson*, 18 A.T.C. 237 (C.S.)

Mr C sold his business as a going concern to a company but subject *inter alia* to two conditions (1) the profits on unexecuted contracts on the date of sale were to belong to the vendor, but the company was to execute the contracts and receive 25 per cent. of the profits on them, the balance of 75 per cent being given to the vendor, and (2) the company was to collect outstanding debts on behalf of the vendor to whom they were to belong. It was held that the 75 per cent given to the vendor was not a capital receipt but the profits of a new business set up at the time of sale, *Southern v Cohen's Executors*, 1942 I.T.R. (Sup.) 8

See also *Martin v Lowry*, 11 Tax Cases 297 (1927) A.C. 312, *Cohan's Executors v Commissioners of Inland Revenue*, 12 Tax Cases 602 and *Hillerns and Fowler v Murray*, (1932) 48 T.L.R. 213, 17 Tax Cases 77 (C.A.) referred to under sections 2 (4) and 4 (3) (vi)

Lease—Foreclosure of—Compensation paid—The compensation paid to a lessee of mineral rights for compelling him to foreclose his lease is a capital receipt. The fact that compensation is based on the value of the minerals left unworked does not make the payment one of an accumulated loss of profits.

Per Lord Buckmaster—"There is no relation between the measure that is used for the purpose of calculating a particular result and the quality of the figure that is arrived at by means of the application of that test. I am unable to regard this sum of money as anything but capital."

Per Lord Wrenbury—"Is a sum profit which is paid to an owner of property on the terms that he shall not use his property so as to make a profit? The answer must be in the negative. The whole point is that he is not to make a profit and is paid for abstaining from seeking to make a profit. The matter may be regarded from another point of view—the right to work the area in which the working was to be abandoned was part of the capital asset consisting of the right

to the whole area demised. Had the abandonment extended to the whole area, it would be impossible to contend that the compensation would be other than capital. It was the price paid for sterilising the assets from which otherwise profits might have been obtained. What is true of the whole must be equally true of part", *Glenboig Union Fireclay Company v Commissioners of Inland Revenue*, 12 Tax Cases 427 (1922) Sess Cases (H L) 112.

This principle was also followed in *Guinness & Co v Commissioners of Inland Revenue*, 3 A T C 686, (1923) 2 I R. 186 in which the firm who were brewers and whose stock of barley was commandeered by the Crown during the War claimed that the profits made on the compulsory sale to Government were not assessable to tax on the ground that they were not income but capital receipts. The Irish Court of Appeal upheld the contention (Pim J dissenting). Pim J's point was that the barley was part of the circulating capital of the company not its fixed capital and that therefore the case was more like that of *Beynon v Ogg*, 7 Tax Cases 125 than like the *Glenboig case* supra.

In *Commissioners of Inland Revenue v Newcastle Breweries*, 12 Tax Cases 927, however in which the greater part of the rum imported by the firm for blending purposes had been similarly commandeered by the Admiralty it was held by Rowlatt J that the compensation paid was a profit arising from the firm's trade. The decision of the Irish Court in the *Guinness case* was deliberately departed from. The reasoning of Rowlatt J was that in a case like the *Glenboig case* what was done was to stop the trade and pay compensation whereas in the *Sutherland case*, 12 Tax Cases 63 and the one before him all that happened was a compulsory sale of a portion of the goods and that the fact that the sale was compulsory could not make any difference. The Court of Appeal confirmed Rowlatt J's judgment. The House of Lords confirmed the judgment of the Court of Appeal but considered the *Guinness case* distinguishable. In the *Newcastle Brewery case*, the initial payment which was made was received under protest later on an Indemnity Act was passed, and a new Tribunal was set up to determine the additional compensation in cases of commanding for the war. The claim of the assessee was that as a consequence a new source of profit had arisen whereas the decision was that the profit arose from the taking of the sum.

In the *Sutherland case*, the Admiralty had compulsorily hired a steam drifter of the assessee and it was held that the payments by the Admiralty were not compensation for the stoppage of business but trading receipts since the assessee continued in his business of using the ship for profit. The ship had been acquired as a commercial asset. It could be put to a variety of profit earning uses and to whichever of these uses it may have been put the business was the same *viz* making profits from the ship so long as the ship was suited to the use and even though alterations in the ship may have been necessary.

In *Joglekar v Commissioner of Income tax, Central Provinces* it has been held that if a person deals in lands as a business, the fact that at one stage, the lands or a part thereof are compulsorily acquired by Government will not make the gains from such sale any the less profits from business.

Payments made by a mine to the surface owner for the right to let down the surface may in certain circumstances be of the nature of rent, i.e., income and therefore taxable to the extent that it is held not to be

agricultural—see *Elliott v Burn*, (1935) A C 84, 18 Tax Cases 595, *Commissioners of Inland Revenue v New Sharlston Collieries* (1936) 53 TLR 280 15 ATC 578 (CA) *Commissioners of Inland Revenue v Sir Archibald Hope* 16 ATC 78 (KB), Cf also *O Grady v Bullcroft Main Collieries and Markham Main Collieries*, 17 Tax Cases 93 [referred to under s 10 (2) (xx)]

Forests—Felling timber—Receipts from—The Allahabad High Court thought in the *Tehr* case, (1930) A L J 579 that it was a question of fact whether receipts from timber sold in forests constituted capital or income. On the other hand it was held by the Madras High Court that such receipts are income, there being no essential difference between these receipts and those from quarries and mines all of which are treated as income *Commissioner of Income tax v Manaved Tirmalpad* 4 ITC 421 AIR 1930 Mad. 764. A similar view was taken by the Oudh Chief Court in *Maharaja of Kapinthal v Commissioner of Income tax*, UP 1945 ITR 74. If however the forest was felled once for all in a particular year or if the forest was sold outright the owner not dealing in the purchase and sale of forests the receipts might be capital.

Annuities—Repayment of debt—The Secretary of State for India exercised the option of purchasing the undertaking of a railway company by payment of an annuity for a term of years instead of a lump sum. Held by the House of Lords that income-tax could not be charged on the annuity.

Per *Vaughan Williams, LJ*—It is not denied that the Income tax Act would apply in respect of so much of each annual payment as was not a repayment of an instalment of the antecedent debt, and it is not denied in this case that income-tax is payable on so much of each annual instalment paid by the Secretary of State as consists of interest. The whole question is whether Income tax is payable on that portion of the annual payment which can be discovered from the terms of the contract to be a payment of an instalment necessary to complete the payment of the existing debt. In my judgment no income tax is payable in such case' (1903) 1 K.B 494 501.

Per *Strling LJ*—'We have the authority of the decision in *Nizam's Guaranteed State Railway Company v Wyatt* 4 Tax Cases 621 24 QBD 548 that the mere fact that a sum of money which is payable annually is designated as an annuity is not conclusive but that the real nature of the transaction must be looked at. If we look at the real nature of the transaction these so-called annuities are simply annual payments of equal amount, being instalments of a debt, and are made up partly of principal partly of interest, calculated at a particular rate. On the face of the contract therefore, it appears that each annual instalment contains principal money and a portion of interest which can be readily ascertained by a competent actuary. It seems to me therefore that in that state of things we are right in following the principle which I take to be laid down in *Foley v Fletcher* 3 H & N 769, that the word 'annuity', under those circumstances is not to be read in such a way as to make capital taxable.

Now the difficulty which I certainly felt in the case arises from this that it is said (and forcibly said) by the Attorney-General

If that be so then in the case of every terminable annuity which has been purchased for value the same thing occurs, and you ought, if you logically follow out the principle, to say that each annual payment of

that annuity ought to be split up between capital and interest and the only portion which represents interest ought to be taxed" I feel the full force of that remark, but it seems to me that the cases are not the same. Those are cases of purchase of annuities, where investment has been made in that form of property, and the legislature in so many words has said that that is to be taxed, and it is recognised in this very case throughout that an annuity of the kind is taxable. And I in no way depart from that. The case to which I have referred seems to me to show that it is a different matter where it appears, on the face of the transaction, that the so called annuity is not a thing of that kind, but simply represents instalments of an existing debt (1903) 1 K.B. 494, 502.

Per *Mathew, L.J.*—"Annuity" in the ordinary sense of the expression, means the purchase of an income. "It generally involves the conversion of capital into income, and reasonably enough, where the buyer places himself in that position, the Act of Parliament taxes him, he is taken at his word, he has got an income secured in the way I have mentioned. Now, has such a case any analogy whatever to the present?" It appears to me, none. Here was a sum of money, a lump sum stipulated for in the first instance, which was to represent the capital outlay. If that money had been handed over to those who were entitled to it, it might have been invested, ought to have been invested and probably would have been invested and, if invested, the income of it would be taxable and not the principal sum. Now that sum representing the capital outlay is by the terms of the contract a sum that may be paid off by what is called (unfortunately) in the contract an annuity. It really meant 'by annual instalments'" (1903) 1 K.B. 504.

Per the Lord Chancellor—"Still, looking at the whole nature and substance of the transaction, I cannot doubt, I say, that what is called an 'annuity' in the contract between the parties and in the Statute was a mode of making the payment for that which, by the hypothesis on which I am speaking, had become a debt to be paid by the Government. If it was to be a debt paid by the Government, it introduces this consideration: was it the intention of the Income tax Act ever to tax capital as if it was income? I think it cannot be doubted, both upon the language of the Act itself and the whole purport and meaning of the Income-tax Acts, that it never was intended to tax capital, as income at all events.

Under the circumstances, I think I am at liberty so far to analyse the nature of the transaction as to see whether this annual sum which is being paid is partly capital, or is to be treated simply as income and I cannot disagree with what all the three learned Judges of the Court of Appeal pointed out, that you start upon the inquiry into this matter with the fact of an antecedent debt which has got to be paid, and if these sums, which it cannot be denied are partly in liquidation of that debt which is due are to be taxed as if they were income in each year in which it is being exacted, the result is that you are taxing part of the capital. As I have said, I do not think it was the intention of the Legislature to tax capital and, therefore, the claim as against those sums fails.

My Lords, as I have already said, I do not think it is a matter on which one can dogmatize very clearly. There is no doubt that what

has been pointed out is true that in one sense the Legislature has in the sense in which I have used the words my-self taxed capital Where you are dealing with income tax upon a rent derived from coal you are in truth taxing that which is capital in this sense that it is a purchase of the coal and not a mere rent All I have to say upon that and other illustrations of the same character is this that the income tax is not and cannot be I suppose from the nature of things cast upon absolutely logical lines *Secretary of State for India v Scoble and others* 4 Tax Cases 618 (1903) A C 299, at p 303

Where without any commercial background or course of business an assessee paid a large sum to a company and received in return 120 promissory notes of the company falling due for each quarter for thirty years the lump sum paid being equivalent to the initial value of the notes on a 4 per cent interest basis it was held that each note should be dissected into capital and interest the latter being taxed *Beck v Lord Howard de Waldon*, 23 Tax Cases 384

Where an assessee transferred his estate to a relation on consideration of the latter's taking over the assessee's debts paying some cash at once and also agreeing to pay an annuity for the rest of the assessee's life it was held by the Patna High Court that the annuity was taxable as income not being a repayment of capital The assessee discarded his capital with its pleasures as well as its risks and burdens and chose to exchange for it the convenience of an annual income In all such cases the substance and not the form of the transaction should be examined to ascertain the nature of the receipt *Commissioner of Income tax Bihar and Orissa v Gopal Sharan* (1934) ITR 264 AIR 1934 Pat 384 13 Patna 661 The Privy Council confirmed this ruling in (1935) ITR 237 62 IA 80 AIR 1935 PC 143 To say that an annual instalment is a part of price does not necessarily make it a capital receipt It is only one way of saying that it is consideration for transfer of property and consideration may well take the form of annual sums which are income in the hands of the payee The owner did not in this case exchange his estate for a capital sum payable in instalments but exchanged a capital estate for *inter alia* a life annuity and the annuity was therefore taxable as income

In consideration of a quarry owner's meeting the cost of constructing a siding to the quarry, a railway agreed to allow a rebate on freight on materials booked at the siding The rebate was to last for ten years or till the cost of construction had been recouped whichever was earlier It was held that the rebate was the income of the quarry since there was no overriding obligation as in *Scoble's* and similar cases for the repayment of a capital debt Rebate on freight on materials debited to capital expenditure could however be excluded from the income *Westcombe v Hadnock Quarries, Ltd* 16 Tax Cases 137

A railway company constructed sidings for a customer who paid the cost of construction but the railway was to eventually repurchase the sidings by paying to the customer every year a percentage of its own gross traffic receipts from the sidings such payments ceasing when the cost of construction had been recouped when the sidings became the property of the railway The agreement however could be terminated on 12 months' notice on either side irrespective of what had been repaid The question arose whether the annual payments received by the customer from the railway were capital in his hands and was answered in the affirmative Though

there was no antecedent debt or a sale of sidings the transaction was in substance one of sale and repurchase and the fact that the instalments of payments were measured with reference to the freight earned every year made no difference *Legge v Flettons Limited* (1939) 3 All L R 220 K B D

A railway company possessing its own steel works agreed to close them down (and not to permit them to be worked by others) for ten years during which period it was to take all its requirements of steel from two companies (of which the as essee was one). In return the companies were *inter alia*, to pay £180 000 to the Railway Company in equal monthly instalments over the ten years. After sometime the two steel companies farmed out a part of the contract—with the consent of the railway company—to outside manufacturers who were to take orders from and supply directly to, the railway company but were all the same to pay so much per ton to the two companies. The tonnage so received was kept by the two companies in a special account and used for amortising the £180 000 which they were paying to the railway company. The Special Commissioners held that the tonnage receipts were trading receipts of the two companies but Macnaghten J overruled them. The Court of Appeal however agreed with them in holding that the tonnage was only a commission for procuring business *United Steel Companies v Callington* 18 ATC 311 (CA)

Annuities under education and endowment assurances in which the policy holder receives back annuities for a given number of years depending on the survival of the nominee (usually a child) are not taxable in so far as the annuities represent repayment of premia paid but are taxable on the interest on such premia. In every case the taxability of an annuity depends on its true nature. There is no simple touch stone to be applied such as that there was or was not a pre-existing debt. It is immaterial whether the consideration is money paid or property assigned. An important test is whether you are parting with a capital sum or not. If the capital sum is returnable there can be no tax on its return but when you purchase an annuity outright you practically sell a capital asset just as you would sell a patent or copyright in return for an annual royalty. *The Right Rev W W Perrin v Dickson* 8 ATC 153 and 372 45 TLR 621 (1930) 1 K B 107

Refund annuity' contracts provide not only for an annuity for life to the purchaser but also guarantee to pay his heir or nominee in annual or other instalments the difference between the purchase price and the total annuities drawn by the deceased. In such cases what the heir receives is only a return of capital and the absence of an antecedent debt makes no difference *Southern Smith v Clancy* 1941 ITR (Sup) 10

Payments under wills—Annuities under wills are taxable even if paid out of capital funds but if an annuity is merely advanced and not paid finally i.e. if it can be recovered as a debt the annuity would be taxable only when finally paid or adjusted but the question whether a payment is a loan or a payment in advance of the due date should be decided on the facts of each case i.e. the proper construction of the trust or other provision regulating the payments the nature of the discretion and powers of the trustees etc. *Williamson v Ough* 20 Tax Cases 194 (1936) AC 384 (HL). In this case payments out of capital in order to supplement the income were treated as the income of the recipients. An income receipt to the payee is not necessarily an income outgo of the payer or *vice versa*

Broadly speaking, in the case of legacies and other payments under wills, if the capital belonged to the person receiving the sums, i.e., if he were beneficially interested not only in the income but in the corpus, then the payments would be regarded as paid out of capital but where there is a right only to income, and the corpus belongs to some one else then the payments would be out of income, *Brodies Trustees v Inland Revenue*, 17 Tax Cas 432

Merely calling something capital will not make it such. Where a testator directed trustees to 'raise a clear sum of £250 free of all deductions out of the capital of the trust fund and to pay that sum to each of his daughters and the residuary income to his widow, and the trustees sold some of the securities to raise the required amounts, it was held that what the daughters received was income, the true criterion being the nature of the receipt in the hands of the payee, *Jackson's Trustees v Inland Revenue*, 1943 K.B.D. (?)

Royalties on minerals—Per *Mukerjee, J.*—(After referring to *Foley v Fletcher*, 3 H & N 769 and *Secretary of State for India v Scoble*, (1903) A.C. 299, 4 Tax Cases 618) The term 'income' is not defined in the Act (II of 1886). The word 'income' however is, to use the language of Sir George Jessel in *In re Huggins*, (1882) 51 L.J. 935, 938 as large a word as can be used to denote a person's receipts, and it seems to me that it is wide enough to include a royalty received from a mine. The nature of a royalty was examined at some length by Lord Denman C.J., in *Reg v Westbrook* and *Reg v Everist*, (1847) 10 Q.B. 178, 74 R.R. 248, it appears to have been contended in the case that it is altogether wrong in principle to consider the royalty as rent, because it is a sum paid not for the renewing produce of the land, but for severed portions of the land itself. The learned Chief Justice answered this argument by observing that the occupation of a mine is only valuable by removal of portions of the soil and whether the occupation is paid for in money or in kind, is fixed beforehand by contract or measured afterwards by the actual produce it is equally in substance a rent inasmuch as it is the compensation, which the occupier pays the landlord for that species of occupation which the contract between them allows. As pointed out by Lord Denman, this would not admit of an argument in an agricultural lease, where a tenant was to pay a certain portion of the produce, which would be admitted to be in all respects a rent service with every incident to such a rent. The same view was adopted in substance by Sir Charles Abbott, C.J., in *King v Althwood*, (1827) 6 B. & C. 277 and by Lord Blackburn in *Coltress Iron Company v Black*, (1861) 6 App. Cases 315, 335. Lord Blackburn referred to the observations of Lord Cairns in *Gowan v Christie*, (1873) L.R. 2 H.L. (Sc.) 273 that a mineral lease, when properly considered, is in reality a sale out and-out of a portion of the land, but remarked that this did not justify the inference, that no income-tax should be imposed on the rent reserved on a mineral lease. The distinction between a price paid down in one sum for the out and-out purchase of the minerals forming part of land and the rent and royalty, which constitute, in reality, a payment by instalments of the price of those minerals, is intelligible though it may not be quite logical, thus affording an illustration of Lord Halsbury's observation in *Quinn v Leatham*, (1901) A.C. 495, 596, that law is not necessarily a logical Code and is not always logical at all. The view I take receives some support from the definition of the word 'income' as given in the

Oxford Dictionary, Vol V, page 162 The same view of the matter appears to have been adopted in the American Courts, in which it has been held that the term "income" includes a sum accruing as royalty under an oil lease of land granted in consideration of a royalty of part of the oil see *In re Woodburn's Estate*, (1891) 21 Am St. Rep 932 In the case of a mine, the rent may be (a) fixed sum, (b) a certain annual sum, (c) a royalty on the amount of minerals extracted payable at fixed intervals or times, (d) such a royalty, but not less in the aggregate than a fixed amount each year (as in the lease produced in the present case), and (e) such royalty and a covenant to mine a certain minimum amount or pay royalty thereon But whatever form the consideration for the lease may assume, the money or thing which is paid for the occupation of the mine, though it is in one sense a preferred debt is in its essence rent, and has all the qualities thereof, see *Raynolds v Hanna*, (1893) 55 Fed Rep 783, 800, where it was held that money received as royalty from a mine was "income" and distributable as such and not as a part of the corpus of the estate, because royalty is the most appropriate word to apply to rental based on the quantity of coal or other mineral that is or may be taken from a mine (see also a number of similar cases collected in *Baringer and Adams on Mines*, pp 9 15) I must hold consequently that the royalty received by the plaintiff is 'income' within the meaning of Act II of 1886,—*Monindra Chandra Nandi v Secretary of State*, (1907) 34 C 257, 285 This judgment was approved by the Privy Council in *Kamakshya Narayan Singh v Commissioner of Income tax, B & O*, 1943 I T R 513 There is no difference in this respect between the Act of 1886 and the present Act

In *Kamakshya Narayan Singh's Case*, referred to above the assessee contended that the earlier rulings were all wrong and that a coal royalty was not income at all but a payment for a capital asset The claim was rejected Income is not any the less income because it arises out of sinking capital in a wasting subject matter *Gowan v Christie*, (1873) 2 H L (Sc) 273 on which the assessee relied did not relate to taxation but to whether a lease could be surrendered or not, and the decision in *Coltress Iron Co v Black*, 1 Tax Cas 287 did not turn on any special provisions in the United Kingdom Statute, and the fact that 'mines' are specifically referred to in the United Kingdom Income tax Acts but not in the Indian Acts makes no difference A mining royalty is "in substance a rent, it is the compensation which the occupier pays the landlord for that species of occupation which the contract between them allows" per *Lord Denman* in *R v Wesbrook*, (1875) 10 Q B 178 It is a periodical payment for the continuous enjoyment of the various benefits under the lease

In a case in which the assessee allowed his tenants to extract earth containing saltpetre, it was claimed that the receipts from the tenants were capital receipts for the sale of the earth The claim was disallowed *Maharaja Guru Sahi v Commissioner of Income tax, B and O*, 2 I T C 281 6 Pat 29, A I R. 1927 Pat 133 So also a claim that income from brick-hands let-out for brickmaking was a capital receipt from the sale of the soil once for all, *Maharajah of Bettiah v Commissioner of Income tax, B and O*, 5 I T C 42

On the other hand calling a payment a "royalty" will not make it so In a case in which oil bearing land was sold, a part of the consideration being a percentage of the oil produced the Privy Council held that the

so called royalty was really the payment of a part of the purchase price spread over several years. The point was that the vendor had parted with all his right to the land including the right to search for oil (not merely the latter) and was in no sense a joint adventurer with the purchaser in the business of oil prospecting or production, *Minister of National Revenue (Canada) v Cooper*, (1933) A.C. 684.

Annuity—Payment for goodwill, etc—In a case in which the assessee was a residuary legatee of her husband who was a senior partner in a firm the articles of partnership in which were. In the event of the death of one or both of the senior partners, the remaining partners or partner may continue the use of the firm's name and established trade 'marks' and goodwill paying quarterly to the Trustees of the deceased senior partner or partners the sum of £500 each for a period of five years for the privilege, after which it may be enjoyed without further payment and in the event of the death of one or both of the senior partners and after 31st August, 1921 in the event of the death of a specified junior partner the surviving partner or partners shall proceed to liquidate all business open at the time of the partner's death, a period of six months being allowed for this purpose, and shall then pay over to the executors the deceased partner's ascertainable share of capital, etc'. *Rowlatt, J.*, held that the quarterly payments were income paid for the use of the firm's name goodwill, etc., a payment concurrent with the enjoyment of the thing for which the payment is made, though the payment was only for five years, *Commissioner of Inland Revenue v Mrs Mackintosh*, 14 Tax Cases 15, 7 A.T.C. 212, 154 L.T. 141.

The widow of a dentist sold his practice to his assistant for £15,000, out of which £5,000 was paid in cash and the balance was to be paid in ten equal instalments of a quarter of the net profits each year, the primary price being increased or decreased as the case may be. The Special Commissioners and *Finlay, J.*, held that the annual sums were income but the Court of Appeal held otherwise. There is no reason why a creditor who has sold property for a particular price should not, in discharge of the price, agree to accept a fluctuating sum if it suits both him and the buyer to do so. In this case the primary price of £15,000 was not an otiose figure, it permeated the whole contract and could be enforced in various events, the quarter share of profits being only an alternative, *Commissioners of Inland Revenue v Ramsay*, 20 Tax Cases 79, 154 L.T. 141.

On the other hand, where a production executive of a film company entitled to salary and a share of profits surrendered his rights and agreed to be paid at a percentage of the receipts of the company in respect of certain pictures (above a minimum fixed limit), it was held that his share of receipts was not capital. There was no antecedent debt due to him, and what he received was a share of the revenue of the company, paid to him as his remuneration, *Asher v London Film Pictures*, 1943 (C.A.).

A owned the leasehold of a property subject to a ground rent of £300. The property was sub let to *B* for a gross rent of £1,625. *A* contracted to sell his interest to *B* by two deeds. The first deed assigned to *B* the property for the remainder of the lease subject to the payment of the ground-rent to the landlord, the consideration being the payment of £1,000 by *B* to *A*. Under the second deed *B* agreed to pay to *A* £1,625 per annum by quarterly payments for the remainder of the term.

of lease. No sum was settled in lump as the price of the property. *Held*, that the quarterly payments were income and not capital.

Per Walton, J—It is obvious, that there will be cases in which it will be very difficult to distinguish between an agreement to pay a debt by instalments and an agreement for good consideration to make certain annual payments for a fixed number of years.

In the one case there is an agreement for good consideration to pay a fixed gross amount and to pay it by instalments, in the other, there is an agreement for good consideration not to pay any fixed gross amount but to make a certain or it may be an uncertain number of annual payments. The distinction is a fine one and seems to depend on whether the agreement between the parties involves an obligation to pay a fixed gross sum—*Chadwick v Pearl Life Assurance Co.*, (1905) 2 K B 507.

The above dictum must not be read with an emphasis on the words "fixed gross sum". A lump sum from sale would not cease to be of a capital nature merely because the actual amount to be received depended on certain subsequent considerations. Where a creditor in bankruptcy proceedings entered into a compromise under which he received certain amounts outright and certain further instalments so long as the debtor was alive, it was held that the last mentioned instalments were capital receipts. The case was one of compromising a capital debt and not one of converting capital into annuities: the intention clearly was to receive something less than what was due even if the debtor had lived longer than he did, *Dott v Brown*, (1936) 1 All E R 543, 15 A T C 147 (CA).

A company which held the whole of the issued capital of another, making bicycles and tricycles, sold the shares to a third company the purchase price being made up of a number of items, most of them related assets in the balance sheet, but one of them was a periodical payment at so much per machine sold. The purchaser held the option between certain specified dates to commute these periodical payments into a lump sum. The question arose as to the true nature of these periodical receipts, and it was held that they were of an income nature, being payments, not related to an antecedent debt and capable of being in perpetuity while the right of commutation was unilateral. *Inland Revenue v 36-49 Holdings, Ltd*, 1943 (CA).

Patents—Sale of—Receipt from—*A*, a non resident alien, gave to *B*, an English Company the right to sell and manufacture certain articles by a secret process in return for a payment of a percentage on the gross receipts from sales. Before paying the amount to *A*, *B* deducted the income-tax due thereon. *Held*, that *B* was entitled to do so, the payment being the income of *A*.

Per Phillimore, J—This case is not like *Scoble's case*, (1903) 1 K.B. 494, (1903) A C 299, 4 Tax Cases 618 or the case of *Foley v Fletcher*, (1858) 28 L J Ex 100, 3 H & N 769, because there is no first ascertaining of a lump sum and it is an arrangement under which no lump sum is apportioned to the annual payment, and I cannot help noticing—whether the argument carries force with me or not it certainly did seem to carry force with the House of Lords—that the process by which the annuity was ascertained in that case was a process which involved in the first instance the finding of a lump sum. To my mind it can make no difference but it obviously made a difference

with the House of Lords in the case of *Scoble v Secretary of State for India* and if it does make a difference in the opinion of the highest tribunal I must pay attention to it. I find here there is no such fact. Therefore upon the whole I think this is an annuity.—*Delage v Nugget Polish Co*, (1905) 92 L.T. 682

The British Dye Stuffs Corporation gave an American Company the right to exploit its patents and secret processes in certain territories. In return the Corporation received £25 000 a year for 10 years. *Held*, that the annual payments were income and not the repayment in instalments of the purchase price of a capital asset.

Per *Rowlatt, J*—‘It is one of those cases that just depends really on how you look at it. It is really using this property if you like and taking an annual return for it roughly corresponds probably to its average life and not a sale once and for all of a capital asset.’

Per *Banks, L.J*—‘I do not myself think that the method of payment adopted in carrying through a transaction is very much a guide of the true nature of the transaction. I read this agreement taking it as a whole as a trading convention. The amount which is payable by the one company to the other is not in truth and in fact the purchase price of part of the property of the English Company but it is only a method of arriving at the value of the processes and patents.’ per *Warrington L.J* the whole transaction is a trading convention regulating the mode in which they should respectively carry on their trade and the mode in which they should co-operate with each other in so doing. It is a fixed sum paid as a payment for the profits to be derived by them from the working of the convention. *British Dye Stuffs Corporation v Commissioners of Inland Revenue*, 3 A.T.C. 532 12 Tax Cases 586 129 L.T. 538

A company sold the patent rights it had to two Companies in Japan and America respectively in consideration of a lump sum payable by 10 equal instalments plus a royalty in the former case and in consideration of a certain share in the American Company in the latter case. *Held* by the Court of Appeal (reversing the decision of *Rowlatt J*) that it was a question of fact—to be decided by the Commissioners—whether the company was trading in patents or merely realised its capital rights in its patents and that even on merits the findings of the Commissioners were right, viz., that the money received in addition to the royalty was capital. *Collins v Firth Brearley Stainless Steel Syndicate*, 9 Tax Cases 520

An assessee was the joint inventor and jointly entitled to letters patent in respect of certain appliances which were manufactured and sold under a licence from the assessee and his co-inventor, by a company of which they were the sole directors and shareholders. In conjunction with the company they agreed to sell to another company *inter alia* (a) the said inventions letters patent and all rights appertaining thereto and (b) the goodwill of the company in consideration of a sum of £750 payable as to £300 by three instalments of £100 each and as to the balance of £450 by a royalty. There was no liability to super tax in respect of this payment of £750 which was a capital receipt. The purchasers also agreed to pay by way of additional consideration a ‘further royalty’ of 10 per cent. upon the invoice price of all machines constructed under the said

inventions and sold during a period of ten years. *Held*, that the "further royalty" did not constitute part of a capital sum but represented a share of the profits of the purchasing company and formed part of the income of the assessee and that, as such, it had been correctly included in the assessment to super tax made upon him.

Per Rowlatt, J—I do not think there is any law of nature, or any invariable principle, that because you can say a certain payment is considered for the transfer of property, therefore, it must be looked upon as the price in the character of principal. It seems to me that you must look at every case and see what the sum is. A man may sell his property for a sum which is to be paid in instalments, and when you see that that is the case, that is not income or any part of it—that was the case of *Foley v Fletcher*, 7 WR 141, 3 H & N 769. A man may sell his property for what is an annuity, that is to say, he causes the principal to disappear and an annuity to take its place. If you can see that that is what it is, then the Income tax Act taxes it. Or a man may sell his property for what looks like an annuity, you can see quite well from the transaction that it is not really a transmutation of a principal sum into an annuity, but that it is really a principal sum the payment of which is being spread over a time, and is being paid with interest and it is all being calculated in a way familiar to accountants and actuaries, although taking the form only of an annuity. That was *Scoble's case*, 4 Tax Cases 618 when you break up the sum and decide what it really was. On the other hand, a man may sell his property nakedly for a share of the profits of a business, and if he does that I think the share of the profits of the business would be undoubtedly the price paid for his property, but still that would be the share of the profits of the business and would bear the character of income in his hands, because that is the nature of it. It was a case like that which came before Mr Justice Walton in *Chadwick v Pearl Life Insurance Company*, (1905) 2 KB 507. It was not the profits of a business, but a man was clearly bargaining to have an income secured to him, and not a capital sum at all, namely, the income which corresponded with the rent which he had before.

I therefore think that what one has to do is to look and see what the sum payable really is. The ascertaining of an antecedent debt is not the only thing that governs it. It does not govern it by magic, but it is a very valuable guide in a great many cases, undoubtedly. Here, the property was sold for a certain sum and in addition the vendor took an annual sum which was dependent in effect, on the volume of business done—that is to say, he took something which rose or fell with the chances of the business. I think, when a man does that, he does take an income—*William John Jones v Commissioners of Inland Revenue*, 7 Tax Cases 310 (1920) 1 KB 711.

By an agreement between an inventor and a company formed to develop his patents the inventor was guaranteed a minimum royalty for a specified period. *Held*, that the guaranteed payments were not capital receipts but income to the inventor, *Wild v Tomdes* 9 Tax Cases 392.

An assessee was a joint inventor of synchronising gears which were patented both in the United Kingdom and in the USA. The inventions were used by the Governments of both countries during the war, and ultimately the inventors were given £70,000 by the British Government and £15,000 by the United States Government for the use of the patent.

The assessee claimed that the payments were capital and not liable to tax. *Held*, by the House of Lords that in view of the fact that the corpus of the patent had not been given up by the inventor and that the Royal Commission for Awards had fixed the compensation at the probable reasonable royalty for four years, as between a willing licensor and a willing licensee the payments represented royalty for four years and were therefore taxable as income, *Constantinesco v The King*, 11 Tax Cases 730 43 TLR 727

In a similar case, *Mills v Jones* 14 Tax Cases 769 the award was for a lump sum 'in respect of all user, past, present and future by or for the purposes of His Majesty's Government (including user by way of selling for use, licensing or otherwise dealing) and an attempt was made to distinguish it from the *Constantinesco* case on the ground that it included an award for the future also and that, as the latter was of a capital nature and could not be separated, no part of the lump sum could be taxed. The House of Lords negatived this contention since the Commissioners had found that the payment in respect of the future was negligible. Presumably if the figures could have been separated, a part would have been income and a part capital.

In *Ducker v Rees Roturbo Development Syndicate* 7 ATC 42, (1928) AC 132 the House of Lords followed the *California Copper Syndicate* (5 Tax Cases 159) and *Melbourne Trust cases* (1914) AC 1001 and reaffirmed the principle that 'a gain made in an operation of business in carrying out a scheme of profit making' was taxable. The point in issue was whether in this particular case there was a solitary or accidental disposal of a capital asset or whether the company sold its patents as a regular and systematic business. The question was one of fact and there was no misdirection on the part of the Commissioners. Though the line in dispute was one which the company did not intend to develop extensively there was evidence to show that it intended to sell and make profits on the patents. The House of Lords therefore declined to interfere.

An assessee possessed patents for certain machines and processes. In selling these machines he sold to the purchasers also the right to use the processes not only within the buyer's mills, but if necessary beyond. He also agreed not to instal his machines—with one exception—in the neighbourhood of his purchaser's mills. He claimed that his receipts from the processes (as distinct from the machines) were the sale proceeds of selling an exclusive right to the patents and therefore capital receipts. The Special Commissioners held that the profits arose from the sale of the machines and that the patent rights were given in order to make the machines more saleable. Rowlett, J., found that there was enough evidence before the Special Commissioners to arrive at the finding, *Brandwood v Banker*, 14 Tax Cases 44 7 ATC 208.

A person who divulges his secret knowledge or process in return for some compensation is parting with a capital asset, viz., the secrecy and such compensation is of a capital nature even though the person might continue to exploit the knowledge himself, since he has lost the advantage of secrecy. It is immaterial for this purpose whether the process could have been patented or not. *Handley Page v Butterworth*, 12 ATC 541 19 Tax Cases 328 HL.

A company acquired the exclusive right of translation and publication in English of a French book by an author in French, to whom the com-

pany agreed to pay a lump sum for a certain number of copies of the best edition sold, and thereafter a percentage on sales of that edition and of cheaper editions. The book was a failure, and nothing beyond the lump sum was paid. It was held that the lump sum was not a capital receipt but of the nature of a royalty since the company did not get a complete assignment of the copyright but only a limited licence to translate and publish in English, *Commissioners of Inland Revenue v Longmans Green & Co, Ltd*, 17 Tax Cases 272.

Even though you need not completely part with a patent, if you take a lump sum for its use (a lump sum fixed in advance) the mere fact that a part of the lump sum is permitted to be paid in instalments will not make them income, *De Soutter Bros, Ltd v Hanger & Co, Ltd*, and artificial *Limb Makers, Ltd*, 15 A.T.C. 49 (1936) 1 All E.R. 535.

A licence to exploit a patent, even if an exclusive licence, is not the same as a sale especially if the licensor is bound to prevent others (including himself) from exploiting the licensed territory, and if such a licence is given for a period of years in return partly for a lump sum (or sums) to be paid in advance and partly for annual payments (not being instalments of a previously fixed lump sum), the lump sums may be capital while the annual payments are income. Whether a payment is of the nature of royalty (income) or not must be examined with reference to the facts of each case and the fact that both the parties call it royalty, while not conclusive, cannot be ignored. *Commissioners of Inland Revenue v British Salomon Aero Engines*, 17 A.T.C. 187 (C.A.).

In *Margerson v Tyresoles, Ltd*, 1943 K.B.D., a company in possession of a patented process set up and operated plants (which remained its property) in the premises of distributors who paid a rent for the plant and in addition a certain other sum. The company bound itself not to set up or permit the setting up of similar plant, and not to canvas orders within a defined area for each distributor for a fixed period but determinable in certain events. It was held that the additional sums received were of a capital nature, arising out of the company's parting with its freedom of action within the defined area.

If the agreements refer both to payments for the user of a patent and to other payments it is open to the Crown to go behind the agreements and to ascertain what in fact the payments do represent, *Paterson Engineering Co v Duff*, 1943 K.B.D.

The trustees of the late Earl Haig arranged with an author to publish a book based on Lord Haig's diaries the profits being equally divided between both. The author received from the publishers a 25 per cent royalty subject to a minimum of £10,000 paid in advance, and a further £10,000 in four instalments from another source in return for 'serial' rights. He was assessed on his own share in these sums and the question arose whether the share of the trustees in them was taxable. The answer was given in the negative, because the receipts were really for the partial realisation of the asset, the greater part of the publicity value of the diaries being exhausted by the transaction which had no resemblance to the user of a property on terms requiring its return substantially with undiminished value. *Earl Haig's Executors v Inland Revenue*, 18 A.T.C. 226 (C.S.).

Where a sum of £150 was given by a publisher to an author to revise a book written by him he having written no other book, it was held that the item was a capital receipt. *Beare v Carter*, (K.B.D.) 1940 I.T.R. 127.

On the other hand when an authoress who owned the copyright of her novels cancelled the ordinary licence given to a publisher to publish three of her novels and gave him the sole right to publish them during the whole of her period of copyright and received the consideration in instalments it was held that her receipts—whether royalties or payments for copyright—were all profits from her profession as an authoress. It was argued unsuccessfully on her behalf that this was the only occasion on which she had sold the copyright outright and that it was not usual for authors to make such outright sales. *Glasson v Rougier* 1944 K.B.D

When the vocation is that of a dramatist or playwright it is an ordinary incident of the disposition of plays either to realise them by means of royalties or by outright sale either way it is merely the realisation of what may be regarded as the circulating capital of the dramatist his brain being the fixed capital and his circulating capital the plays which no doubt may be regarded for certain purposes as property but at the same time may be realised in the course of the business which he carries on. *Billam v Griffith* 1941 K.B.D

Receipts for performance of services are always of a revenue nature it is only in the case of sale of property that the question can arise whether the gain is capital or revenue. Where therefore an individual not a professional author sold the serial rights in his life story to a newspaper it was held that what he received was not the price of the copyright but remuneration for writing the serial articles and therefore income. *Hobbs v Hussey* 1943 I.T.R. (Sup) 48

Where certain race horse owners jointly bought a stallion for the free service of which they had proportionate rights but sold their rights to outsider it was held that the sale proceeds were income being the realisation of the reproductive faculties of the stallion and not representing any capital accretion of property. The fact that there was no trade was immaterial. So long as the item is of a revenue nature it is taxable if from trade under case I of Schedule D (corresponding to section 10 in India) otherwise under Case V (corresponding to section 12 in India). *Leader v Counsel* 1943 I.T.R. 43 (Sup)

Some of the English authorities were reviewed by the Lahore High Court in *Anantram Khem Chand v Commissioner of Income tax Punjab* 1937 I.T.R. 511 I.L.R. (1938) Lah 210 A.I.R. 1937 Lah 880 who laid down the test that if there is an out and out sale of a patent by the patentee for a definite price even though the price is payable only in instalments then the instalments are not income. On the other hand if what is granted is a working licence in return for an annual payment then the receipt is taxable as income.

Land—Price of—Under an agreement between a local authority and a company the authority purchased the site and erected the buildings required for generating electricity and the company fitted up plant for the undertaking. The company received the profits from electricity and paid the authority every half year the amount paid in the previous half year by the authority in repayment of the debt incurred by the authority in acquiring the land and erecting the buildings. Held that the half yearly payments made by the company were not capital in the hands of the authority. *Surbition Urban District Council v Callender Cable and Construction Co* (1910) 74 J.P. 88

Where a local authority took over the liability, in perpetuity to repair and maintain certain streets which were maintainable by certain trustees, and as consideration for the arrangement, the trustees paid twenty annual instalments of a certain sum each it was held that the payments were not income of the local authority but capital receipts, *Goole Corporation v Acre and Calder Navigation Authorities*, 1942 K B D

Advances—'One-man' Companies—An assessee was the sole director and was in complete control of a limited company, of which the whole of the share capital, consisting of 2,500 £10 shares had been allotted to him in 1911 as part of the consideration for the sale to the company of his business. Of these shares 2,499 had been continuously held by him until September, 1917, when the company was voluntarily wound up. The one remaining share had been given to a former employee, from whom it was purchased in May, 1917 by the assessee's daughter. The company had made considerable profits during the years 1911 to 1917 but had declared no dividends the profits made up to 1916 having been accumulated and used for the purposes of the business. In the year 1916-17 the company, under the authority of its Memorandum of Association, had advanced to the assessee without interest and without security various sums, amounting in the aggregate to £6 531 which in the company's balance sheets were described as "Loans or Advances", and these moneys were utilised by him to purchase War Stock in his own name. In winding up the company's affairs in 1917 the Liquidator had not required the assessee to repay to the company the sums in question, but had taken them into account in determining the share of the assets to which the assessee was entitled. An assessment had been made upon the assessee upon the basis that the payments, amounting to £6 531, made to him by the company in the year 1916-17 were in fact not 'Loans or Advances' but constituted income received by him. Upon appeal the Special Commissioners had found as facts (*inter alia*)—that the company was a properly constituted legal entity, that it had power to make and did make, loans to the assessee, and that such loans did not form part of the assessee's income, and they accordingly discharged the assessment. On appeal to the High Court Mr Justice Rowlatt ordered the case to be remitted to the Special Commissioners on the ground that they had not found as a fact whether the business had been carried on by the company or whether it had really been carried on by the assessee to the exclusion of the company. The assessee appealed against Mr Justice Rowlatt's order remitting the case to the Special Commissioners. Judgment was delivered by the Court of Appeal against the Crown on the ground that by their findings of fact in the case stated the Special Commissioners had by implication found as a fact that the business was carried on by the company and not by the assessee. *Commissioners of Inland Revenue v Sansom*, 8 Tax Cases 20, (1921) 2 K.B. 492

An assessee was the controlling shareholder of five private limited companies. From time to time he withdrew sums of money from each company, which were shown as 'loans' in the accounts of the companies. The loans were not secured by any document, there was no provision for the repayment of interest and the companies did not pay any dividends. One of the companies was liquidated voluntarily through the assessee as liquidator who did not settle the accounts with the shareholders but simply took over the business in the style of a firm and did not repay the loans taken by him. The Special Commissioners held that the loans in question were not genuine loans and should be assessed as income of the assessee.

Held that there was evidence before the Commissioners to support their finding of fact, *Jacobs v Commissioners of Inland Revenue* 10 Tax Cases 1

In a private company an assessee and his brother held all the ordinary shares and by virtue of the article the company was entirely under their control. For some years the company had paid no dividend on the ordinary shares though it had made large profits. On the other hand it had made large loans to the two brothers. Under the article the company could lend money and it was conceded by the Crown that the loan were *bona fide* loans. On 31st December 1919 the brothers owed the company about £283,000 and the company had large accumulated profits. The brothers wanted to write off the loans but were advised by Counsel that a reconstruction was necessary for the purpose. Nevertheless on the advice of their auditor the company wrote up the values of their assets by £226,000 and transferred this amount to a newly opened General Reserve to which they also transferred £57,000 from the undivided profits. To the other side of this reserve they transferred the loans so that the reserve automatically vanished. The Special Commissioners held that in effect the profit had been distributed as far as they could go (i.e. £117,000) to meet the sum of £283,000. *Held* reversing the decision of the Special Commissioners that the write off of the loans did not effect a distribution of the profits.

Per Rowlatt J—Of course if a General Reserve Fund had been created in effect and allowed to live beyond its birth it would have appeared in the next balance sheet simply as a liability against the whole body of assets and if that had been divided say as a bonus dividend and if a bonus dividend had been divided to that amount that bonus dividend undoubtedly would have been good so far as the undivided profits existed to satisfy it. It would not have gone against the general reserve in particular it would merely have been taken out of the assets of the company and it would have been good so far as there was profits to meet it. But it seems to me perfectly clear that these people had no intention whatever of dividing their undivided profits up to the hilt.

What they purported to do in perfectly clear terms was this. We are going to create a fund to give to these people to treat as belonging to these people in order to cancel their loans against us. We are going to create a particular fund. We are going to do it by writing up the assets to the tune of £226,000. We are going to put into it profits to the tune of £57,000. I cannot conceive how it can be said that the action of dividing whatever profits there might be beyond the £57,000 can be attributed to them.

Now supposing that the loan had been exactly of the same amount as the amount that was obtained by the inflation in the valuing up of the assets and they had said. We will carry to General Reserve Account the amount by which we inflated the assets. We will leave the exact amounts of the loans and we will carry to the Reserve Account the amounts of the loans too and so cancel them. Could it then have been said. Well although they have said nothing whatever about profits and are simply seeking to cancel the loan against the inflation of their fixed assets they are to be taken *volentes nolentes* as having distributed the undivided profits though they never hinted that they wanted to disturb the profits of the company in the smallest degree? I do not think it would have been said. On the other hand

supposing that the loans had amounted to just the same amount as the amount which they were taking from the profits, and they had not inflated the assets at all—that would have been the strongest possible case for the Crown. They have mixed the two together.

Now am I to hold that the Commissioners were entitled to dissect this combined fund so to speak and attribute £57,000—because I do not see that they could do more—to the cancellation of the loan?

There is another fact which in my judgment just turns the scale. They sought to cancel these loans altogether. I am conceiving the possibility that they cancelled them to the tune of £57,000 by the division of profits. But the loans were not owing to the two brothers equally. The £57,000 has got to be apportioned between them somehow—either it has got to be said that the loans were written off equally in point of amount but not equally in proportion or I have got to say that there has got to be a distribution of profits not on the footing of equality between the shares because the brothers had the same shares but giving a greater dividend to one brother in order that he might have a proper proportion of his loan written off. Whichever you do you have to mould the transaction into a shape that the people never intended it should bear. *Non constat* that they would have written off any of the loan if they could not write it all off, *non constat* that they would have written it off unequally as regards proportion, *non constat* that they would have written off equally as regards proportions and therefore unequally as regards amount. It seems to me that in the result I cannot hold that it is open to the Commissioners to say that they can treat this transaction as necessarily having the effect of a distribution of profits. I can quite understand that when a series of acts are done and are called by a wrong name you can apply the right name to them and the Court is not to be constrained by language but it does seem to me here that what is sought to be done and has been done has gone beyond that and the Commissioners have taken it upon themselves to say that one set of facts shall be another set of facts—*Hall v Commissioners of Inland Revenue* 11 Tax Cases 21 135 L.T. 759.

The Court of Appeal following *Miles v New Zealand Alford Estate Co* 32 Ch D 283 affirmed Rowlatt J's judgment. The point stressed by that Court was that the debts due by the shareholders had not been validly cancelled &c the Directors still owed the loans to the company since there was no consideration in return for which the loans could have been cancelled.

A floated company X which substantially owned another company Y. A received a loan from Y and agreed to repay it in instalments. The shares of the companies were of little nominal value but were floated at high premia. In effect A merely got back from Y what he paid to Y as share value. A successfully avoided surtax on the ground that he was paying Y the instalments under a deed of covenant (cf *Commissioner of Inland Revenue v Duke of Westminster* (1936) A.C. 1 19 Tax Cases 490 51 T.L.R. 467 H.L.). There was no finding in the case that the two companies were dummies and were really doing the business of A, *Commissioners of Inland Revenue v Morgan Grenville & Co* 20 Tax Cases 529 (1936) 1 A.L.R. 895.

Sir D. M. Petit formed four private limited companies each with a capital of between 30 to 40 lakhs and owned all the shares excepting three

held by his subordinate employees Sir D M Petit paid for the shares allotted to him by agreeing to make over to each company a block of shares and securities of other concerns which he held but as a matter of fact he did not so make over the shares each company, at the time of its formation appointing him or his nominee as trustee for itself to hold the shares on its behalf and allowing him to keep the shares without formal transfer to the company until the company should call upon him to do so The share were in Sir D M Petit's name When he received dividends and interest book entries were made in each company crediting them with dividends and interest on securities giving Sir D M Petit loan at 6 per cent without security or voucher Neither capital nor loan nor interest was ever repaid. The memorandum of each company contained 38 objects but the companies did nothing beyond receiving dividends and giving loans to the assessee. This continued for six years during which period no dividend was declared by these four companies Held that the Income-tax Officer could enquire into the genuineness of such companies though he should not start with the presumption on that they are simulacra or shams and that in this case there was evidence to justify the finding that the loans were not genuine Held also that a formal transfer of shares is not in itself conclusive proof of the ownership of share In re Sir D M Petit 21 TC 255 51 Bom 372

As regards one man companies see also section 23 A and notes thereunder

Insurance of lives of employees—In a trading company both goods and services fall in the same class Expenditure on both is revenue expenditure and income from both is revenue Receipts from insurance of goods are on the same footing as sale proceeds of goods and similarly receipts from insurance policies on the lives of employees for the benefit of the company are receipts on revenue account The question is not whether a receipt arises periodically or once for all but what is its nature Just as it will make no difference whether a temporary disability payment is paid week by week or in a lump sum it makes no difference whether the lump sum payment is made at death or periodically from the date of death to the date up to which the employee's service was estimated to continue The point is that the receipt compensates for the loss of income represented by the employee's services *Murphy v Gray & Co* 23 Tax Cases 225 1940 ITR (Sup) 1 (K.B.) If money so received by a company in respect of the death of a director is distributed to shareholders the latter are taxable since there is a distribution of revenue profit *Inland Revenue v Williams' Executors* 1943 ITR (Sup) (H.L.)

A sum received in payment of a life or other insurance policy unrelated to any business is however ordinarily of the nature of capital See *Shaw Wallace & Co's Case* 59 IH 206 and *Fletcher's Case* 1937 ITR 428 (P.C.) Accordingly section 4 (3) (v) which in terms stated that a capital sum received in payment of any insurance policy was exempt was deleted in 1939 as being superfluous See also notes under section 4 (3) (v)

Release from debt—A release from a past debt assuming the transactions to be *bona fide* is not necessarily a trading receipt of the year in which the debt is cancelled If the debt was for example forgiven solely in order to save the debtor from foundering the forgiven debt need not be added to the debtor's trading receipts of the year in which the debt is forgiven, *British Mexican Petroleum Co v Commissioners of Inland Revenue* 16 Tax Cases 570 (H.L.) Ordinarily however a cancelled debt would automatically swell

the profits. See also notes under section 13 about 're opening of old accounts'. Where an assessee received from his auditor certain payments representing embezzlements by assessee's employees in earlier years not detected by the auditor then it was held that the payments were trading receipts following *Green v Glkston & Son* 14 Tax Cases 364 (H.L.) (1929) A.C. 381 referred to under section 10 (2) (iv). There is nothing in the *British Mexican Petroleum Case* to prevent the taxation of such sums as income in fact they are trading receipts *Gray v Lord Penrhyn* 16 A.T.C. 221 (1937) 3 All E.R. 468.

Sinking fund—The Nizam's Government guaranteed a company which constructed a railway in Hyderabad an annuity for 20 years of 5 per cent on the issued share and debenture capital to be applied in paying interest on such capital and in forming a sinking fund for the redemption of the debentures subject to provisions for repayment of the sums paid with interest out of profits earned. Held that the whole annuity including the sums applied to sinking funds was chargeable with duty *Blake v Imperial Brazilian Railway* 2 Tax Cases 58 1 T.L.R. 68 followed *Nizam's Guaranteed State Railway Co v Wyatt* 2 Tax Cases 384 24 Q.B.D. 548.

Interest on securities—Sales cum interest—Under a contract of sale dated 29th November certain securities of a company the interest on which was payable half yearly on 31st May and 30th November under deduction of income tax were sold together with the accrued interest. The actual transfer was made on 14th December. The books of the company were closed from 16th to 30th November and the interest was paid by the company to the vendor who made it over to the purchaser under the Rules of the Stock Exchange. Held that the interest was the income of the purchaser and not of the vendor *Commissioners of Inland Revenue v Sir John Oakley* 9 Tax Cases 582. In the hands of the latter it would have been a capital receipt. This latter point arose in the following case in which stock was sold cum interest and it was held that the interest was included in the price.

Per Roulat J—The truth of the matter is that the seller does not receive interest and interest is the subject matter of taxation. He receives the price of the expectancy of interest and that is not the subject of taxation. You cannot put the case without relying on the theory that the interest accrues *de die diem*. If that could be said it would be at any rate correct in point of figures and economics but that cannot be said. The point of course is that there is no guarantee that when the due time comes the purchaser will get the interest. So many contingencies might intervene *Wigmore v Thomas Sumner & Sons* 9 Tax Cases 577 41 T.L.R. 379.

It follows from this that what the vendor gets is part of capital unless his circumstances are such that he is held to trade in such securities or shares. This view was endorsed (*obiter*) by the Patna High Court in *Rajni Prasad Singh v Commissioner of Income tax* 11 L.R. 9 Pat 194 4 I.T.C. 264.

Where a security is sold cum interest after the due date for payment of interest the purchaser drawing the interest and not the vendor cannot claim for the purpose of assessment that the interest should be treated as his income and that he should be given a refund of tax. On the other hand if he is a dealer in securities the profits from the purchase and sale of securities will be taxable in his hands *Rm Ar Ar Rm Arunachalla Chettiar Brothers v Commissioner of Income tax Madras* 3 I.T.C. 38 A.I.R. 1929 Mad 769.

The mere quotation in the bargain of estimated accrued interest does not establish a separate contract in respect of interest and even if such a separate contract were established it would remain part and parcel of the purchase consideration *Hazeli Shah Sardari Lal v Commissioner of Income tax Punjab* (1936) ITR 297 AIR 1937 Lah 435

Where certain executors of the estate of a deceased person transferred certain bonds together with accrued interest to the Inland Revenue in payment of estate duty it was held that no part of the interest was taxable as income of the estate *Monks v Fox & Executors* 13 Tax Cases 171 (1928) 1 KB 351

Sales 'cum' dividend—On the 25th November 1919 an assessee purchased certain shares in a company for a sum exceeding their par value by £50 the excess being expressed in the contract to be paid to cover the portion of the dividend accrued to date. On the 13th May 1920 a dividend of 10 per cent free of income tax was declared and paid by the company for the year ending the 28th February 1920. The assessee contended that of the dividend so receivable on his shares £50 plus income tax (i.e. £71 in all) should be treated as capital in view of the terms of the contract of purchase. Held that the transaction was in substance an ordinary one of purchase of shares and that the sum of £71 in question could not be excluded from the assessee's taxable income *Commissioners of Inland Revenue v Forrest* 8 Tax Cases 704 (1924) 555 Ca 450

That dividends and interest are normally the income of the owner of the shares or securities on the dates on which the dividend or interest falls due was reaffirmed in a case in which the executors of a deceased person were not permitted to apportion dividends and interest due and received after the death of the deceased as partly relating to the period before death *Commissioners of Inland Revenue v Henderson's Executors* 16 Tax Cases 282 1931 SC 681

An assessee arranged with a financial corporation for the sale at a price of £3 per share of the whole of his shareholding comprising 79,920 out of the total issued ordinary share capital of 80,521 shares in a company of which he was the Managing Director. One of the conditions of the proposed purchase was that prior to the transfer of the share the assessee through his controlling interest in the company should make the company declare out of the balance of its undivided profits a bonus or special dividend of 10s per share on its ordinary shares the proceeds of which should be held by the assessee as part of the agreed purchase price. The company duly declared such bonus or special dividend free of income tax and free also of super tax up to a sum not exceeding £6,000 should a claim upon any shareholder for the future tax arise by reason of the receipt of the bonus. The assessee received from the company two months later a payment of £39,960 in respect of the bonus or special dividend on his shares. The terms of the agreement for sale were first included in a written document a month after he received the special dividend. In that document the purchase price was stated to be £2 10 per share but it was also stated that the assessee was entitled to, and had previously received the bonus or special dividend of 10s per share which had already been declared. Upon appeal by the assessee the Special Commissioners held that the sum £39,960 and the income tax applicable thereto constituted part of the purchase price of the shares and did not form part of the

assessee's total income upon which he was liable to super-tax. *Held*, that the evidence before the Special Commissioners did not justify the conclusion of fact that an enforceable agreement for sale had existed between the parties prior to the written agreement and that the bonus or special dividend therefore formed part of the assessee's income and had not been received by him on behalf of the purchaser, *Commissioners of Inland Revenue v Frank Bernard Sanderson*, 8 Tax Cases 38. The sum of £6,000 above referred to was paid by the company on account of the super tax payable by Sir F. B. Sanderson and the question was raised whether the amount was his 'income'. *Held*, that it was part of the purchase price of the shares sold by him and not received by him in his capacity as shareholder and therefore not chargeable to any tax.

Per *Roulatt, J*—'One cannot look at it as a dividend, it is not one. It is not a percentage on the shares. It is with reference to an unascertained sum. (As to 'unascertained'—'you cannot declare a thing free of super tax which would only come on next year, if it will please Parliament and to an amount in the pound which will please Parliament') He was not entitled as against the company at any time to have his £6,000. It simply was a statement that the company would do what was anticipated. This money came to him under and because of the execution of and not before the agreement.' *Commissioners of Inland Revenue v Sanderson*, 8 Tax Cases 38.

See, however, sections 44-E and 44-F of the Indian Act which apply to certain types of sales and purchases of stocks and shares, following similar provisions in the United Kingdom Law consequent on the above rulings.

Accumulated dividends—Mr. Bason was a substantial shareholder in a group of three private companies, which pooled their profits. A resolution was passed by the Directors of one of the companies that, after a dividend of 10 per cent. had been paid, 1/3rd of the balance of profits should be given as a bonus to the working Directors. Mr. Bason objected to the resolution and brought a suit. The money intended to be paid to the Directors was kept in suspense, and, finally, as a compromise, the company, with the consent of the Directors, paid Mr. Bason one lakh of rupees as his share of bonus. It was held that this was merely an accumulated dividend paid out of accumulated profits and taxable in the year of actual receipt, *Bason v Commissioner of Income-tax*, 55 Cal 987, 2 ITC 523.

Where the sale and transfer of certain shares in a company were set aside by a Court on a suit by the vendor after some years, on the ground that the purchaser had made fraudulent representation the Court ordered that in addition to the retransfer of the shares to the vendor, the purchaser should pay a lump sum representing the loss of the vendor on the transaction including dividends in the interval. It was held that the effect of the Court's order was to revert the property in the vendor as from the date of sale and that therefore the vendor was taxable on the dividends during the interval which were refunded to him by the purchaser, *Spence v Inland Revenue*, 24 Tax Cases 311 (CS).

Isolated transaction—Profit from—A company carried on business as Coal Merchants, Ship and Insurance Brokers, and as sole selling agents for various Colliery Companies. In the latter capacity it was part of the company's duty to purchase waggons on behalf of its clients. The company

made a purchase of waggons on its own account as a speculation and subsequently disposed of them at a profit. It was contended that this transaction being an isolated one the profit was in the nature of a capital profit on the sale of an investment. *Held*, that the profit realised on this transaction was made in the operation of the company's business and was properly included in the computation of the company's profits.

Per Sankey J—To begin with, the waggons were not bought as plant and machinery for the purpose of the appellant company's trade.

They were—I do not like to use for a moment in this connection the word capital—no part of the capital bought for the purpose of the appellant company's trade and I do not think that the purchase price of the waggons when sold ever formed part of the capital of the business. It is expressly found that they had nothing to do with the purchase and sale of the waggons. Then it is admitted that these waggons were purchased for the purpose of resale.

I do not think that it is possible to say that the mere fact that it was an isolated transaction at once takes it out of the category of chargeable property. I think in most cases an isolated transaction does not fall to be chargeable but I think you have to consider the transaction and you cannot bring it down as a matter of law without regard to the circumstances.

Although it is perfectly true that the transaction began with one purchase and ended with one sale that I think is only a coincidence. *T. Beynon & Co Ltd v Ogg* 7 Tax Cases 125.

See also section 4 (3) (*iii*) and the notes thereunder. Under that section income is exempt if it is casual and non-recurring and also not arising from a business, profession or vocation.

Hired out goods—Sale of—Surplus from—A company manufacturing waggons also used to hire out some of the waggons. Later on it sold the waggons used for hire and the question arose whether the profit from the sale of waggons were profits or capital. The profits were calculated on the basis of excess of sale proceeds over book price (the latter including manufacturing profit already credited to the manufacturing department and taxed but allowing for depreciation). The company claimed that hiring waggons was a separate business from selling waggons and that profits from selling outright the former class of waggons were an accretion of capital. *Held* by the House of Lords that the surplus was trading profits as there was only one business the waggons were not of the nature of plant but more of the nature of trading stock even though they were hired out for some time before being sold. *Gloucester Railway Carriage and Wagon Co v Commissioners of Inland Revenue*, 12 Tax Cases 720 (1925) A.C. 469. If the company had brought all its waggons and only hired them to users and only incidentally sold some of the waggons the decision would have been different.

Interest included in or of the nature of damages—In *In re National Bank of Wales* (1899) 2 Ch. 629 it was held that when a former director repaid the liquidator with interest the amount of dividends wrongly paid out of capital the interest was not taxable as it was of the nature of damages. Interest which is taken into account in settling the amount of damages is not interest but part of damages i.e. it is a capital receipt and therefore not chargeable to tax. *Commissioners of Inland Revenue v Ballantine* 3 A.T.C. 716 8 Tax Cases 595. Whether damages as such are income or capital is a different matter *see* rulings referred to later and particularly those relating to cancelled contracts.

A sued *B* for an account of sums due to *A* as *cestui que trust* and obtained an order directing accounts to be taken of monies due to him or due to be invested on his behalf from time to time with compound interest at $4\frac{1}{2}$ per cent per annum with yearly rests. The accountants of *A* and *B* were unable to agree and finally a compromise was arrived at. The question arose whether the lump sum awarded to *A* included any interest and it was held that it did, since the suit was for accounts *i.e.*, certain sums together with interest, *Commissioners of Inland Revenue v Capt Woolf Barnato*, 20 Tax Cases 455, (1936) 2 All E.R. 1176 (A.C.). Where there is a breach of trust and the person breaking it pays expressly both the principal *lo t* and the interest thereon it cannot be said that the entire payment is of the nature of capital damages assessed partly with reference to the interest that might have been earned *Sir Thomas Barlow v Commissioners of Inland Revenue*, 16 A.T.C. 266 (K.B.).

Pending an appeal to the Privy Council, the High Court stayed the execution of the decree in a suit for a partition of a Hindu undivided family on the condition that the party asking for the stay gave security and also paid interest at 6 per cent on the above security which was paid to the other party. The Privy Council dismissed the appeal and the interest periodically paid had not to be repaid. The question arose whether it was income in the hands of the recipient. *Held*, that it was income. In lieu of the enjoyment of his property from which he would have derived income he received 6 per cent on the security amount. The income was also not of a casual or non-recurring nature. *Commissioner of Income tax v Jagmohan Das Rastogi*, 3 I.T.C. 274, A.I.R. 1929 Oudh 125.

Interest paid under section 28 of the Land Acquisition Act (received by a person not trading in land) has been held to be of the nature of capital and not of that of income because (a) the payment is discretionary (on the part of the Court) (b) it relates to a period when the recipient has neither title nor possession of the source *viz.*, the land (there is no 'tree' therefore no 'fruit') (c) it is not the potential profits of the recipient if he had retained the land, and (d) on the contrary it is a measure of damages for the period between the loss of possession of property and the receipt of consideration, *Beharilal Bhargava v Commissioner of Income tax, U.P.*, 1941 I.T.R. 9 (All.).

On the death of the holder of an impartible estate a collateral took possession both of movable and of immovable property, and a widow, along with others, sued for the recovery of the entire property on the ground that the collateral was not the rightful owner. The Court awarded the widow a number of movable properties and the total value of these properties together with the arrears of her maintenance allowance was a substantial figure. The Court also awarded damages for detention of properties. Ultimately, after some payments had been made there was a compromise and sums paid by the judgment debtor thereafter were to be allocated, by consent, in a fixed proportion between principal and damages. It was held that the damages were not of the nature of interest because the collateral was under no obligation to pay interest and what he paid was damages for detention. *Commissioner of Income tax B & O v Ram Prayag Kumari Debi*, 1940 I.T.R. 25 following *Simpson v Maurice's Executors*, 14 Tax Cases 580.

In *Commissioner of Income tax v Narayanan Chettiar*, 1943 I.T.R. 47, the Madras High Court declined to follow *Beharilal Bhargava v Commissioner of Income tax, U.P.*, 1941 I.T.R. 9 (All.), but followed *Schulze v Beusted*, 7 Tax Cases, 30 and *Inland Revenue v Barnato*, 20 Tax Cases 445,

in holding that interest allowed by panchayatdars on the amounts due to certain minors from a partnership, of which their father had been a member, was not damages for wrongful detention of money

Discounted Bills—A payment to a Bank in respect of a discounted bill drawn in the ordinary course of trade in selling goods which the drawer is unable to meet is not a capital loss but a trading loss. Similarly, any repayment by the Bank on account of such a transaction is a trading receipt and not a capital receipt, *Bernhard v Gahan*, 12 Tax Cases 723 7 A T C 102

Compensation—Cancelled contracts—To decide whether compensation for cancelled contracts is capital or revenue, one must look at the intrinsic nature of the business. In the course of business one enters into a great number of contracts, some of which are fulfilled some broken and others terminated. So long as the assessee has no less power than other persons to terminate his contracts upon terms mutually acceptable e.g. if he does not enter into a restrictive covenant preventing him from undertaking other contracts, the compensation for closing a contract is merely the price paid for immediate freedom in the course of business from the responsibility for executing the particular contracts and not the price received as compensation for a burden thrown on the assessee not to carry on the trade. It was held accordingly that the compensation received by a ship builder for the cancellation of contracts to build certain ships was not a capital receipt, *Short Bros v Commissioners of Inland Revenue* and *Sunderland Shipbuilding Co v. Commissioners of Inland Revenue*, 12 Tax Cases 955, 136 L.T. 689

See also *John Smith & Sons v Moore*, 12 Tax Cases 266 (1921) 2 A C 13 and other rulings set out under section 10 (2) (xn)

Following *Hall v Commissioners of Inland Revenue*, (1921) 3 K B 152, 12 Tax Cases 382, Sargant, L J, said in *Short Bros case*, 12 Tax Cases 955 "You cannot stop at one definite period and say 'Here was a contract, the contract must be looked upon as an equivalent to the sale or purchase of an annuity, payable at fixed dates, of a definite amount, and therefore any sum received in lieu of the contract being carried out must be looked at as a capital sum received for the surrender of the annuity'"

A building company received a lump sum as compensation from a landowner, for the latter's having withdrawn from the building scheme of the company a large number of the plots which he had agreed to allow to be built upon. It was held that the lump sum was a trading receipt because land was the stock in trade of the company, and a right to build on a plot was as much a trading asset as the land itself, *Shadbolt v Salmon Estates*, 1943 K B D

In another case, the assessee who were chalk merchants and owned quarries entered into a contract to supply chalk to a person for ten years and had under the contract to have a wharf for the loading of chalk. The quantity to be supplied each year was to be varied between a minimum and a maximum. The contract was subsequently cancelled and the assessee received compensation which they used for writing down the value of the wharf on their books. The wharf was not required for their other business. There was no lease of the wharf, and the sums were not paid in respect of the wharf at all. Held, following the case of *Short Bros v Commissioners of Inland Revenue*, that the compensation was really a new form of profit in lieu of that under the contract and therefore a trading receipt and not a capital receipt, *Commissioners of Inland Revenue v Northfleet Coal and Ballast Co*, 6 A T C 1030, 12 Tax Cases 1102

The compensation paid for the detention of ships during a coal strike by the Customs under orders of the Ministry of Shipping for a period of 15 days was considered to be taxable even though there was no formal chartering or requisitioning of ships by Government. The assessee claimed that the compensation was in the nature of damages for personal injury to a professional man. The *ratio decidendi* was that the compensation was really in the nature of payment for the time and profit lost by the vessels during their detention. The *Glenboig Case* was distinguished on the ground that in that case the compensation was for the sterilisation of the source of income. *Ensign Shipping Co v Commissioners of Inland Revenue (C of A)*, 7 A T C 130 12 Tax Cases 1169 138 L T 180

An assessee purchased a vessel which required overhauling and certain replacements before it could be used. The repairers delayed delivery and paid compensation for the delay. The compensation was held to be taxable on the ground that the profits of a shipper include not only freight but payments in lieu thereof the compensation in this case being in lieu of the freight which the ship would have carried. The compensation was of the nature of demurrage and not like damages for running down or sinking the vessel and the temporary sterilisation of the source of income did not involve a capital loss but only loss of its use as a freight earning source. Damages which go to fill a hole in profits are trading receipts while those which go to fill a hole in capital assets are not and the measure by which damages are ascertained is no clue as to the capital or revenue nature of the damages. Lord Sands suggested that if the assessee had had to pay a certain fixed sum for repairs to make the ship seaworthy with an abatement for delay, the abatement might have been a capital saving instead of a Revenue receipt. *Burma Steamship Co v Commissioners of Inland Revenue*, 16 Tax Cases 67. While compensation received for cancellation of a contract in the ordinary course of business is taxable the taxability of compensation received for the termination of a pooling arrangement has given rise to considerable divergence of opinion. In the leading case on the subject, *Van den Berghs, Ltd v Clark*, 19 Tax Cases 390, (1935) A C 431 the High Court held that the compensation was of the nature of capital. The Court of Appeal held otherwise but the House of Lords restored the decision of the lower Court. The agreements which the appellants consented to cancel were not ordinary commercial contracts made in the course of their trade they were not contracts for the disposal of their products or for engagement of agents or for employees necessary for the conduct of business nor were they agreements as to how the profits when earned should be distributed as between the contracting parties. On the contrary the cancelled agreements related to the whole structure of the appellant's profit making apparatus. They regulated the appellants' activities defined what they might and what they might not do and affected the whole question of their business. Further, even if the magnitude of the transaction which is not an entirely irrelevant consideration be ignored, the congeries of rights which the appellants enjoyed under the agreements and which they surrendered for a price was a capital asset. The criterion of distinction between fixed and circulating capital which the Court of Appeal applied is not helpful. The agreements formed the fixed framework within which the circulating capital operated they were not incidental to the profit making machine but were essential parts thereof. They provided the means of making profits but did not themselves yield profits the profits arising from manufacturing and dealing in margarine. That

being so the appellants could not be said to have turned over the asset of the agreements

In applying *Short Bros case* 12 Tax Cases 955 or *Van den Berghs Case* 19 Tax Cases 390 (1935) A.C. 431 one has to see how far the structure of the business is designed to absorb such shocks as the cancellation of a single albeit important agency contract. So when an agent who represented several principals who changed from time to time and whose contracts with the respective principals also changed from time to time lost an important agency by its being terminated a year before the due date the compensation received in respect of such premature termination was held to be income. The agency agreements were in the circumstances of the case temporary and variable elements and not the fixed framework of the agent's profit-making enterprise, *Aelsall Parsons & Co v Commissioners of Inland Revenue* 17 A.T.C. 87 (C.S.)

The most important criterion in all such cases is whether what is injured or lost is a capital asset or its income. In a company whose business is to acquire licences to produce plays each licence is not a separate capital asset but is part of the stock in trade and any expenditure on such licences would be a charge against the profits so also any compensation for damages must come in as profits and not as capital receipts. *Vaughan v Archie Parnell Ltd* 1942 I.T.R. 37 (Sup.) A company D introduced company M to company R for the supply of goods to company R and was entitled under an agreement to receive from M a commission on the goods so supplied. Later on M paid roughly the equivalent of three years' commission to D who agreed to cancel the original agreement. It was held that the lump sum so received was taxable as profits of D. The test is not whether the contract was usual or unusual but whether it is of a trading nature i.e. revenue nature. No money was spent to secure it in this case no capital asset was acquired to carry it out and its cancellation was only an ordinary method of modifying it and realising the profit from it. *Shove v Duna Manufacturing Co* 1942 I.T.R. (Sup.) 150. A company requiring chlorine for the manufacture of magnesium contemplated setting up its own plant for making chlorine but was persuaded not to do so by another company making chlorine. The first company was to take chlorine from the second at £10 per ton but at the same time under another contract was to receive £7½ per ton as compensation for loss of profit in not setting up its own plant. The Special Commissioners held that the receipt of £7½ a ton was not a trading receipt but their view was not accepted. *Magnesium Electron Co v Thompson* 1944 (C.A.)

The Government who controlled the works of certain assesseses during the Great War allowed them to go on with their business but merely restricted buying and selling prices. Compensation was paid to the assesseses on account of the deficiency of profits below a certain normal standard. Held that the compensation was not a capital receipt but the income of the assesseses' business. *Charles Brown & Co v Commissioners of Inland Revenue* 9 A.T.C. 15 (C.A.) 12 Tax Cas. 1256. In another case in which compensation was received for cancellation of contracts to purchase yarn from the assessesee and also a sum in settlement of a claim for damages for a breach of a similar contract both the sums were held to be trading receipts. *Jesse Robinson & Sons v Commissioners of Inland Revenue* 8 A.T.C. 125 12 Tax Cas. 1241.

A Greyhound Racing Association acquired the lease of a track and made losses. A receiver took possession on behalf of debenture holders and hired the track to another company for a long period the rent being fixed at 15 per cent of the gross takings (subject to certain minimum). The lessee company wanted to go into voluntary liquidation and the receiver of the lessor company agreed to the surrender of the lease only if a new company was formed to take over the lease and also the old lessee company paid the lessor company a lump sum actuarially equal to the difference between the rent payable by the old company and that by the new one. It was held that the lump sum was taxable being paid for the use of a capital asset. *Mallett v Staveley Coal Co*, 13 Tax Cases 772 was distinguished on the ground that in that case the sums paid for surrender were for getting rid of onerous assets once for all while in this case the user of the track—no matter by whom—could not create a capital asset and the original asset i.e., the track continued to be the property of the lessor. The case was therefore similar to *Short Bros Case* 12 Tax Cases 955. It was also different from *Van den Bergh's Case*, 19 Tax Cases 390, (1935) A.C. 431 since the agreement in it did not relate to the whole of the lessor's business nor was it a fundamental organisation of his activities, like the pooling in the other case. The payment of a percentage of gross receipts was only a means of settling the rent to be paid and there was nothing to prevent the lessor company from acquiring other assets or from carrying on business in connection with such assets. *Greyhound Racing Association v Cooper* (1936) 2 A.E.R. 712 20 Tax Cases 373 (K.B.).

In *Glenboig Union Fireclay Co v Inland Revenue*, 12 Tax Cases 427, the company received damages on account of expenditure incurred by it in keeping open the mine during the period when it was restrained from working the mine pending final settlement. The Court of Session by a majority held that the damages were not trading profits but recoupment of cost of protecting capital assets which subsequently turned out to be unproductive. The dissentient view was that the restraint did not reduce the capital value of the asset, but only the trading profits. The point was not considered by the House of Lords since, by agreement between the parties a part of the damages was treated as trading receipts. The expenditure had been debited in the accounts to Revenue and the damages when received had also been credited to that head.

A private company of chemicals merchants dealing in industrial chemicals entered into a contract for the purchase of agricultural chemicals from a manufacturer who gave them a monopoly for a particular territory. For this purpose the company set up a new sales organisation. After some time the contract was cancelled and a lump sum received by the company as compensation. It was claimed on behalf of the company that the selling of industrial and of agricultural chemicals formed two separate businesses so that the cancellation of the contract destroyed the whole of the business in agricultural chemicals, that the contract had not only created a new source of supply but a new market, and that in view of the monopoly given to the company in the specific territory, the contract was a capital asset to it. Lawrence J. negatived all the claims. The case was nearer to *Short Bros Case*, 12 Tax Cases 955 than to *Van den Bergh's Case*, 19 Tax Cases 390. The compensation represented the profits that might have been made under the contract, had it continued and not the purchase price of the contract. The structure of the company's business was not altered by the cancellation of the contract, and the company could always have sold agricultural

chemicals and could still do so. The exclusion of competition is a common incident in such contracts, and is not analogous to a pooling arrangement, *Bush, Beach and Gent, Ltd v Road*, 1939 L.J.K.B. 801. *Henderson v King Meade Robinson*, 17 A.T.C. 241, was distinguished on the ground that in that case money had been lent to secure a sole agency, and the loss on the loan was thus a capital loss. Here, on the other hand no money was paid to secure the contract and the compensation was not a repayment of money.

Compensation—Loss of agency—It was held by the Calcutta High Court that compensation received by a company for the loss of one of the managing agencies held by it was income assessable under section 12 not being exempt under section 4 (3) (vi), *Turner Morrison & Co, Ltd v Commissioner of Income-tax*, 56 Cal 211 3 I.T.C. 214 but this ruling was distinguished by the same High Court later as being based on the peculiar facts of the case. In the next case of this kind before that Court, in which a lump sum was paid to an employee by his employer in satisfaction of a claim by the employee that he was a partner in the employer's business, which however was not admitted by the employer and which formed the subject matter of a pending civil suit between the two it was held that the lump sum was a capital receipt. Section 4 (3) (vi) does not apply to such cases since the payment arises out of business. But it is not 'income' at all within the meaning of section 3 or 4, *In re Mundy*, 57 Cal 1330 A.I.R. 1930 Cal 625.

The Calcutta ruling in *Turner Morrison's case* was overruled by the Privy Council in *Shaw Wallace & Co's case*, 59 I.A. 206 *see also* rulings set out under section 4 (3) (vi) regarding compensation for loss of office.

A suit by an employee for breach of his service agreement was settled on terms that he received the sum of _____ as agreed damages and the defendants withdrew the counter claim. The Commissioners dissected the lump sum into two parts representing respectively salary (with commission), i.e., income and true damages, i.e. capital. *Fulay, I*, held that there was no evidence to justify such a finding, *George du Cros v Ryall*, 19 Tax Cases 444 (H.B.).

If a transaction *per se* gives rise neither to "salary" (section 7) nor profits (section 10), nor 'income' (section 12), e.g., a restrictive covenant, the mere fact that compensation is paid over several years in instalments will not make the payments 'income', even if the payments were contingent on events from time to time e.g., the conduct of the payee, *Commissioner of Income tax, Sind v Mill Stores Co*, 1941 I.T.R. 642. The facts of the case however, were peculiar and if the payee whose agency had been terminated had not received cash but accepted the alternative of a limited commission agency the decision might have been different.

Stock—Purchase of—Undervaluation—A company acquired for £25,000 the assets of another company in liquidation. The assets stood in the books of the latter at £75,000. The £25,000 was apportioned between various items, £5,625 being taken against stock. Stock was taken and the actual value was found to be £12,798. The question was whether this difference between £12,798 and £5,625 was taxable as profit.

Held, by the Scottish Court of Session that the difference was not taxable, as no one could tell what was the exact price paid for each asset and there was only one alternative so far as stock was concerned, viz., its

real value, *Craig (Kilmarnock), Ltd v Cowperthwaite*, (1914) 13 Tax Cases 627

Debts taken over at succession to a business—In cases of succession where the successor takes over the predecessor's business as a going concern, it is a matter of considerable importance whether particular items taken over represent accrued debts or merely executory contracts. In *Dalhousie Distilleries v Commissioners of Inland Revenue*, 15 Tax Cases 613, (1930) SC 878, it was held that the successor was taxable in respect of accrued rents taken over from the predecessor. In this case, there was a minimum period for which rent was payable by tenants and till the end of that period, rent could not be demanded. Moreover, when rent was eventually payable, deductions for damages (on account of deficiency of spirit warehoused) could be claimed by the tenants. For these reasons, it was held that what was taken over by the successor was only a number of executory contracts. On the other hand, in the case of *the Commissioners of Inland Revenue v Oban Distillery Co*, 18 Tax Cases 33, (1933) SC 44, the tenants not only acknowledged the debts due from them as correct to the successor at the time of transfer but immediately paid the rents, and it was held that the successor was not taxable in respect of these rents which formed part of the capital assets purchased. In a third case the facts of which fell between the two, the tenants acknowledged the correctness of the accrued rents on the date of transfer but the successor financed and granted credit to the customers who actually paid the accrued rents much later. It was considered that this postponement did not alter the true nature of the debt which was a non revenue asset including no element of profit or loss, *Commissioners of Inland Revenue v Arthur Bell & Sons*, 17 ATC 563 (CS). See also *In re Bissendoyal Dayaram*, 1938 ITR 165 (Cal), referred to under section 10 (2) (xii)—Capital expenditure—Transfer of business

Rent dependent on capital and interest—A local authority raised a loan and purchased a tramway. The loan was repayable in half yearly instalments with interest spread over thirty years. The tramway was leased to another local authority for such a rent as should enable the lessors to repay the principal and interest of the loan in thirty years. The lessees claimed that they could deduct income tax from the payments made by them whereas the lessors claimed that the net payment due to them after deduction of tax, if any, was such a sum as would repay the loan in thirty years. *Held*, that the contention of the lessees was correct, *Poole Corporation v Bournemouth Corporation*, (1910) 103 LT 828 that is to say, the payments were income and not repayments of capital in instalments.

A colliery company agreed to supply water to a local authority and erected the necessary works according to the designs, etc. of the latter. The company received (a) a lump sum, (b) an annual payment of 1/30th of the capital cost of the works (c) interest on outstanding capital, and (d) a penny per thousand gallons of water. The agreement was to run for 30 years (with option of renewal on modified terms) when the works became the property of the company, but, if the company ceased to work, the local authority could take permission and pump the water. *Held*, by the Court of Appeal that item (b) was repayment of capital expenditure and neither taxable in the hands of the company nor deductible from the profits of the

local authority, *Boyce v Whitnack Colliery Co*, and *Coahulle Urban District Council v Boyce*, 18 Tax Cases 655, 151 L.T. 464

Debenture—Trust deed—Payment of interest—Whether capital or income—Under a debenture trust deed arrears of interest had to be paid before the principal. A debenture-holder having commenced an action, the Court directed that the trusts should be given effect to. The rates of interest on the debentures varied. The Court distributed the funds from time to time to the debenture holders in proportion to the amounts due to them for interest. These funds consisted of rent and royalties from which income tax had been already deducted. Afterwards the assets were sold and the Court was asked to make a final distribution. It was contended that the payments already made to the debenture holders were payments of capital. *Held*, by *Farrwell, J.*, that as the debenture holders did not possess the same interests and the deeds provided for payment of interest before principal the debenture holders could not waive their rights under that provision in the absence of agreement of all the debenture holders, although the provision was inserted in the deed for the benefit of the debenture holders, and that the payments made must be in accordance with the terms of the deed and that income tax must be deducted from such payments as had not already borne the tax, *Re Queensland and Coal Co Davis v Martin*, (1903) unreported

In another case of a debenture trust deed in which there had been similar default and the Court had ordered the carrying into execution of the trusts it was held on the facts of the case and on the construction of the orders directing payment that as it was clearly to the benefit of the debenture holders that the payments should be appropriated to principal, they ought to be so appropriated without putting the payees to their election and that no income tax should be deducted, *Smith v Law Guarantee and Trust Society*, (1904) 2 Ch. 569 (C.A.)

Grants-in aid—A grant-in aid received by a trading body from Government for a specific purpose (relief of unemployment) is not received as part of the trade and it is irrelevant for the purpose of taxation whether the money is spent on works of a Capital or of a Revenue nature. It is not conceivable that Government intend a part of such grants in aid to return to the Exchequer as tax. *Seaham Harbour Dock Co v Crook*, 16 Tax Cases 333 (H.L.). This does not, however, mean that a subsidy paid by Government is never to be taxed. Under the British Sugar Subsidy Act, the subsidy had to be repaid if the relevant market price exceeded a certain 'basic' price or if the payee went into liquidation or wound up his business. *Finlay, J.*, held that the subsidy was of the nature of a loan while the Court of Appeal held that it was a final grant and taxable, since the contingency to repay in certain events could be discounted and allowed for in ascertaining profits. In confirming the decision of the Court of Appeal the House of Lords observed that the question did not turn on verbal arguments based on the statute regulating the subsidy but on the substance of the transaction which was that the company received sums which were intended to be used and could properly have been used to meet its current trading obligations. Moreover, the contingency of possible repayment did not in fact arise. *Smart v Lincolnshire Sugar Co, Ltd*, 20 Tax Cases 643 1937 A.E.R. 413, 53 T.L.R. 306

4. (1) Subject to the provisions of this Act, the total income of any previous year of any person includes all income, profits and gains from whatever source derived which—

(a) are received or are deemed to be received in British India in such year by or on behalf of such person, or

(b) if such person is resident in British India during such year,—

(i) accrue or arise or are deemed to accrue or arise to him in British India during such year, or

(ii) accrue or arise to him without British India during such year, or

(iii) having accrued or arisen to him without British India before the beginning of such year and after the 1st day of April, 1933, are brought into or received in British India by him during such year; or

(c) if such person is not resident in British India during such year, accrue or arise or are deemed to accrue or arise to him in British India during such year:

Provided that there shall not be included in any assessment for the year ending on the 31st day of March, 1940, both the amount of the income, profits and gains referred to in sub-clause (ii) of clause (b) and the amount of the income, profits and gains referred to in sub-clause (iii) of clause (b) but only the greater of these two amounts:

Provided further that, in the case of a person not ordinarily resident in British India, income, profits and gains which accrue or arise to him without British India shall not be so included unless they are derived from a business, controlled in or a profession or vocation set up in India or unless they are brought into or received in British India by him during such year:

Provided further that if in any year the amount of income accruing or arising without British India exceeds the amount brought into British India in that year, there shall not be included in the assessment of the income of that year so much of such excess as does not exceed four thousand five hundred rupees.

Explanation 1.—Income, profits and gains accruing or arising without British India shall not be deemed to be received in or brought into British India within the meaning of this sub-

section by reason only of the fact that they are taken into account in a balance-sheet prepared in British India

Explanation 2 —Income which would be chargeable under the head 'Salaries' if payable in British India and not being pension payable without India shall be deemed to accrue or arise in British India wherever paid if it is earned in British India

Explanation 3 —A dividend paid without British India shall be deemed to be income accruing and arising in British India to the extent to which it has been paid out of profits subjected to income tax in British India

(2) For the purposes of sub section (1), where a husband is not resident in British India remittances received by his wife resident in British India out of any part of his income which is not included in his total income shall be deemed to be income accruing in British India to the wife

History —For the corresponding provisions in previous Acts see definition of income and sections 4 (1) and 7 (2) in the Act of 1886 and sections 3 (1) and 14 (1) of the 1918 Act

The section has been amended several times since 1922 the most important occasions being (1) the extension in 1933 of the liability to taxation though only on a remittance basis of all foreign income whenever brought in (not only from business as before) and the exemption in the same year of agricultural income remitted from Indian States which had paid land revenue there and (2) the radical alteration in 1939 of the basis of taxation into one of residence

Immediately before the amendment in 1939 the two sub sections read as below —

4 (1) Save as hereinafter provided this Act shall apply to all income profits or gains as described or comprised in section 6 from whatever source derived accruing or arising or received in British India or deemed under the provisions of this Act to accrue or arise or to be received in British India

(2) Income profits and gains accruing or arising without British India to a person resident in British India shall if they are received in or brought into British India be deemed to have accrued or arisen in British India and to be income profits and gains of the year in which they are so received or brought notwithstanding the fact that they did not so accrue or arise in that year

Provided that nothing contained in this sub section shall apply to any income profits or gains so accruing or arising prior to the first day of April 1933 unless they are income profits or gains of a business and are received in or brought into British India within three years of the end of the year in which they accrued or arose

Provided further that nothing in this sub section shall apply to income from agriculture arising or accruing in a State in India from land for which any annual payment in money or in kind is made to the State

Explanation—in same terms as present *Explanation* (1)

Scope of this section—The marginal note against section 3 is 'charge of income tax' and that against section 4 is 'application of Act'. Section 3 defines who has to pay, *i.e.*, every individual, company, etc., on what he has to pay, *viz.*, the total income of the previous year, and at what rates, *viz.*, the rates imposed by the Finance Act every year. Section 4 circumscribes the scope of section 3 by defining and limiting the nature of the income that may be included in total income of the previous year. Sections 7 to 13 regulate the computation of income.

The section contemplates three classes of assessee, *viz.*, (1) Resident in British India, (2) Resident but not ordinarily so resident, and (3) Not resident in British India.

Class (1) is chargeable on, (a) their 'world' income subject, however, to a deduction of Rs 4,500 of foreign income, not brought into British India and to the addition of foreign income that arose after 1st April, 1933, and was brought into British India after the assessment year 1939-40 (and had not been taxed).

Class (2) is chargeable on all British Indian income, both factual and deemed and on foreign income from business, profession or vocation if controlled or set up in India (not British India) or if brought into British India, subject also to a deduction of Rs 4,500 not brought into British India.

Class (3) is chargeable on British Indian income only, both factual and deemed.

Clause (a) of subsection (1) referring to receipt in British India applies to all persons whether resident or not, clause (b) applies to residents and clause (c) to non residents. The second proviso further differentiates between residents who are ordinarily resident and those who are not.

Subject to the provisions of this Act—These words take the place of "save as hereinafter provided", and both the phrases mean practically the same thing and refer to exemption clauses like sections 4 (3), 60 and 14.

"Total income includes"—While the section as it stood before used the words 'this Act shall apply' section 4 (1)] and 'this Act shall not apply' [section 4 (3)], the present section uses the words 'the total income includes' [section 4 (1)] and "shall not be included in the total income" [section 4 (3)]. Here again there is no real change of substance the new words being intended to bring out the intention more clearly and to avoid difficulties that might otherwise arise in respect of 'total world income'. In section 2 (15), however, which defines 'total world income' the old words "Act does not apply" have been used.

It had been held with reference to the old section that income to which the Act does not apply shall not be taken into account for any purpose under the Act, see per Krishnan, J., in *Board of Revenue, Madras v. Arunachalam Chetty*, 44 Mad 65, 1 ITC 75, 89. On the other hand, the income to which the Act applies could be taken into account for some purpose or other defined in the Act, *e.g.*, it may be taken into account merely in fixing the rate of tax—see section 16.

Includes—Obviously means "means and includes" having regard to the structure of sub sections (1) and (3).

Previous year—See section 2 (11) and notes under it

Person—The special definition in section 2 (9) expands the definition in the General Clauses Act, so as to cover a Hindu undivided family and a local authority, but it appears to fail to cover an association of persons, since the definition in the General Clauses Act refers only to an association of individuals. On the other hand in section 3 reference has been made, not to associations of individuals but to those of persons.

Conditions in clauses alternative—The successive use of the word 'or' will make it clear that the fulfilment of each of the conditions by itself will result in the inclusion of the item in total income, if it does not fall under a proviso or an exempting provision.

On behalf of—This phrase has been used in clause (a) of sub-section (1) which evidently refers to the occasion of receipt for the first time, but not in other clauses nor even in the second proviso referring to remittances. See however notes below as regards Constructive remittance of foreign income.

Resident—See section 4-A and notes thereunder

Accrue or Arise to him—See notes below and rulings

Deemed to accrue, etc., and deemed to be received—See following Explanations (2) and (3) and sub-section (2) of this section, sub-section (2) of section 7, sections 16, 18 (4), 41, 42, 44-D *et seq.*, 49-B and 49 C and also sections 2 (6-A) 2 (6-C), 10 (2) (vi) and (xi) and 23-A

First proviso—The proviso applies only to the assessment for the year 1939-40. In the assessments of later years items already taxed under clause (b) (ii), i.e., foreign income as it accrued from time to time, will presumably not be taxed again in a later year under clause (b) (iii), when brought into British India, on the recognised principle, though not laid down in the statute in express terms, that the same income cannot be taxed twice in the hands of the same assessee. But foreign income which accrued after 1st April, 1939, and was not taxed for any reason will, when brought into British India in a year later than in the assessment for 1939-40, be taxed in addition to the fresh foreign income accrued and taxed in that year at higher rates on the two blocks of income taken together.

An important exception to the above plan was made by the amendment of sections 14 and 17 in 1941, in respect of income arising in Indian states to residents of British India. Under these sections now, such income is not ordinarily taxed unless it is brought into British India though it is included in total income (i.e., for determining the rate of tax on other blocks of income), and when brought in, is taxed on an *ad hoc* and somewhat arbitrary and complicated basis.

The first proviso applies only to a resident since it qualifies clause (b) only. Obviously the proviso is to be applied with due reference to the other two provisos.

Second proviso—The proviso is evidently intended to be an exception to items (ii) and (iii) of clause (b) of the sub-section, for these are the only two cases under which, but for the proviso, liability for tax in respect of income accruing or arising to the person outside British India would arise. That being so, since clause (b) applies only to a resident, this proviso also applies only to residents, that is to say, the person contemplated by the proviso is a person resident, but not ordinarily resident,

in the relevant year. So, for the purpose of this section, we are really concerned with only three classes of tax payers, *viz*, (a) resident and also ordinarily resident, (b) resident but not ordinarily resident, and (c) non-resident irrespective of his ordinary residence.

Three conditions have to be satisfied if the income in question is to be excluded, *viz*, (a) the person is not ordinarily resident in British India, as to this, *see* section 4-B (b) the income does not arise from a business [i.e., as defined in section 2 (4)] controlled in or a profession or vocation set up in India (not British India), and (c) the income has not been received in or brought into British India.

As to what is business, *see* section 2 (4), and more particularly notes as to the meaning of the words "in the nature of trade", and as to 'profession', *see* notes under section 4 (3) (*vi*).

The 'such year' in the proviso refers back to the "previous year", jumping across the first proviso.

As to what constitutes bringing into or receipt in British India, *see* notes below under Remittances. What is brought in should be taxable income, i.e., not capital or income falling under section 4 (3) and therefore exempt.

While the words 'on his behalf' appear in clause (a) they do not appear in this proviso, but, in view of the various rulings on constructive remittances, receipt in or bringing into British India on behalf of an assessee would presumably be considered equivalent to receipt or bringing in by him. *See* however explanation to proviso to section 45 which restricts that explanation only for the purposes of that section, *viz*, postponement of collection of tax.

Third proviso—This proviso also, for the same reasons as have been explained in respect of the first and second provisos, applies only to a resident. This proviso must be read with reference to the other two provisos, that is to say, (a) the foreign income referred to is such income as is taxable under the second proviso and (b) for the year 1939-40, the first proviso also should be applied.

"In any year" refers clearly to the 'previous year'. The words 'to him' have been left out after 'accruing or arising'. The amount brought into British India in a particular year has not been qualified and need not therefore necessarily be out of the foreign profits which accrued in the same year. So if (say) Rs 50,000 accrues in a year and Rs 60,000 is brought in (including earlier taxed profits), the tax will be on Rs 50,000. If next year (say) Rs 60,000 accrues and Rs. 50,000 is brought in, the tax will be on Rs 55,500. The concession of excluding Rs 4,500 can be enjoyed every year.

This proviso is 'subject to the provisions of this Act' (at the beginning of the section), which includes section 23, that section makes it clear that a registered firm has to be assessed as such first, and that the liability of the partners arises later. So, the allowance of Rs 4,500 is to be given to the firm as such and not to each of the partners. *Mohanlal Hirralal v. Commissioner of Income tax, C P*, 1943 ITR 259. If the partner has other foreign income, he can, it is considered, claim the balance of the allowance if otherwise eligible to it.

The words 'shall not be included in the assessment of the income' merely mean 'shall be excluded from total income.' Therefore, foreign income whether in an Indian state or elsewhere, which is not brought into

British India is to be left out of the picture altogether up to a limit of Rs 4 500 both for rate and liability to tax

Clause (b) (iii) and the second proviso use the words 'brought into' and 'received in' as alternatives while the third proviso uses only 'brought into'. The words 'brought into' refer to income already received abroad, while 'received in' refer to income accrued outside but received for the first time itself not outside but within British India. Since the object of the proviso is to exempt a part of the income that does not come into British India there is no need to refer specially to receipt in British India, as distinguished from bringing in.

Where foreign profits are frozen—See proviso to section 45 and explanation thereto which permit the postponement of collection of tax on foreign income which cannot be brought into British India.

Incorporation in accounts of foreign profits—Explanation 1—This is the same as the explanation to old sub-section (2). It embodies the substance of several well known decisions including that of the House of Lords in *Gresham Life Assurance Society v Bishop*, 4 Tax Cases 464, (1901) 1 K.B. 153. See however notes below in respect of Foreign Remittances.

Salaries—Explanation 2—It will be seen from the rulings under the old section (see notes on the words 'Accrue or Arise') that the position in regard to tax on salaries was obscure and this new explanation clause seeks to make it clear that barring pensions payable outside India (not British India) the basis of liability to the extent that it depends on that of accrual is that of income being earned in British India. Overseas pay, paid in sterling in the United Kingdom to Government Servants working in British India had all along been taxed in British India on this view. Pension payable without India—whether Government or other pension—has been exempted unless it can be taxed on the basis of ordinary residence. This is in accordance with the decision of the Lahore High Court in *Sir T. Vijayaraghavacharya's case* (1936) I.T.R. 317 under the old section. 'Payable' evidently means payable under the contract or other conditions of service. It should be noted that the pension should be payable outside India. If it is paid in an Indian State it will be deemed to arise in British India.

The salary of an individual working outside British India cannot be said to be earned in British India especially if it is also paid outside British India so, it will not be deemed to accrue or arise in British India except to the extent covered by section 7 (2) but leave pay and salary for work done in British India will be deemed to accrue in British India wherever paid. Salary for work done outside India and paid outside India, will be taxable if paid to a resident of British India who is also ordinarily resident but not if he is not ordinarily resident for *ex hypothesi* the vocation is not set up in India. If the work is done in an Indian State and payment made there sections 14 and 17 will apply.

Explanation 3—The object of this provision is to render liable to super tax dividends paid outside British India from profits subjected to income tax in British India. Otherwise on the principle of *Commissioner of Income tax v Goldie*, 5 I.T.C. 228 55 Bom 734 A.I.R. 1931 Bom 420 the income in the shareholders' hands would be held to accrue outside British India. The income by virtue of this explanation not only becomes

liable to super-tax but is eligible for refund under section 48. The word 'dividend' should be read with reference to the special definition in section 2 (6-A).

It was held by the Federal Court in *Governor-General in Council v Raleigh Investments*, 1944 ITR 265 that this explanation clause is not beyond the powers of the Indian legislature as laid down in the Government of India Act 1935. The source of income in such a case is the profits made in British India. The unsuccessful argument to the contrary was that such dividends being payable abroad under foreign contracts, are, if paid to non-residents, beyond the ambit of taxability by the Indian legislature.

Where a part only of the profits of the Company is taxed in British India only a proportion of the dividend can be deemed to accrue in British India. The extent to which a dividend paid abroad is paid out of profits subjected to Income tax in British India is a question of fact, and the general principle of Rule 33 would be applied in such cases.

The words 'subjected to tax' should be noted. If no tax is actually payable by the company but nevertheless the company pays a dividend, e.g., out of taxed profits of earlier years or out of capital appreciation, such dividend would appear to be outside the scope of this explanation.

Remittances from husband to wife—Sub-section (2)—The husband should be non resident the wife resident (section 4-A) and the remittances made out of the husband's income [section 2 (6-C)] but not included in his own 'total income' [section 4 (1)], before this sub section can come into operation. The reverse case of a remittance from a wife abroad to a husband in British India is not covered.

Income, profits and gains—See notes under sections 2 (6-C), 3 4 (3) (vi), and 10 (2) (vi) and (xi). Capital receipts are excluded except those covered by section 2 (6-C).

From whatever source derived—The evident object is merely to refer to the sources in section 6 and in this view the words "from whatever source derived" are mere surplusage.

Accrue or arise—Meaning of—Having regard to the use of the word 'received' also in this section, the words 'accrue and arise' obviously refer to a stage earlier than receipt. There are at least four different elements in the concept 'accrue'—(1) that of time, (2) that of place, (3) that of source, and (4) that of the person to whom the income accrues.

The element of time arises principally in deciding when income should be taxed. This question is dealt with in the notes under section 13. See, however, notes below as regards remittances from abroad. Once income has accrued, that is, assuming that the "time" factor has been solved the liability to tax is determined by the other three factors only. In practice, however, it is more usual to settle the liability to tax with reference to the other three factors and then consider the 'time' element when computing the income liable.

If 'accrue in' a place means to be derived from a source in or earned in that place there is no separate element of source to be considered. The two elements of place and source merge into one. But if the phrase means something like a right to receive the income in that place and nothing else, and has no reference to the material origin or the source of the income, the place of accrual may not be the place where the income originates or is earned.

In all cases, wherever and whenever income may accrue, it must accrue to some person who is the person sought to be taxed.

Section 4 (1) as it stood before, did not require the income to accrue to the assessee in British India. All that it required was that the income should accrue or arise or be received in British India or be deemed to accrue, etc., before it could be taxed. It was the same thing whether the person to whom the income accrues was a resident or not except in certain cases in which income was deemed to accrue, etc., in British India. In this respect the law in India differed radically from the English law. The question was what was meant by accrual in a place. Did accrual merely mean *receivability* in that place or did it involve the income either being earned in that place or being derived from a source of income situated in that place?

The arguments in support of the former construction were the following—(1) The words “from whatever source derived” became surplusage if they merely referred to the sources described in section 6. The only meaning to be given to these words, if we were not to treat them as surplusage was to construe them as referring to sources both within and outside British India. (2) Section 42 as it stood then contemplated the “accrual” outside British India (unless the income accrued outside, there would be no object in ‘deeming’ it to accrue inside), of income to a non-resident, from ‘business connection’ or ‘property’ in British India. Even ‘business connection’—whatever it may mean—clearly connotes that the source of income if not actually or wholly in British India has either some connection with British India or lies partly in British India. Again though the word ‘property’ in section 42 (1) is not limited by its special meaning in section 9, it should be something tangible and situate in British India as laid down by the Privy Council in *Commissioner of Income tax v. Currimbhoy Ebrahim & Sons, Ltd*, 60 Bom 172, AIR 1936 PC 1 63 IA 1 1935 ITR 395. (3) Section 4 (2) as it stood also suggested that “accruing” referred to *receivability* rather than to the place or origin. Incidentally, this was the official view in regard to interest on securities payable abroad.

On the other hand, (1) sub section (2a) of section 18 clearly assumes that salaries payable to a Government servant out of India by or on behalf of Government were taxable, i.e., they ‘accrued or arose’ in British India within the meaning of section 4 (1). (2) The fact that pay leave salaries and pensions paid out of India by the Government of India were exempted under section 60 showed by implication that they were taxable. (3) The more natural meaning of ‘accrue’ or ‘arise’ and more particularly the latter, when used only with reference to a place and without reference to a person or source, is to connote something springing up from the place, i.e., from a source in it—see the authorities cited in the judgment of *Oldfield, J* in *Board of Revenue v. Ramanathan Chetti*, 1 ITC 37 43 Mad 75. The idea of “receivability” is less natural and is usually imposed only by the necessity of the context in construing a particular Act or Acts, as in the United Kingdom, the words there are “accruing or arising to a person” see *Colquhoun v. Brooks*, 2 Tax Cases, 490. (4) While in the English Acts the words used are ‘accruing or arising’ the corresponding words in the Indian Act were ‘accruing or arising or received’. Income which is *receivable* in India would ordinarily be received there and the words “accruing or arising” may therefore be considered to have no reference to *receivability*.

The words 'accrue' and 'arise' had been construed in other countries but these rulings could not be followed in India on account of the difference not only in the wording but in the structure of the Acts. In *Commissioners of Taxation v Kirk* (cited *infra*), a case from New South Wales, it was held by the Privy Council that 'accrue' or 'arise' meant the same as 'derived', but the case was distinguished from English decisions on the ground that the language and aim of the United Kingdom statutes were different. In two New Zealand cases also—*Commissioners of Taxes v Lovell and Christmas* and *Commissioners of Taxes v Eastern Extension, etc., Telegraph Co.*, (*infra*) 'accrue' was held to mean the same as 'derived'. On the other hand in the United Kingdom it was held in *Colquhoun v Brooks* 2 Tax Cases 490—that "accrue" meant only a right to receive' (per Fry L.J. in the Court of Appeal—the judgment was reversed by the House of Lords on different grounds altogether). None of these decisions is already stated, could be applied to India. In the Colonial cases the statutes used the word 'derived' more or less as a variant to 'accrue' or 'arise' while in the English law the idea of accruing to a person resident in the United Kingdom is prominent.

The section as amended in 1939 makes a radical departure from the previous law. Not only is the new plan of taxation nearer to that under the English law laying greater emphasis than before on residence, but even the new wording of the section makes a closer approach to that of the English law by using the words "accrue to a person" in British India or without British India instead of merely referring to accruing in or outside British India though simultaneously the words "to a person" have been omitted in section 42 where they appeared formerly. Again Explanation 2 proceeds on the footing that the main basis of accrual in a place is its receivability there. On the other hand the words used in the section now are different in several respects from those used in the English Law. For example taking a typical case (say) of a non resident, the English Law taxes him on 'profits accruing to him from any property whatever in the United Kingdom or from any trade, profession, employment or vocation exercised within the United Kingdom.'

Accruing to a person in British India is not the same as accruing to him from a trade etc. in British India therefore United Kingdom rulings cannot be followed in their entirety. Further, section 42 is so wide as to catch profits from trade with British India—not only trade in British India though by executive instructions the scope of that section has been restricted. At the same time, many of the tests suggested by the rulings in the United Kingdom e.g., as to place where trade is exercised can be applied e.g., to the place of accrual under the Indian Law—the tests being where contracts are made or services rendered.

Obviously there can be receipt of income at a single point of time or place but accrual can be in stages also income can be in kind, viz., 'moneys worth', assuming of course a market, actual or possible, to enable kind to be converted into cash. At each stage if the income is taxable its value at that stage has somehow to be ascertained.

It is safe to say that there is no one single, conclusive test of what constitutes accrual of income—whether at a particular point of time or place.

If it is held that there is a material difference between 'accruing to a person in a place' and 'accruing in a place' the consequence is not so im-

portant now as it was before 1939, the result will merely be that the case will fall under section 42 instead of section 4. The question whether the source of income is in British India or not will arise only under section 42 and not under section 4, where all that has to be seen is whether the income accrues or arises or is received in British India or is deemed so to accrue or arise or be received—without regard to the location of the source the words in section 4 being from whatever source derived.

The word 'source' has not been defined in the Act nor been interpreted judicially. In a Rhodesian case however, the Privy Council held that 'a source was not a legal concept but something which a practical man would regard as a source of income' *Rhodesia Metals Co (in liquidation) v Commissioner of Taxes*, 1941 ITR (Sup) 45.

Decisions in India.—In India the meaning of the words accrue and 'arise' as they stood in the law before 1939, has been considered in many cases, e.g., *Commissioner of Income tax v Ramanathan Chetti*, 43 Mad 75, 1 ITC 37—the point in issue being whether income from business abroad not remitted to British India "accrued" or "arose" in British India because the business was subject to general supervision by the owner from British India it was held that the income did not either accrue or arise in British India, *Commissioner of Income-tax v Arunachallam Chetti*, 1 ITC 75 (see section 13), in which the point was when income 'accrued', and *Rogers Pyatt Shellac Co v Secretary of State*, 52 Cal 1, AIR 1925 Cal 34, 1 ITC 363, (cited under section 42) relating to profits accruing to a non resident from business connection in British India, in which *M N Mookerjee, J*, quoted with approval the meaning given in *Colquhoun v Brooks*, but there are passages in his judgment which show that he inclined to the other view also. In *Commissioner of Income tax v North Anantapur Gold Mines*, 1 ITC 133 44 Mad 718 however in which the company contended that no profits arose or accrued in India because the sales were made in England and the money received there, the Madras High Court, while refusing a mandamus to ask the Commissioner to state a case on the ground that the High Court had no jurisdiction to do so, incidentally expressed the opinion that the profits had arisen or 'accrued' in India, having regard to the difference in the wording of the Indian and the English Acts. On the other hand, it was held by the Lahore High Court in the case of *Bhagat Jwandas and others*, 4 ITC 40 that in the purchase of goods in British India for export no part of the profit accrues or arises in British India. See also *In re the Aurangabad Mills, Ltd*, 45 Bom 1286, 1 ITC 116 and *Board of Revenue v Ripon Press and Sugar Mills*, 46 Mad 706, AIR 1923 Mad 574, 1 ITC 102 in both of which notwithstanding the location of the head office and the control in British India, it was held that the income accrued or arose outside British India. These decisions, however, do not decide as between the earned (or derived) theory and the 'receivability' theory. In *Rogers Pyatt Shellac Co v Secretary of State*, AIR 1925 Cal 34, 1 ITC 363, 52 Cal 1, *Chatterjee, J*, thought it 'possible to conceive of cases where a property may be situate in British India and the profits thereof may accrue or arise out of British India,' and, favoured the receivability theory.

The Rangoon High Court held in the case of *Commissioner of Income-tax v Phra Phrasan Salarak*, 6 Rwp 598, AIR 1929 Rang. 1, 3 ITC.

237 that the remuneration paid in Siam to a Siamese official for service rendered in Burma is not income accruing or arising in British India. If it is the location of the source of income which has to be considered, the salary accrued or arose in Siam, the Government of which paid the salary irrespective of where he worked, and if the place where the enforceable right to demand the income arises also Bangkok. Employment in British India is not a source: see also *Pickles v Foulsham* 9 Tax Cases 261 (1925) AC 458 (HL) in which even though the whole of the taxpayer's work lay outside the United Kingdom it was held that the source of the income was not the employment but the money paid by the employer who paid it, and had to pay it in the United Kingdom. It has also been held in the United Kingdom that while the source of income in respect of a trade or profession is that trade or profession itself, the source of income from employment is the money paid under contract of employment if this money is payable and paid abroad it is a possession out of the United Kingdom. The fact that a part of the work in respect of the employment has to be or is done in the United Kingdom will not in itself make the source of income one in that country. *Bennett v Marshall* 16 ATC 377 (CA). The provisions of the United Kingdom Statutes in this respect however are somewhat different from those in India.

On the other hand it was held in *In re Sounders*, (the Lord Bishop of Lucknow) 54 All 223 AIR 1932 All 151 5 ITC 454 that a gratuity allowance payable in London from a private fund to the Bishop of Lucknow in his official capacity accrued or arose in British India since the allowance depended on the Bishop's continuing in the See at Lucknow.

Similarly commission paid abroad to an employee of a tea estate in British India when on leave abroad in respect of a period served by him in British India and for services rendered in British India has been held to accrue or arise in British India.

Per *Costello J*— when one gets down to the fundamental aspect of the matter we have to decide it really resolves itself entirely into a question of fact and one which in my view should be looked at and decided in the light of commonsense and plain thinking and not too much importance should be attached to or emphasis laid upon the niceties of verbal definition. 1937 ITR at p 231.

Per *Panckridge J*— the question whether any particular income profits or gains accrue or arise in British India is a question of fact and it is not practicable to formulate any precise test. It is not always enough that the income should be earned in British India in the sense that the assessee was in British India for a part of the period or all the period during which the income was earned. For example it would not be right to hold that a portion of the salary of an officer of the Mercantile Marine accrued or arose in British India because for some portion of the period during which the salary was earned the officer was serving in Indian waters. In this case the assessee is under a four years whole-time agreement to serve his employers on the Indian tea estates. *In re Every* 1 I.L.R. (1937) 2 Cal 327 41 CWN 823 1937 ITR 216 (Cal). In *Phra Phrasan Salarak's case* 6 Rang 598 3 ITC 237 the officer it should be noted could be called on to serve anywhere and the remuneration bore no relation to the employee's work in British India and was presumably paid out of the General Revenues of Siam. These facts distinguish it from *Every's case*.

In *Commissioner of Income tax v Bombay Trust Corporation*, 4 I T C. 312, 57 I.A. 49, 54 Bom. 216 the Bombay High Court held that interest on deposits made by a non resident finance company with a resident accrued from business carried on by the non resident in British India or from other sources in British India (see section 6) even though the interest was payable outside British India, and the Privy Council agreed with this view.

In *Commissioner of Income tax v Raja Bahadur Bansilal Motilal*, 54 Bom. 460, A.I.R. 1930 Bom. 381 4 I T C. 332 the same High Court held that the interest on a debt contracted and repayable in British India accrues in British India even though the interest may in fact be payable outside British India. The interest arises or springs from principal moneys invested in and repayable in British India and the amount of such interest is calculated as a percentage on the principal moneys which constitute the source of the interest. The same High Court held in the case of *Commissioner of Income tax v Sarupchand Hukumchand* 5 I T C. 108 A.I.R. 1931 Bom. 236 55 Bom. 231 that the commission earned by a firm as secretaries treasurers and agents of a company registered outside British India and having mills outside it but having a shop within it to sell the mill products accrued in British India because of the sales through the shop even though the commission was payable and paid only outside British India under an agreement executed outside British India. The word 'source' can be interpreted in several ways like for instance the word 'cause' which may refer to the material cause the final cause the immediate cause and so on. In this case one had to look to the material sources, viz, the shop rather than the metaphorical source viz, the agreement regulating the commission. This decision was approved by the Privy Council in *Chumal B Mehta's case* 1938 I T R 521.

On the other hand in an otherwise similar case in which the sales were made free on rails outside British India *hundis* being drawn on British India for the sale proceeds and collected from the purchasers by the agents through their office in British India it was held that the commission arose from the sales which took place outside British India and not from the collection of the sale proceeds the income therefore accrued outside British India. In *re Hirai Kalyanmal* 1943 I T R 129 (Bom.).

According to the Privy Council to answer the question 'Do profits accrue or arise in British India by asking another viz. What in the sense of section 6 is the source of the profits and is it situate in British India?' is to divert attention from that to which the statute points and to devote attention to what it discards. Nothing could be easier than to say "from whatever source derived if situate in British India had this been intended but it would have been by no means easy to apply. The source of salaries of interest on securities of professional earnings is not readily described as situate anywhere though the place where employment is carried on or an investment made or a salary or fees earned is a familiar notion. There would have been no difficulty in the case of property and with the aid of certain rules little difficulty, it may be in the case of business. But the Legislature has chosen a different test and applied it to all kinds of profits accruing or arising in British India' and it may even have chosen it as fairer because it could be applied distributively to the profits of a single source. What connection exists if any between the place of direction and the place at which profits arise is not touched by section 4 (as it stood before 1939) 6 or 10. Not only do they lay no stress on the

place at which business is carried on they do not even mention it. It cannot therefore, be held that it is itself the test of chargeability by virtue of a rule, nowhere mentioned in the Act, that profits accrue or arise at the place where the business is carried on

That profits in respect of transactions abroad may depend largely on the knowledge, skill and judgment of the assessee in British India and on the instructions issued by him will not in itself make the profits from such transactions accrue or arise in British India, and for this purpose it is immaterial whether the business consists of dealing in goods or in mere differences. Even though a business may be a single organisation it does not follow that all its profits should accrue or arise at the place of its control. The United Kingdom Acts impose a tax on those who "exercise a trade," in that country and rulings of Courts in that country do not furnish any guidance. *Commissioner of Income tax, Bombay v Chunnimal B Mehta* I.L.R. 1938 Bom 752 A.I.R. 1938 P.C. 232, (1938) I.T.R. 521 (P.C.) [confirming (1935) I.T.R. 376]. Where, however, a firm of brokers, etc. trading in Bombay entered into contracts in Bombay with another firm of brokers trading there and the profits or losses were payable in Bombay to either firm even though the transactions concerned were put through by the second firm with brokers in New York (but without any privity of contract between the first firm and the New York brokers) it was held that the profits accrued in British India even though they were not actually paid but allowed to remain in New York, *Commissioner of Income tax Bombay v Govindram Seksaria* (1938) I.T.R. 584

On the other hand in *Major Goldie's case* 5 I.T.C. 228 55 Bom 704 the Bombay High Court held that a dividend paid by a company having its head office abroad to a shareholder not resident in British India was a debt payable by one non resident to another and did not therefore accrue or arise in British India even though the company did business there and paid tax. The source from which the debtor paid his debt was irrelevant the source of the income from the creditor's point of view being the debt itself. This ruling has been nullified by Explanation 3 inserted in 1939 but the validity of that Explanation was questioned and affirmed by the Federal Court in *Governor General in Council v Raleigh Investments* 1944 I.T.R. 265

It has also been held that pension payable and paid outside India does not accrue in India even if paid out of Indian funds and in respect of service rendered in India. Pension is different from pay, and is merely a right to receive a certain sum of money annually at a particular place. *Sir T. Vijayaraghavacharya v Commissioner of Income tax, Punjab* (1936) I.T.R. 317

When tea was grown and manufactured outside British India but sold in it, it was held by the Calcutta High Court that the whole income accrued or arose in British India. In *re Mohanpura Tea Company, Ltd.*, 1937 I.T.R. 118. A different view was taken by the Madras High Court in *Commissioner of Income tax, Madras v Mathias*, (1937) I.T.R. 435, and the Privy Council to whom the latter case went on appeal did not decide where the income accrued or arose. The case referred to coffee grown in Mysore but dried and cured and sold in British India and the view of the High Court was that agricultural income arises as soon as the produce is received in kind and not necessarily when sold and converted into money, 1939 I.T.R. 48 (P.C.). The Privy Council suggested that no income

arose in this case in Mysore because the green coffee was grown for the purpose of sale, i.e., in British India. The business operations could not be cut into two portions arbitrarily but must be regarded as a whole. On the other hand, with reference to the question whether profits accrued in British India the fact that the coffee was grown in Mysore could not be disregarded, notwithstanding that it was sold in British India especially if it was sold without further processing of a manufacturing character. The Privy Council however did not think it necessary to decide whether the income arose within or outside British India, and disposed of the case on other grounds including the receipt of the income in British India.

Even if 'accrue' or 'arise' in British India be construed to mean to be earned or derived from sources in British India the problem is one of difficulty when the profits arise from activities partly in and partly outside British India. In this connection see the case of *Ramanathan Chetti* cited below 43 Mad 75, 1 ITC 37.

It has been held that in certain circumstances mere book keeping might result in the accrual of income in British India even though not received or receivable there, *A T K P L S P Subrahmaniam Chettiar's case*, 2 ITC 365, 50 Mad 765 (reaffirmed in *S V L L case*, 3 ITC 421) also *Kanwalnen Hamir Singh v Commissioners of Income tax U.P.*, 1938 ITR 675 (All). These rulings rest largely on the interpretation of section 13, though it is doubtful whether a rule of computation like section 13 can extend the ambit of taxability under section 4 (or 42).

The place where the sale is effected and the price realised is certainly the principal place, but is not necessarily the only place of the accrual of profits. Cases decided under section 42 (1) (as it stood before 1939) cannot be extended by analogy. Section 42 (1) created a special legal fiction in the circumstances specified therein. Not only is there no provision identifying the place of the accrual of income with the place where the goods are purchased but on the contrary section 42 (3) (as it stood then) indicated—either by a legal fiction or otherwise—that it is the place of sale and not the place of purchase which is the place of accrual of the profits. English cases furnish no guidance because of the difference in the scheme of the Acts. *Commissioners of Taxation v. Kirk*, (1900) A.C. 588 can be distinguished because in that case the business was admittedly carried on in New South Wales, whereas the mere purchase of goods for sale abroad does not amount to the exercise of a trade in the country of purchase, *Sully v. Attorney-General*, 2 Tax Cases 149. If the assessee did not himself purchase the goods in British India but asked his agent abroad to order the goods from British India, no part of the profits could be assigned to any process performed in British India. The same result would follow if the person exported his own goods, e.g., raw produce of his land for sale abroad, i.e., without purchasing them in British India. Also, if the mere purchase of goods in British India makes it the place of accrual of a part of the profits, the same result could be attributed to the passage of goods through British India in transit. It was held, therefore, that in the case of a resident who purchases goods in British India and exports them for sale abroad no part of the profits accrues or arises in British India. *Bhagat Jivandas and others v. Commissioner of Income-tax, Punjab*, 4 ITC 40.

While mere buying in British India cannot result in profits accruing in British India it is possible that a buying office or organisation or agencies in British India might be a 'source' of income in British India with reference to section 42 and a part of the income be deemed to accrue in British India, an apportionment being made under section 42 (3)

Where, however, an assessee bought sheep and goats in British India and sold them in Ceylon and the Commissioner ought to assess tax on (1) the notional profit arising out of the supervision of the assessee in British India and (2) an element of profit in *f.o.b.* prices, such profit not having been included in the Colombo books, the High Court held that in a simple case of purchase in India and abroad the profit can only arise at the point of sale, and that the profit can only be the difference between the cost of purchase and the sale proceeds *Sudulamani Nadar v Commissioner of Income tax, Madras* 1940 ITR 619

The arrangement in British India of sales and the receipt of money in British India constitute trading in British India even though acceptance of the contract may be outside British India *Tehri Case, Commissioner of Income tax v Tehri Gharwal State* AIR 1934 PC. 34, 66 MLJ 127, 1934 ITR 1 60 IA 1

The Pondicherry Railway Co constructed a railway line in French territory under an agreement with the French Government. The South Indian Railway Company worked the Pondicherry Railway as though it were an integral part of its own undertaking. The gross receipts of the whole system including the lines in French territory were paid into a Government Treasury within British India. The working expenses were allocated between the two systems in the same proportion as the gross earnings, the latter being shared on a certain arbitrary mileage basis. The net profits were paid in rupees to the Pondicherry Company every half-year subject to the sanction of the Secretary of State for India, and the Agent of the Pondicherry Company in India who was the same person as the Agent of the South Indian Railway Co., and had offices in the same building remitted the money to London by Bank drafts. In view of the fact that the profits though earned in French territory, were receivable in and actually paid in British India to the Pondicherry Company it was held (*Coults Trotter, C.J.* dissenting) that the profits were liable to British Indian Income tax and taxable through their Agent in British India 3 ITC 485. The company appealed and the Privy Council rejected the contention that the Agent was a mere animated 'Post office' and that the profits were really received only in London. In the first place the agreement required the South Indian Railway Company to pay the Pondicherry Company "in India in rupees", and in the second place if the Agent of the Pondicherry Company did not receive the profits in India on behalf of the Pondicherry Company he could not make over the sums due to the French Colonial Government. Following the *South Bihar Railway case* 12 Tax Cases 657, the Privy Council also held that the profits of the Pondicherry Company arose from business but left open the question where the business was carried on *Pondicherry Company Ltd v Commissioner of Income tax*, AIR. 1931 (PC) 164 5 ITC 363, 58 IA. 239, 54 Mad. 691

The question whether the 'guaranteed' interest payable outside British India to a Railway Company if it does not make enough profits in British India, arises in British India has not been decided but if the guarantee

is met out of the profits, such guaranteed interest is part of the profits and therefore arises in British India *M S M Railway v Commissioner of Income tax, Madras*, 1940 I T R. 280

An assessee was the proprietor of a money lending business carried on on his behalf in various places in Indo-China. The business was carried on by agents appointed for fixed periods, who used their own discretion in lending money to customers. The only part taken by the proprietor was to acquaint himself with the general trend of the business and occasionally to issue general instructions. The profits were not brought into India. Held that the profits were not hable as they did not accrue or arise in India.

Per *A Rahim, Offg C J* — "The tax is leviable with reference to the place where the income accrues or arises or is received and not with reference to the residence of the person who is entitled to the income. This seems to be the entire scheme of the Act. Whatever meaning be attached to the words 'accrue' or 'arise', or such as 'grows' or 'becomes due or payable', it is impossible to hold that the income in this case could be said to have accrued or arisen in British India. If loans are made and the borrowers reside outside British India and if accounts are adjusted the moneys lent are realised with profit or are capable of being realised and the profits are periodically ascertained and dealt with outside British India it is impossible to hold that the income of such business accrued or arose in British India."

A number of English decisions were discussed before us but it is unnecessary to deal with them in any detail, because the English Statute under consideration in those cases differs in many material respects from the Indian Act. In the English Statute the place of residence of a person is a basis of assessment but is not so as pointed out above in Act VII of 1918," *Commissioner of Income tax, Madras v Ramanathan Chettiar*, 43 Mad 75 53 I C. 976 1 I T C 37

If the degree of control from headquarters had been greater, perhaps the Court might have been prepared to hold that the profits accrued or arose in British India irrespective of the "residence" of the assessee. See *Ogilvie v Kilton* 5 Tax Cases 338 and *Egyptian Hotels v Mitchell*, 6 Tax Cases 542 (1915) A C 1022

A company with head office and control in British India had a press in an Indian State. The press levied a charge on persons bringing material to be pressed, and this was received wholly at the factory. The only receipt of money in British India was the remittance to the head office for expenditure. The dividends of the company were payable only at the factory. Held, that the income of the company did not arise, accrue nor was received in British India, nor could be deemed to accrue, arise or be received in British India within the meaning of section 3 (1) of the Income-tax Act, 1918 [corresponding to section 4 (2) of the present Act as it stood before 1939]

Per *C J* — "Even the small amounts received at the head office are not taxable." (*Obiter*)

Per *Coutts-Trotter, J* — "The same sum of money cannot be received qua income twice over, once outside British India and once inside it." *Board of Revenue v Ripon Press and Sugar Mills* 1 I T C. 202, 46 Mad. 706, A I R. 1923 Mad. 574.

The profits of a company which are derived from manufacture carried on beyond British India cannot be said to accrue or arise in British India merely on account of the head office being in British India. In re *The Jurgabad Mills* 1 ITC 119 45 Bom 1286.

If the local office of a foreign concern sends to its head office not orders but orders for execution business is carried on in British India even though payment may be made only to the head office. If moreover, stocks be kept locally and non resident principals visit British India at intervals to supervise the branches the conclusion is even clearer that business is carried on in British India. *Sri Hardo Bengal Salt Co v Commissioner of Income tax B & O*, 1942 ITR 13.

The pre-1939 rulings taken as a whole went more by the criterion of origin than by that of receivability and even in applying the former criterion concentrated on the essential links in the chain of profit earning operations and attached little importance to the place of control. Many of the decisions however have become obsolete in view of the radical change made in 1939 in section 4 and of the insertion of sections 4-A and 4-B but the place of accrual is still a matter of importance in the case of non residents and to some extent also of residents who are not ordinarily resident. But even so section 42 is so wide that cases not falling under section 4 can be caught under section 42.

Interest on Sterling Government Securities—The former official view was that such interest being payable outside British India did not accrue therein and was therefore not taxable. The question is not of much importance now because not only have such securities practically disappeared but in respect of non Government loans the amendment of section 12 deeming such interest to be income accruing in British India and also the prohibition in sections 8 9 10 and 12 against the deduction of interest payable outside British India have radically changed the position and all such interest is directly or indirectly made liable to tax.

It is a different matter however what is or is not chargeable under the Act and the decisions in the appeals before the Privy Council in the *Wallace and Raleigh Investments Cases* as to the extra territorial powers of the Indian Legislature may have some repercussions on the point.

Accrue—Arise—Difference between—Under the Indian law as it stands since 1918 it is immaterial whether or not there is any difference between the words accrue and arise but attempts have been made to distinguish them.

The word accrues seems to be the more appropriate word to be used in connection with a periodically recurring right to receive an income which is usually defined in amount while arises seems to be used more appropriately and frequently in connection with a business in which rights arise to receive income of a more fluctuating kind and at more uncertain intervals. per *Sadasiva Iyer J* in *Board of Revenue v Arunachalam* 14 Mad 65 1 ITC 75. Strictly speaking accrues should not be taken as synonymous with arise but in the distinct sense of growing up by way of addition or increase or as an accession or advantage while the word arises means comes into existence or notice or presents itself. The former connotes the idea of a growth or accumulation and the latter of the growth or accumulation with a tangible shape so as to be receivable. It is difficult to say that this distinction has been throughout maintained in the Act and perhaps the two words seem to denote the same idea or ideas.

very similar and the difference only lies in this that one is more appropriate than the other when applied to particular cases per *M N Mukerjee, J* in *Rogers Pyatt Shellac Co v Secretary of State*, 1 ITC 363

United Kingdom Law—The relevant parts of Schedule D are as below. The other Schedules (for which see notes under section 6) excepting to some extent Schedule F (which relates to public offices and annuities etc payable by the Crown or out of the public revenues) refer to sources of income in the United Kingdom

1 Tax shall be charged in respect of—

(a) The annual profits or gains arising or accruing

(i) to any person residing in the United Kingdom from any kind of property whatever whether situate in the United Kingdom or elsewhere, and

(ii) to any person residing in the United Kingdom from any trade profession employment or vocation whether the same be respectively carried on in the United Kingdom or elsewhere and

(iii) to any person whether a British subject or not although not resident in the United Kingdom from any property whatever in the United Kingdom or from any trade profession employment or vocation exercised within the United Kingdom and

(b) * * * *

2 Tax under this schedule shall be charged under the following cases respectively that is to say—

Case I—Tax in respect of any trade not contained in any other schedule

Case II—Tax in respect of any profession employment or vocation not contained in any other schedule

* * * *

Case IV—Tax in respect of income arising from securities out of the United Kingdom except such income as is charged under Schedule C,

Case V—Tax in respect of income arising from possessions out of the United Kingdom

RULES

Case I—The tax shall extend to every trade carried on in the United Kingdom or elsewhere.

Case II—The tax shall extend to every employment by retainer in any character whatever and to all profits and earnings of whatever value arising from employments

* * * *

Case IV—1 The tax shall be computed on the full amount arising in the year of assessment whether the income has been or will be received in the United Kingdom or not

2. The foregoing rule shall not apply—

(a) to any person who satisfies the Commissioners of Inland Revenue that he is not domiciled in the United Kingdom or that being a British subject he is not ordinarily resident in the United Kingdom

Case V—1 The tax in respect of income from stocks shares or rents whether the income has been or will be received in the United Kingdom etc

2 The tax in respect of income from possessions other than stocks shares or rents shall be computed on the full amount of the actual sums annually received in the United Kingdom from remittances payable in the United Kingdom or from property imported or from money or value so received on credit or on account in respect of such remittances property money or value brought or to be brought into the United Kingdom etc

The English law as will be seen gives rise to various problems. First of all is a person whether an individual or a corporate body a *resident*? If so a minor question which however is a major question under the new section in the Indian Act is he *ordinarily resident*? Next how are we to distinguish between the following classes of trade trade wholly carried on in the United Kingdom trade carried on partly in the United Kingdom and partly outside and trade carried on wholly outside in circumstances making it a foreign possession? Then in what circumstances can trade be said to be carried on or exercised in the United Kingdom? What are securities as distinguished from shares etc. and so forth

There is no definition either of residence or of 'ordinary residence' in the United Kingdom Income tax Acts and the difficulty has generally been in respect of incorporated persons that is companies and the Courts have held [the *De Beers* Group of cases 5 Tax Cases 198 (1906) A C 455] that a company resides where its head and seat and directing power reside and that it can so reside in more places than one. Ordinary residence has been considered to be a question of fact

As regards trade carried on partly in and partly out of the United Kingdom it is a matter of importance whether the business can be separated into two so that the income from the trade outside can be taxed only on the part brought into the United Kingdom. There is a large group of cases dealing with this problem—*The London Bank of Mexico* 3 Tax Cases 143 (1891) 2 Q B 378 and other cases of the same type *infra*. This particular problem has been and still is of little importance under the Indian Law except in respect of Excess Profits Tax and to a lesser extent and indirectly in the application of section 14 (2) (c) in respect of income accruing in Indian States

When a trade is exercised in the United Kingdom the question has been of importance in catching foreigners trading in the United Kingdom. This is a difficult question with a large number of rulings dealing with it—*Sulley v Attorney General* 2 Tax Cases 149 and other cases in that group *infra*

None of these cases has any direct bearing on the Indian Law but some of them help in throwing a little though remote and indirect light on certain aspects of some of the problems that arise under the Indian Law

Colonial cases—Under the New South Wales Income tax Act, 1899 under which income (1) arising or accruing to any person wheresoever residing from any profession trade etc. carried on in New South Wales or (3) derived from lands of the Crown held under lease or

(4) arising or accruing to any person wherever residing from any land of property or from any other source whatever in New South Wales was taxable it was held in the case of a mining company that won

and refined the ore in New South Wales but sold the product in England, that the profits accrued from business in the New South Wales.

'The word trade' no doubt primarily means traffic by way of sale or exchange or commercial dealing but may have a larger meaning so as to include manufacture. But if you confine trade to its literal meaning one may ask why is not this income derived (mediately or immediately) from lands of the Crown held on lease under section 15 sub-section (3) or from some other source in New South Wales under sub-section (4). Their Lordships attach no special meaning to the word derived, which they treat as synonymous with arising or accruing. It appears to their Lordships that there are four processes in the earning or production of this income—(1) the extraction of the ore from the soil (2) the conversion of the crude ore into a merchantable product, which is a manufacturing process (3) the sale of the merchantable product (4) the receipt of the moneys arising from the sale. All these processes are necessary stages which terminate in money and the income is the money resulting less the expenses attendant on all the stages. The first process seems to their Lordships clearly within sub-section (3), and the second or manufacturing process, if not within the meaning of trade in sub-section (1), is certainly included in the words 'any other source whatever' in sub-section (4).

So far as it relates to these two processes therefore their Lordships think that the income was earned and arising and accruing in New South Wales.

The fallacy of the judgment of the Supreme Court in this and in *Tindal's Case*, 18 NSWLR 378 is in leaving out of sight the initial stages and fastening their attention exclusively on the final stage in the production of the income. The learned Judges refer to some English decisions on the Income tax Acts of this country (United Kingdom), which in language and to some extent in aim differ from the Acts now before their Lordships. The language used in the English judgments must of course be understood with reference to the cases then under consideration. *Commissioners of Taxation v Kirk* (1900) A C 588.

A company carried on business in London as commission agents for provisions. It had a salaried employee in New Zealand who had no other business. Every year another servant of the company also went to New Zealand to arrange for the business. The business was as below. The produce was consigned to the London company directly by the consignors, who were local dairies. Against these consignments the dairies were granted advances through credits in New Zealand banks, opened by the London company. The London company however, acted only as commission agents, the unsold surplus being returned to the dairies in New Zealand and the sale proceeds less commission and expenses being made over to them. Held, that the profits of the company were actually made in London and that the earlier transactions in New Zealand were insufficient to make the profits taxable as profits derived from business carried on in New Zealand. The relevant expression in the New Zealand Act was 'derived from business carried on in New Zealand'.

'One rule is easily deducible from the decided cases. The trade or business in question in such cases ordinarily consists in making certain clauses of contracts and in carrying those contracts into operation with

a view to profit, and the rule seems to be that where such contracts, forming as they do the essence of the business or trade, are habitually made, there a trade or business is carried on within the meaning of the Income tax Acts, so as to render the profits liable to income-tax. But the decisions do not seem to furnish authority for going further back, for the purpose of taxation, than the business from which profits are directly derived, and the contracts which form the essence of that business," *Lowell and Christmas v Commissioner of Taxes*, (1908) A C 46, 52, a New Zealand case, following, *Sulley v. Attorney General* (1865) 2 Tax Cases 149, 5 H and N 711 and *Grainger v Gough*, 3 Tax Cases 426, (1896) A C 325 (H L) and distinguishing, *Erichsen v Last*, 4 Tax Cases 422, 8 Q B D 414

A company with its head office in London owned submarine cables and did business—international telegraphy—in New Zealand, Australia and elsewhere. In New Zealand the telegraph lines belong to the Government who alone can use the lines. The Government received messages from the public together with the entire charge (5s 2d a word) and sent the message on to the nearest station of the company, after deducting a penny a word, being the Government's share of the message fee. It was claimed by the New Zealand Government that the profits in respect of the telegrams were taxable even though the profits did not relate to the company's cables in New Zealand (the profits in question related to the lines from Port Darwin in Australia to Madras) nor were received by the company in New Zealand. *Held*, that the profits from the telegrams from Port Darwin to Madras were not taxable as there was no contractual obligation on the part of the New Zealand Government to receive messages on behalf of the company and send them to their ultimate destination. The profits therefore were not received by the company in New Zealand either by themselves or by agents nor were the cables from which the profits in question were derived within New Zealand. There was no dispute as to the liability of the profits from the company's lines between New Zealand and the adjacent colonies, *Commissioners of Taxes v Eastern Extension etc., Telegraph Company*, (1906) A.C. 526

An association was formed under arrangements between the British and Australasian Governments to realise the value of surplus wool bought during the Great War. The trading operations of the association were entirely outside Victoria (the State which sought to levy tax) and the profits were held not to accrue or arise in Victoria, *Commissioner of Taxes v British Australasian Wool Realisation Association*, 9 A.T.C. 449 (P.C.)

Cases in the United Kingdom—An American firm which had its principal business in New York had a branch in England where one of the partners purchased finished goods for exportation to America where the goods were sold. *Held*, that the firm did not exercise a trade in the United Kingdom

"Wherever a merchant is established in the course of his operations his dealings must extend over various places, he buys in one place and sells in another. But he has one principal place in which he may be said to trade, viz., where his profits come home to him. That is where he exercises his trade. It would be very inconvenient if this were otherwise. If a man were liable to income tax in every country in which his agents are established, it would lead to great injustice," per *Cockburn, C.J.*—*Sulley v Attorney General*, 2 Tax Cases 149

A Danish Company had marine cables communicating with the Government telegraph lines in the United Kingdom. The company had work rooms in the United Kingdom. Telegraph messages from the United Kingdom were sent over the Government lines and thence through the company's cables to other countries. The United Kingdom Post Office under an agreement collected the message fees and paid the company the fees after retaining what was due to the Post Office. The company made no profits from the land lines in the United Kingdom. *Held* that the company exercised a trade in the United Kingdom.

Whatever the word exercised may mean it certainly includes carrying on and therefore carrying on trade is within that word.

I think a carrier who simply regularly undertakes the carriage of goods abroad for money paid in this country as part of his ordinary business would be carrying on trade in this country although the whole of the carriage was done abroad.—*Per Jessel, M R*

"I think it would in the first place be nearly impossible and in the second place wholly unwise to attempt to give an exhaustive definition of what is a trade exercised in this country. The only thing that we have to decide is whether upon the facts of this case this company carry on a profit earning trade in this country. I should say that whenever profitable contracts are habitually made in England by or for foreigners with persons in England because they are in England to do something for or supply something to those persons such persons are exercising a profitable trade in England even though every thing to be done by them in order to fulfil the contracts is done abroad."—*Per Brett L J* (quoted with approval by Lord Herschell in *Grainger v Gough* 3 Tax Cases 462)

Whenever a foreigner either by himself or through a representative in this country habitually, does and contracts to do a thing capable of producing profit and for the purpose of producing profit he carries on a trade or business. *Per Cotton L J* (quoted with approval by Lord Watson in *Grainger v Gough* 3 Tax Cases 462) *Erichsen v Last* (1881) 4 Tax Cases 422 8 Q B D 414

A firm of wine merchants resided and carried on business in France. The senior partner visited England every year for about 4 months when he saw customers and took orders from English merchants. A London firm acted as agents for the French firm. A room was provided in the office of the London firm for the use of the French firm's senior partner for which the latter paid rent. The French firm's name was painted on the premises and the firm had its own clerk. The wine ordered and sold was shipped from France and the bills of lading and invoices were sent therefrom sometimes to the English agents and sometimes direct to the purchasers. The English agents collected the monies and did such business as was not done by the senior partner during his annual visit. The English firm received a commission and not salary. The commission not only covered the expenses of the agents but a guarantee for debts. *Held* that the French firm exercised a trade in the United Kingdom. *Tischler v Aphorpe* 2 Tax Cases 89

A company incorporated in Norway had its registered office there in which the share list and books were kept and the shareholders meetings held. There were two Managers both in Norway. The company owned a ship the chartering of which was arranged by a Glasgow firm who received all voyage receipts and made all disbursements, retaining all

An English firm acted as agents to a New York company. The agents submitted all orders to the principal who rejected orders as they liked, and the agents accepted the orders only after obtaining the principal's authority. Goods were shipped *for* Boston and consigned to the agents at Liverpool who distributed the goods to the customers. Most of the sale proceeds was collected by the agents and subsequently remitted to Boston by drafts. In some cases, customers forwarded their acceptances direct to the principals. *Held*, that the contracts for, as well as the delivery of the goods were made in the United Kingdom.

Per Wills, J—“Even if the contract had been made in New York an executory contract for sale, a man cannot get his money and can make nothing out of it unless he delivers the goods in this country, when he does deliver the goods in this country, he exercises a trade and carries on a business.” *Thomas Turner v Rickman*, 4 Tax Cases 25.

A Glasgow firm were sole agents in the United Kingdom for a French company with phosphate mines in Algeria. Contracts were entered into by the agents on their own authority subject to minimum prices fixed by the principals. There was no stock in the United Kingdom. The agents appointed sub-agents all over the United Kingdom but subject to the company's approval. Delivery of goods was outside the United Kingdom. The contract required price to be paid by cash in London but in practice crossed cheques were received, sometimes in favour of the agents and sometimes in that of the company. No cheques were cashed by the agents, and all were sent to France. The company had no banking accounts in the United Kingdom. The agents were remunerated by a commission. *Held*, (1) (Lord Dundas dissenting) that the company did not exercise a trade in the United Kingdom and (2) that the agents were not in “receipt of any profits” of the principal, *Crookston Bros v Furtada*, 5 Tax Cases 602. But this decision has been overruled in *Wilcock v Pinto & Co*, 9 Tax Cases 111 131 (1925) 1 KB 30.

“The decision in *Crookston's Case*, may probably be supported for the second reason given by the Court, *viz*, that the profits there in question had not been received by the agents, but on the question first discussed namely, as to the place where the trade was carried on, I think that the reasoning of Lord Dundas is to be preferred to that of the other members of the Court.”—*Per Lord Chancellor Cave in MacLaine & Co v Eccott*, 10 Tax Cases 481 (1926) AC 421.

“It humbly appears to me that the judgment of the majority of the learned Lords of the second division (in *Crookston's Case*) was erroneous. I think that the weight of authority upon the subject in England was much too lightly treated.”—*Per Lord Shaw, ibid*.

A Belgian firm had agents in the United Kingdom for the sale of their yarn. After obtaining the approval of the principals in each case the agents entered into contracts in the United Kingdom on behalf of the firm. The goods were sent to the agents who distributed them to the purchasers and received payment and gave final receipts. Monthly account sales were sent to Belgium and also quarterly accounts for expenses and commission. The agents received commission on business done but were liable for half the bad debts. *Held*, that the Belgian firm exercised a trade in the United Kingdom, *Macpherson & Co v Moore*, 6 Tax Cases 107, (1912) Sess. Cas 1315.

The Industrial Bank of Japan which had no office in the United Kingdom floated loans in the United Kingdom, subscriptions to which were received by three Banks in England. The Yokohama Specie Bank collected these amounts (less commission, etc.) and remitted them to Japan or made them over to the Japanese Government's account in London. The loans were floated with the consent of the Japanese Government whose consent was necessary to the Industrial Bank undertaking business outside Japan. The Yokohama Bank from time to time acted as agents in the United Kingdom for the Industrial Bank but had no general agency power. It was held that the Industrial Bank did not carry on a business in the United Kingdom, *Yokohama Specie Bank, Ltd v Williams*, (1915) 6 Tax Cases 634, per *Rowlatt, J*—"A man does not carry on business here because he employs a solicitor to act for him as his agent here. But the judgment was overruled by the Court of Appeal *MacLaine v Eccott* 10 Tax Cases 481, on the ground that the Tokio Bank exercised, through an agent, the trade of floating loans in the United Kingdom.

The sole selling agents in the United Kingdom of a Dutch company making incandescent mantles were to sell the mantles at the best possible prices but to keep a day book of sales open to the inspection of the company at all times. The company sold the goods to the agents at cost price plus 10 per cent. The agents were to get 5 per cent commission for expenses and *del credere*, and the profits were to be divided. Neither party bore the loss of the other. The name of the company was not shown on the invoices but appeared on the brass plates of the agents' premises though there was no clear authority for it. *Held*, (1) that there was evidence on which the Commissioners could find that the Dutch company carried on a trade in the United Kingdom, (2) that the English firm were agents in receipt of profits of the Dutch company, *Weiss, Biheller & Brooks, Ltd v Farmer*, 8 Tax Cases 381 (C. of A.), (1923) 1 K B 226.

The *ratio decidendi* in this case was that though the absence of privity of contract between the foreign principal and the local purchaser, and the property in the goods having passed to the local agent were important features, yet it did not prevent the foreign principal being considered to 'exercise a trade' through the agent. A man may act through an agent even though the acts of the agent do not bind the principal, and it is not unusual for agents to obtain special property in goods secured by advances made to principals.

A Danish firm carried on business at Copenhagen as manufacturers of and dealers in machinery. There were two partners both of Danish nationality and both resident in Denmark. The firm had an office in London in charge of an employee who ascertained the requirements of the customers, inspected the sites of the proposed installations and generally superintended the installation of the machinery when sold. Contracts were arranged for and made directly from Denmark whence the goods were consigned *f o b*. During the war the firm purchased parts of machinery in England and used them for repairs or for new installations, and it was conceded by them that the profit from the re-sale of the goods purchased in England was liable to tax. *Held*, that (except as regards the goods bought and re sold in the United Kingdom) the evidence before the Commissioners did not justify the conclusion that the firm exercised a trade in the United Kingdom within the meaning of the Income-tax Act.

Per *V R Sterndale*—"I doubt if it is possible, and in my case I do not think that it is necessary, to lay down an exact definition of what constitutes such an exercise of trade."

Per *Itkin LJ* — There are indications in the case cited [*Grainger v Gough* (1896) A.C. 325 3 Tax Cases 462] and other cases that it is sufficient to consider only where it is that the sale contracts are made which result in a profit. It is obviously a very important element in the enquiry. But I am not prepared to hold that this test is decisive. I can imagine cases where the contract of re-sale is made abroad and yet the manufacture of the goods some negotiation of the terms and complete execution of the contract take place here under such circumstances that the trade was in truth exercised here. I think that the question is where do the operations take place from which the profits in substance arise? (approved by the H of L.)
Smidth & Co v Greenwood 8 Tax Cases 193 (1922) 1 A.C. 417 (H.L.)

A firm of cotton merchants in Egypt appointed an agent in Manchester for the sale of their cotton. He was not described as the sole agent. As a matter of fact the agent carried on no other business but he was at liberty to do so. From time to time he received from the principal firm authority to sell specified quantities of cotton on terms fixed by the principals on each occasion. He also obtained offers locally which he referred to the principals for acceptance or rejection. In either event the contract was concluded by the agent in England. No stocks were kept by the agent and the goods were shipped directly by the principals *via* in Alexandria and the invoices sent by them direct to the purchasers. The bills of lading were sent to the purchasers through the ordinary commercial and banking channels *via* in exchange for acceptances of bills drawn by the principals and discounted in Alexandria. The agent at Manchester was in no way concerned with the payment for the goods nor responsible for bad debts. His remuneration consisted of a commission on sales out of which he met his own expenses. *Held* that the Egyptian firm were exercising a trade within the United Kingdom and were properly assessed in respect of the profits of that trade in the name of their Manchester agent who was an authorised person carrying on their regular agency.
Wilcock v Pinto & Company 9 Tax Cases 111 (1925) 1 K.B. 30

In a case in which (1) the local agent received offers and communicated them to the foreign principal for acceptance and the acceptance was communicated to the agent who passed it on to the local customer and made out and delivered Bought and Sold Notes and (2) the agent also received consignment business and sold by auction for commission the agent meeting bad debts out of his pocket it was *held* that (1) the communication of the agent to the customer constituted the acceptance of the contract which was therefore made in the United Kingdom and (2) that the agent was a regular agent in respect of the consignment business.
Rosson v Stephen 8 A.T.C. 141 14 Tax Cases 543

It does not follow that if you find a contract made abroad there is necessarily no trade exercised in England. You may have in the subject matter of the contract work to be carried out in England by the foreign manufacturer and the foreign manufacturer may carry out all the work in England and receive payment in England. These questions therefore *viz* where the work is done or goods delivered and where payment is made are also of importance. See per *Scrutton LJ* in *Belfour v Mace* 13 Tax Cases 539 7 A.T.C. 6 133 L.T. 383

Assessee were agents in England acting for Danish steamers. Goods for shipment were brought in by consignors direct to the quay and the

agents put them on board. The agents arranged for the berthing of the steamers loading and unloading them, clearing through Customs, bunkering coal, and collecting freights. The agents were responsible to the Danish shipowners for freight. The agents' clerk signed bills of lading for the Master. The agents were remunerated by commission. *Held*, that the Danish owners exercised a trade in the United Kingdom through the agents, *Neilson, Anderson & Co v Collins and Tarn v Scanlan* 13 Tax Cases 13, (1928) A C 34.

An English manufacturer was appointed as agent by a French patent owner to manufacture and sell machinery in certain parts of the British Empire on condition that while the selling price was to be fixed by the English agent, his manufacturing costs together with his overheads and profits were not to exceed a certain fraction of the sale proceeds. The question arose whether the payments made by the English agent to the French patent-owner were taxable and it was held (by *Roulatt, J*) that the source of income of the French patent-owner was the agency in the United Kingdom. The fact that the contract of agency had been made outside the United Kingdom was not considered material, *International Combustion Co Ltd v Commissioners of Inland Revenue* 16 Tax Cases 532.

Contracts between non-residents—Per the *Master of Rolls* “

profits on contracts made here (in the United Kingdom) for the shipment of goods from this country, whether the vendor has sold *for* or *on* behalf, by residents here or by non residents—if the proceeds are received here by the agent—are taxable. Profits on contracts made here for the shipment of goods from Rotterdam to residents in the United Kingdom are liable. Profits on contracts for shipment of goods from Rotterdam to this country made between non residents are not within the charge unless the profits thereof are received in this country, *Muller, Ltd v Lethem*, 13 Tax Cases 126 (1928) A C 34.

See notes under section 42 as to the difference between the Indian and the United Kingdom law in this respect.

'Exercise a trade' and 'carry on business'—Difference between—

“The words ‘exercise a trade within the United Kingdom’ have no technical meaning and have been said by more than one learned Judge to be synonymous with ‘carry on business’”—Per *Lord Salvesen* in *Crookston Bros v Furtado*, 5 Tax Cases 602, (1911) Sess Cas 217.

On the other hand, “The question is whether the profits brought into charge are ‘profits arising or accruing’ to the respondents ‘from any trade exercised within the United Kingdom’ within the meaning of Schedule D of the Income tax Act, 1853. The question is not whether the respondents carry on business in this country. It is whether they exercise a trade in this country so that profits accrue to them from the trade so exercised”—Per *Atkin, L J*, in *Sinidh & Co v Greenwood*, 8 Tax Cases 193 (1922) 1 A C 417.

If it is meant by this that without actually carrying on business in the country it is possible for the non-resident to exercise a trade in the country so that profits accrue to him from the trade so exercised, the difference is similar to that between “business” used in section 10 of the Indian Act and “business connection” in section 12 of the same Act, if, on the other hand it is meant that even though a person may carry on business (which is a wider term than ‘trade’) in the country, it might be that he is not exercising a trade from which profits accrue to him; section 42 of the Indian Act which refers

to business connection' brings within the ambit of taxation a wider area of income than the United Kingdom Acts

Press articles by non-residents—The mere publication in the press in the United Kingdom of articles written abroad by a non resident—though written for the British Press and necessitating the visit of the non resident to the United Kingdom to collect materials for the articles—has been held not to attract British income tax, *Farrand v Satterthwaite*, 8 A T C. 85 14 Tax Cases 469

Business abroad—Whether separable from business within the country—As already pointed out it is a matter of importance under the English law whether the business of a resident which is carried on outside is separable from that carried on in England. In the case of a bank which had its headquarters in London and branches in Mexico and Lima, and the London office did not receive current banking accounts but merely did the London business of the branches it was held that the bank does not carry on two businesses. They have only one business which they carry on in England. It is true that part of the profits of that business carried on in England is earned by means of transactions abroad but that is not carrying on the business abroad, it is carrying on the business in England by means of some transactions of it which are carried on abroad per *M R Esher* in *London Bank of Mexico v Apthorpe* 3 Tax Cases 143. In *De Beers v Hallett* 3 Tax Cases 198 it was held that the business of the company was one business namely first to dig for diamonds in Africa and then to secure the sale of them on the London market—Per *Mather* 1 J (affirmed by the House of Lords). In *Colquhoun v Brooks* 2 Tax Cases 490 it was held that the residence in England of a sleeping partner of a firm whose activities were wholly in Australia did not result in the firm carrying on a part of the trade in the United Kingdom merely because the sleeping partner resided in England. In *Dea Hotel v Andrews* 3 Tax Cases 376 it was held that an English company which owned a hotel in the United States and had it run by a manager under the orders of the directors in England carried on a single business the entire profits of which were taxable in England irrespective of their not having been remitted to England. Somewhat similar cases are *Grove v Elliot and Parkinson* 3 Tax Cases 481 *Frank Jones Brewing Company v Apthorpe* 4 Tax Cases 6 *United States Brewing Company v Apthorpe* 4 Tax Cases 17 *St Louis Breweries v Apthorpe* 4 Tax Cases 111 *Apthorpe v Peter Schoenhofen Brewing Company*, 4 Tax Cases 41 and in all these cases the tendency was to emphasize the principle that it was wholly a question of fact where a trade was carried on.

On the other hand in *Kodak v Clark* 4 Tax Cases 549 (1903) 1 K B 505 an English company carrying on business in the United Kingdom acquired 98 per cent of the shares in an American company and thus obtained a predominant position in controlling the American company. The remaining two per cent of the shares were held by independent persons. The English company had no power—nor had it attempted—to exercise any control except as a dominating shareholder. Held that the foreign company was not carried on by nor was it the agent of the English company. The profits of the American company were therefore not taxable except when brought to the United Kingdom. Again in *Stankov v Gramophone and Typewriter* 5 Tax Cases 358 in which all the shares of a German company were held by an English company and the Commissioners found that the English company controlled the German company it was

held that the possession of all the shares, in itself, was not enough for the purpose of holding that the business of the German company was the business of the English company

The pendulum however swung the other way again in *Ogilvie v Kitton*, 5 Tax Cases 338 in which the sole owner of a business in Canada resided in Aberdeen, and the business was carried on by paid managers in Canada who sent weekly reports, and the owner alone was entitled to the profits and liable for losses. It was held in this case that the business was carried on in the United Kingdom

Per Lord Stormouth Darling — "It is a matter of power and right, and not of actual exercise of a right or power. Not a single instance has occurred in which he has as a matter of fact attempted to exercise this control or to give directions even about the smallest detail. Yet the right of control is there all the time and it might be exercised any moment. It is a matter, it seems to me, of power and right and not of the actual exercise of the right or power."

This dictum, however, was qualified in *Egyptian Hotels v Mitchell*, 6 Tax Cases 542 (1915) A.C. 1022. In that case a company registered and domiciled in England and carrying on the business of hotel proprietors owned hotels in Egypt. The Egyptian business was carried on by a local board which met in Egypt. The local board had all the powers necessary for carrying on the Egyptian business and was wholly independent of any other board. Only general meetings of the company held in Egypt could bind the local board or affect the Egyptian business. The local board retained the profits in Egypt and remitted such sums to England as were necessary to pay dividends and expenses in the United Kingdom. The London board kept the accounts and recommended dividends, which were declared by general meetings of shareholders in England. The directors met only in the United Kingdom and looked after the general control of the company including its general financial affairs. The Commissioners found that the real control of the business was in England and *Horridge, J.* took the same view. But the Court of Appeal held the contrary, and opinion being equally divided in the House of Lords the decision of the Court of Appeal was confirmed. Extracts are given below from the judgments of Lord Parker and Lord Sumner who agreed with the Court of Appeal —

Per Lord Parker — "The important point, therefore, was not whether he had power to interfere with the trade or business, but whether he had so, in fact, interfered during the period for which the Crown alleged that he was assessable under Case I. The trade or business we have to consider is a trade or business from which profits or gains can arise, and not the trade or business of disposing of and dividing such profits and gains when they have arisen, and I can see no reason why a corporation, any less than an individual, should not be engaged in more than one trade or business at the same time. It may well be possible that the board of directors of the company still retain powers by virtue of which they could, if occasion arises, so interfere with the company's business in Egypt that such business would cease to be carried on wholly outside this country but, as I have already pointed out, it is not what they have power to do but what they have actually done, which is of importance for determining the question which now arises for decision."

Per *Lord Sumner* — The question is whether the profits are wholly or partly earned from a business wholly or partly carried on in the United Kingdom. If he takes a part at home in earning the profits, its importance relatively to that taken by his agents abroad does not matter, nor does the liability to be charged under Case I depend on active interference. Control exercised here over business operations abroad, though they are far greater in volume or magnitude, will suffice for Case I, *San Paulo (Brazilian) Railway Co v Carter*, (1896) A.C. 31, 3 Tax Cases 407. So, too, will mere oversight regularly exercised, even though actual intervention never becomes necessary, everything abroad going smoothly without it, *Ogilvie v Kilton*, (1908) S.C. 1003, 5 Tax Cases 338. Some actual participation in carrying on the trade is necessary, though it may not go beyond passive oversight and tacit control. It is not enough that the proprietor merely has the legal right to intervene, otherwise *Colquhoun v Brooks*, 2 Tax Cases 490 would have been otherwise decided, for there the respondent was entitled to intervene at any time, though in fact he never did so but took his share of the profits just as they happened to be earned by those in control abroad. I am of opinion that what the board of directors actually did, fell short of taking any part in or exercising any control over the carrying on of the business in Egypt, and that where the directors forbore to exercise their powers, the bare possession of those powers was not equivalent to taking part in or controlling the trading. To say that part of a company's business is to pay dividends, if it has earned them, seems to me to be a play upon words."

An English company owned certain mines in Bolivia. The management was delegated to a Local Board in Bolivia the object evidently being to get the advantage of the decision of the House of Lords in the *Egyptian Hotels case*. An assessment was made on the Local Board in the name of a firm who were the agents in London of the company. Later on, another assessment was made under Case I upon the company itself. *Held* by the House of Lords that (1) the assessment upon the firm was bad and (2) the assessment on the company was good. It was admitted that the company was resident in England and it was found as a fact by the Commissioners that the trade was at all events partly carried on in England during the period of assessment. The assessment on the company was therefore good. The assessment on the firm was, however, bad because in the first place, the Local Board in Bolivia had no separate corporate existence and were merely the agents in Bolivia of the English company, also the agents in England were agents not of the Local Board but of the principal of the Local Board *viz* the appellant company itself. Besides when the company itself had a residence in England, the Commissioners had no right to tax either the Bolivian Board or the agents of the company, *Aramayo Francke Mines, Ltd v Eccott*, 4 A.T.C. 261, 9 Tax Cases 445 (1925) A.C. 634.

In *Noble v Mitchell*, 11 Tax Cases 372 the French business of a company incorporated in England was managed by a Resident Director in France, who derived his authority from a power of attorney from the Board of Directors in England. He was not bound to attend the Board meetings in England but occasionally did so. He also submitted reports at times to his colleagues. The French profits were not remitted to England but included in the accounts there. *Held*, that the control was exercised from

England The *Egyptian Hotels' case* was distinguished on the ground that in it the Egyptian Board derived powers from the Articles of the company while in this case the power was derived from a power of attorney from the English Board

A manufacturer's representative abroad worked on a commission basis paying his expenses out of his pocket He had individual agreements with each of his principals (manufacturers) and visited the United Kingdom every year where he resided with his family in his wife's house The family lived in England throughout The Commissioners held that the trade or vocation was carried on partly in the United Kingdom and *Rowlatt, J.*, declined to interfere, *Spicer v Mackinnon*, 8 A T C 197 14 Tax Cases 386

Simple debts—The locality of a simple contract debt is the place where the debtor is to be found, *English, Scottish and Australian Bank v Commissioners of Inland Revenue*, (1932) A C 238 Viscount B borrowed some money from Earl K on the security of property in Kenya and interest was payable in Kenya The agreement was made in England Viscount B was ordinarily resident in Kenya but sometimes also in the United Kingdom while Earl K resided in Kenya only Viscount B died and his executors who resided in the United Kingdom paid interest to Earl K in London through a London Bank to be credited to Earl K's account at Nairobi It was held that interest was taxable as it has paid out of a source in the United Kingdom (by debtors resident there), *Commissioners of Inland Revenue v Executors, of Viscount Broome*, 19 Tax Cases 667, 14 A T C 320

In the absence of a contract to the contrary interest due to a bank on an overdraft at a branch may be paid at the head office, for the debtor can pay the creditor where the latter resides Therefore, if such interest is in fact paid at the head office, it is 'payable' there The fact that cheques on a branch can only be paid locally makes no difference, *Maude v Inland Revenue*, 19 A T C 29 (K.B.D.)

Agricultural income remitted from Indian States—The second proviso under sub section (2) as it stood between 1933 and 1939 gave rise to difference of opinion between the Calcutta and Madras High Courts, In *re Mohanpura Tea Co., Ltd.*, (1937) I T R. 118, *Commissioner of Income tax, Madras v Mathias*, (1937) I T R. 435 The Privy Council overruled the Madras High Court and interpreted the proviso to mean that the widening of the liability of residents under sub-section (2) in respect of income accruing outside British India and later on brought into British India does not attach to the income mentioned in the proviso *Commissioner of Income tax v Mathias*, (1939) I T R. 48 (P.C.)

Material date of residence—With reference to the old sub-section (2) it was held that the material date of residence for the purpose of the sub section was the date on which the profits in question accrued or arose without British India it was not necessary that there should be residence on the date on which the profits were brought into British India *Commissioner of Income-tax, Madras v Karupiah Kangani*, 3 I T C 282, A I R. 1929 Mad 351 This decision must now be considered to be obsolete.

Remittances from abroad.—The law as amended in 1939 seeks to tax all foreign profits (not already taxed) that first arose on or after 1st April, 1933 when brought into British India. Before 1939, when a resident was not taxed on the basis of his world income and even now

(i.e., since 1943), in respect of income arising in Indian States, it is a matter of importance whether a particular transaction constitutes bringing in foreign profits into British India. There has therefore been considerable litigation on the subject.

In *Narasammal v Secretary of State*, 1 ITC 10, the Madras High Court held that annuities received through an agent in Mysore and then remitted to the assessee in British India were taxable under the Act of 1886, which contained no specific provision regarding remittances from foreign profits. The *ratio decidendi* was that 'income' means 'what comes in—a definition which will clearly embrace sums derived from a source like this and it is incontestable that in this case these sums were 'received in British India'". This view, however, was abandoned in later cases *Board of Revenue v Ripon Mills*, 46 M 706, 1 ITC 202, *Sundar Das' Case*, 1 ITC 189 and *Sir Ali Imam's Case*, 1 ITC 402, on the ground that money could not be received twice over by or on behalf of the same person as income.

The Act (the 1918 Act) contains no definition of the word 'receive' or 'received', but in Murray's Oxford Dictionary the expression 'receive' is defined as 'to take in one's hand or into one's possession (something held out or offered by another) to take delivery of (a thing) from another, either for oneself or for a third party'. In the Imperial Dictionary the same expression is defined as 'to get or obtain, to take as a thing offered, given, sent, committed, paid communicated or the like, to accept'. It seems to me that the word 'receive' implies two persons, namely, the person who receives and the person from whom he receives. A person cannot receive a thing from himself", per *Shadilal, C.J.*, in *Sundardas v. Collector of Gujrat*, 1 ITC 189, 3 Lah 345.

The amendment of the law in 1922 so as to cover income received abroad and brought into British India did not help the Crown in *Sir Ali Imam's case*, 1 ITC 402, since the income in that case was not profits and gains of a business to which alone section 4 (2) as it stood at the time applied. In another case the Amir of Bokhara entrusted the assessee, a trader of that place and two servants of his own, with valuable furs for sale in Europe. After selling them and depositing the money in a Bank in England the assessee returned to India and found that Bokhara was under the Bolsheviks and the Amir a refugee in Kabul. The assessee settled down in Peshawar permanently. The Amir sued the assessee and the two servants in the Peshawar Civil Court for the sale proceeds of the furs, and by a compromise decree the assessee was given a commission. The assessee claimed that the money had already been received in England and deposited in the Bank there, and that the receipt of commission was a second receipt of the same sum and therefore not taxable. Held, that in the absence of any authority given to him to appropriate a part of the sale proceeds towards his commission he was not the owner but the trustee of the money until the compromise decree, and that the commission was therefore received by him for the first time after the decree and therefore taxable under section 4 (2) as it stood there. *Tora Gud Bai v Commissioner of Income tax*, 8 Lah 335, AIR. 1927 Lah 512, 102 IC 298.

As to receipts in kind forming part of income, see notes under section 13.

In respect of a remittance from abroad, it is for the assessee to prove that the remittance was capital and not income, and in the event of his failure to discharge this onus the presumption would apparently be that so long as the capital in the foreign branch is not depleted all remittances are of profits. See *Schulze v Benstead*, 8 Tax Cases 259, *Scottish Provident Institution v Allan*, 4 Tax Cases 591, *Murugappa Chetty v Commissioner of Income tax*, 2 ITC 139, *Commissioner of Income tax, Madras v Nedungadi Bank*, 49 Mad 910, *Chunnilal Nathmul v Commissioner of Income tax, CP*, 5 ITC 221, *S A Subbiah Iyer v Commissioner of Income tax, Madras*, 53 Mad 510 AIR 1930 Mad 449 and *In re Multanchand Johurmull*, 58 Cal 999. This however is not a legal presumption but one to be based on facts, and the only legal question would be that of there being evidence, *V P L P L Chettiar v Commissioner of Income tax, Burma*, (1933) ITR 319. *In re Hukumchand Champalal*, 1942 ITR 109 (Nag). *Balchand Jiwandas v Commissioner of Income tax, Sind*, 1942 ITR 507. See also *Kneen v Martin (CA)*, 19 Tax Cases 333 (1935) 1 KB 499. Relevant evidence would be the accounts of the foreign branches or offices as well as the assessee's British Indian accounts the flow of remittance transactions in either direction, the state of the capital accounts in the head office and the foreign branches, etc. Thus if the foreign branch remitted, say, a large sum, for the purchase of goods and the Indian office sent back the equivalent worth of goods, or say, if the foreign branch borrowed money and remitted it to British India and assuming the transactions to be *bona fide*, the remittance would in either case be one of capital and not of profits. Mere entries in the accounts books however, showing that the remittances are made out of capital and that the profits remain invested in foreign territory are not, by themselves and necessarily, sufficient to displace the presumption referred to above, *Tarachand Pohumal v Commissioner of Income tax, Punjab*, (1936) ITR 312. On the other hand, positive evidence produced by the assessee cannot be ignored by the Income tax Officer without any evidence to the contrary and merely on the ground that corroborative evidence to remove doubt had not been produced, *Pr Al M Muthukaruppan Chettiar v Commissioner of Income tax, Madras*, (1939) ITR 76. It should be noted, however, that all such cases turn largely on their own facts.

It is a reasonable presumption that a man's private expenditure is in the absence of evidence to the contrary met out of income and not out of capital. Where, therefore, the accounts do not show clearly that a remittance is capital but the assessee uses such remittance for his private expenses, the assessee can be put to proving that the remittance is not income but capital. On the other hand, where the accounts and other evidence clearly show the nature of the remittance, its subsequent utilisation after its arrival in British India would not affect the liability to tax, *S A Subbiah Iyer v Commissioner of Income tax, Madras*, 4 ITC 345 53 Mad 510; AIR 1930 Mad 449.

A remittance however may be "constructive", i.e., disguised by a book adjustment or a set-off. The true nature of the transaction must be examined in each case. It has been held that payments made by a foreign branch to a creditor abroad on behalf of the head office in British India did not constitute a remittance of profits into British India, *In re Multanchand Johurmull*, 58 Cal 999. A contrary view also has been taken, *L C T C Subramanian Chettiar v Commissioner of Income tax, Madras*,

(1935) I T R 346 in which against a deposit in British India by a person who also had an office abroad, the assessee drew a *hundi* on his own business abroad for the purpose and his business abroad had enough accumulated profits to cover the *hundi*. Much would depend in such cases on whether or not the debt itself had been transferred to the foreign branch and discharged by it. A remittance from abroad into an Indian State however, is clearly not a remittance into British India. In the case referred to above both the creditor and the debtor resided in British India, and the *hundi* remitting the foreign income was delivered in British India. Where, however, the *hundi* is delivered outside British India to a non resident creditor of a resident assessee who does not bring it into British India, there is no remittance into British India, *Commissioner of Income tax v K M C T Murugappa Chettiar*, 1940 I T R. 297.

The word 'received' does not merely convey the idea of lessening of liability in British India, it refers to receipt in British India of the amount, or by appropriate book entries of an asset which can be pointed out as resulting from the receipt. Therefore, when a foreign branch paid off abroad debts due by the head office to certain creditors, it was held that there was no remittance to British India. In *re Sarupchand Hukamchand*, 1945 I T R. 245 (B & O) following *In re Multan Chand Johurmali*, 58 Cal 999.

Where a resident with a money lending business abroad received in settlement of an account a promissory note in the first instance and then in settlement of the decree on the note jewels in British India and an assignment of a decree in British India, it was held that even though the decretal amount had not been realised and in the absence of any evidence that it was not worth its value, there was a remittance to British India to the extent of the value of the jewels and of the assigned decree, *A R Pl S P Mamkham Chettiar v Commissioner of Income tax, Madras*, (1937) I T R 534 AIR 1938 Mad 52 (1938) 1 MLJ 14 (TB).

In a case in which an assessee carrying on money lending business outside British India purchased land in British India in satisfaction of debts due to his foreign branch it was held that the constructive remittance involved was one of capital and not of profits except to the extent that interest on the loan (for the last three years according to the law then) was included in the purchase price, *S A Subbiah Iyer v Commissioner of Income tax, Madras*, 58 MLJ 581 and 602. Similarly where the assessee's accounts which were kept *bona fide* showed continuous remittances to and from British India separately on capital account and on profit account and the remittances on capital account were utilised to repay loans raised in British India it was held that the assessee had rebutted the presumption that the remittances were from profits. *S A Subbiah Iyer v Commissioner of Income tax, Madras* 4 I T C 345, 53 Mad 510, AIR 1930 Mad 449.

Where during the relevant year an assessee's foreign business (in partnership) took over certain lands in payment of interest due on a loan and it was claimed that a part of the remittances to British India should be treated as representing the assets in the lands which were not available for remittance it was held following *Scottish Provident Institution v Allan* 4 Tax Cases 591, (1903) A C, 129 that the withdrawal of monies by the assessee from the firm should be treated as withdrawals of profits and the immovable properties representing profits must be deemed to have been turned into capital assets, *M S S Chidambaram Chettiar v Commissioner of Income tax, Madras*, (1938) I T R 713.

If the remittances into British India exceed those in the reverse direction it is a reasonable presumption that profits have been brought into British India and it is for the assessee to rebut it. The mere non existence of debit entries in the foreign branch books and of corresponding credit entries in the books in British India is of little evidential value *Jasrups Baijnath v Commissioner of Income tax, C.P.*, 5 ITC 90

On the other hand the fact that remittances to the foreign branch exceed the sum of the value of the goods and the remittances inward is not necessarily conclusive of no foreign profits having been brought in. If the assessee withheld his books the Income tax officer would be justified in assuming that the foreign business made profits and that such profits had been remitted to British India *Souaram Nihal Chand v Commissioner of Income tax, Punjab* 8 ITC 12 AIR 1935 Lah 727

That a remittance related to capital and not to profits should be proved by the assessee. Obviously this cannot be proved if the local and foreign books are not produced. It is no argument to say that there was no need to bring profits into British India and that the mere flow of money in the course of business should be assumed to be on capital accounts *Bansilal Abirchand v Commissioner of Income tax CP* 5 ITC 347

If the foreign profits exceed the inward remittances it is a reasonable presumption that the remittances included profits but the presumption can be rebutted e.g. by proving that all the profits of preceding years had been spent abroad and that the current remittances were in fact from capital *In re Govindram Tansukhras* 1944 450 (All)

Where a resident firm carried on business both in British India and abroad and it brought into British India certain stocks of the commodity in which it dealt at both places it was held that there was no legal presumption against the firm that the stocks brought in represented foreign profits, notwithstanding the fact that in the firm's headquarters in British India credit had been taken for the foreign profits and the partners been given their shares of such profits. The Commissioner had found as a fact that the inward remittances of money did not represent foreign profits and the case turned entirely on the significance of the stocks brought in and the evidence from the accounts did not bear out the presumption that the stocks represented foreign profits *Spedding Dinga Singh and Co v Commissioner of Income tax, Punjab*, (1937) ITR 490, AIR 1937 Lah 884

Where a resident exports goods abroad, he does not receive any part of the profits until he has first received the cost of the exports till then he is recouping only his working capital. The fact that he has made profits abroad will not make the remittance one of profits until the working capital has been recouped *Commissioner of Income-tax Burma v Bhaqrandas Bagla*, 1942 ITR 35

The mere fact that the resident partners went on overdrawing on their accounts with the British Indian branch of the firm when there were no available profits in British India, does not by itself conclusively establish that the firm had received its foreign profits in the year in the cloak of remittances of capital or that the firm had distributed its profits to the partners *S. L. S. Chettappa Chettiyar v Commissioner of Income tax, Madras* 4 ITC 188, AIR 1930 Mad 119, 122 IC 349

This does not however mean that until there is an allocation of profits among the partners, there can be no receipt of the profits in British India and the receipt by a partnership may be equivalent to receipt on behalf of a

partner *M A L A R Aryan Chettiar v Commissioner of Income tax, Madras*, (1937) ITR 600

Where an assessee takes over a money lending business abroad and remits monies to British India the fact that certain sums represent interest accrued before the business was taken over and are therefore capital must be proved. Mere entries in the books are not conclusive. Similarly the fact that the sums represent capital lent out and returned must be proved by the assessee. If the profits realised abroad are in excess of the amounts brought into British India (the taxing authorities may assume in the absence of evidence to the contrary (which it is for the assessee to adduce) that the remittances are all out of profits *P L S K R Firm v Commissioner of Income tax Madras* 5 ITC 55 AIR 1930 Mad 104

In a case in which the profits of the foreign branch were added to its capital account every year and a remittance was made to the head office by debit to a Headquarters current account, the latter not having been operated upon for ten years it was held that the Commissioner had evidence to hold that the remittance was out of profits *A V K R M Kasinathan Chettiar v Commissioner of Income tax, Madras* (1935) ITR 89

In a case in which there was a continuous running account between the Madras branch of the business and that in Malaya and there was an entry in the Madras books which had the effect of cancelling the indebtedness of the resident partner to the Madras branch on account of his personal drawings the Commissioner assumed that there was an appropriation of profits remitted from abroad and the assessee did not disprove this assumption. The High Court held that the Commissioner had evidence to support his finding *K V P I Ramanatha Chetti v Commissioner of Income tax* 2 ITC 348

In assessing a person to tax each year's transactions would have to be taken into account as a whole. If the accounting year of the foreign branch does not coincide with that of the head office the Income tax Officer can if necessary use his powers under sections 13 and 2 (11) and make the best that he can out of the accounts.

The place of receipt of income is a question of fact not of intention. The date on which a constructive remittance of profits made by adjusting book entries is made into British India will depend on the date of adjustment in British India rather than on the date of adjustment outside British India. *Sir Ali Imam v The Crown* 1 ITC 402 see also *Pondicherry Railways Case* 3 ITC 485 and 5 ITC 363 (PC) 58 IA 239. An assessee was a partner in a firm abroad. In 1931 the principal partner in it transferred out of profits Rs 30,000 to one of his own places of business in British India (where the assessee was not a partner but a debtor) kept the item in suspense for some time and in 1932 adjusted the amount against the assessee's debt due to the British Indian firm. The assessee objected at first but eventually agreed in 1935 to the adjustment. It was held that the profits were remitted only in 1935 i.e. after the consent of the assessee to the adjustment. In 1931 the profits were not brought in as profits of the assessee. *A R A N T Narayanan Chettiar v Commissioner of Income tax Madras* 1941 ITR 509

Where a resident advanced money abroad from his foreign profits towards the purchase of a house in British India it was held that a constructive remittance took place not on the date of advance but on the date

of execution of sale-deed, *Chidambaram Chettiar v Commissioner of Income tax, Madras*, (1936) ITR 309 An advance from the general account of the firm before profits are ascertained, cannot be taxed as a payment out of profits, since profits may ultimately not accrue and the partner may have to refund the advance, *Ramaswami Pillai v Ramaswami Pillai*, (1939) ITR 40 If remittances are admittedly made out of the profits of the preceding year, and not made in anticipation of profits, the remittances are taxable even though in the later part of the year, losses may have been made abroad wiping out the earlier profits *Commissioner of Income tax, Madras v Sm Ar Vr Annamalai Chettiar*, 1941 ITR 663 On the other hand, remittances made during a year before foreign profits of that year could ever be ascertained are not income In re *Govindram Jansukhras*, 1944 ITR 450

Though Chetti firms usually make paper adjustments of interest as between branches with the sole object of adjusting the commission payable to local agents, and not of reflecting actual loans made or interest received, it was held in *Somasundaram Chetti v Commissioner of Income tax*, 2 ITC 61 that, if on evidence the Commissioner found that interest was actually paid by one branch to another, the finding was one of fact in which the High Court could not interfere

The presumption ordinarily is that a branch office does not make a "loan" to its head office or *vice versa* The relation of creditor and debtor cannot exist between a head office and a branch. It follows therefore, that the remittance of so-called interest on such loans would be treated as remittance of profits See however *Somasundaram Chetti v Commissioner of Income-tax, Burma*, 2 ITC 61

From that fact that a person cannot lend to himself, it follows that, when a partnership business becomes a sole business, what were loans become the proprietor's own money, and consequential book adjustments will not necessarily involve a constructive remittance of funds *R M A T M Meyappa Chettiar v Commissioner of Income tax, Madras*, (1935) ITR 93, 8 ITC 100

If a resident in British India is a partner in a firm outside British India and makes advances of money to the firm, being genuine loans bearing interest, and takes periodical credit for the interest through his account in the firm as a partner there can be no doubt that there is a constructive remittance of the interest from outside British India into British India, and the interest therefore would be taxable in the hands of the resident in the year in which he takes credit for the interest.

While it may be a reasonable presumption that where an assessee has two funds abroad at his disposal, one which has borne tax in India and another which has not, he is more likely to remit the former to India, the presumption can be rebutted by the Revenue authorities if the books show that at the time of remittance the already taxed funds were locked up and not available for remittance, *M S M M Meyappa Chettiar v Commissioner of Income tax, Madras*, (1933) ITR 37, 63 M.L.J. 796

Where however a resident assessed had profits abroad and the foreign branch bought with those profits a *hundis*, in favour of one of the branch agents of the resident in British India, and the latter repaid the value of the *hundis* (with interest) to the foreign branch it was successfully claimed that the transaction was a loan from the foreign branch to the particular agent in British India and that the position was the same as if the latter had gone abroad and received the loan and brought it—not as if the assessee

had brought it, *Commissioner of Income tax, C P v Mathuradas Mehta*, (1939) ITR 160

An assessee's agent abroad borrowed money there on behalf of the assessee and remitted it to British India. At that time the cash balance of the foreign branch was small but there were accumulated profits which had been lent out. Without any re transfer of funds from British India the foreign agent repaid the loan as he realised his outstandings. The loan was repaid within twenty eight days and it was held that in the absence of evidence to the contrary the remittances to British India must be presumed to have come out of profits *V V R Firm v Commissioner of Income tax, Madras*, 63 M I J 227 AIR 1932 Mad 573

The existence of foreign profits together with the fact of remittance into British India while raising a presumption that profits have been brought in can by no means be conclusive. On the other hand even remittance from apparently foreign capital sources in the first instance might well be really remittances of income if such income is utilised to discharge foreign loans otherwise tax can be permanently evaded by borrowing abroad every time to bring profits into British India and then repaying the loans at leisure from the foreign income. Moreover debits and credits in a bank account cannot be divided from each other the debits being treated as capital and the credits as income and similarly the transactions of preceding years cannot be ignored, for what has to be ascertained is the available foreign income. The mere continued existence of an overdraft abroad therefore throughout the year (though reduced) does not necessitate the inference that no foreign income was available for remittance and the entire course of transactions affecting the balance from time to time should be reviewed in order to ascertain the really available profits for remittance *Commissioner of Income tax Madras v Nadimuthu Pillai* 1940 ITR. 249

An assessee had profits in a foreign branch K. He opened another foreign branch T, where he immediately borrowed money and brought it over to British India. At a later date but within the year he remitted the profits from K to T, and paid off the loan. It was held that the profits of K had been remitted to British India *Commissioner of Income tax Madras v Meyyappa Chettiar* 1940 ITR. 20

Foreign profits placed on time deposit in a bank in British India through a foreign bank are not any the less remittance of profits the case is just like buying Indian Securities with foreign profits and bringing the securities into British India *Commissioner of Income tax Madras v Rm. Al Ct Annamalai Chettiar*, 1945 ITR 171

What the Act charges is income and nothing but income if foreign income is spent or otherwise so converted abroad that it ceases to be income it is not taxable merely because the thing on which it has been spent or into which it has been turned is afterwards brought into British India. On the other hand in order to attract tax it is not necessary that the income should be brought in in exactly the same form as it was received abroad. The facts have to be examined. Thus where a cotton mill company in British India bought certain machinery in England with interest on its sterling securities and imported it into British India for its own use (not for sale) it was held that it did not bring any income into British India but only capital goods. There was no evidence that the goods had been bought as a means of bringing in foreign income *Commissioner of Income tax Bombay v Ahmedabad Advance Cotton Mills* 1940 ITR 95 (P.C.) In re *Bombay Electric Supply and Tramway Co Ltd*, 1940 ITR 432 the

Crown conceded that interest on sterling securities payable, and paid in the United Kingdom and spent on machinery, etc., was not taxable even though the machinery was brought into British India

An assessee, resident in British India, remitted income from abroad to Mysore direct, where he purchased Mysore Government Bonds. There was no finding that the bonds had been bought as a means of bringing in the foreign profits, and the bonds were therefore presumed to have been a permanent investment. After two months, he brought the bonds into British India and used them as cover for an overdraft with a bank. It was held that the use of the bonds as such cover had not altered the capital nature of the bonds, *Commissioner of Income tax, Madras v Muhammad Ismail Rowther*, 1940 ITR 150

If the assessee hands over outside British India his foreign profits to a charity and the latter brings the money into British India though through the assessee the remittance is not taxable because it is the property of the charity. Whether the profits were in fact handed over (outside British India) to the charity is a question of fact *P L S K R Firm v Commissioner of Income tax, Madras*, 4 ITC 185

A resident assessee a money lender with a branch abroad had, in the foreign branch funds belonging to trustees of certain temples in British India and invested with him. His British Indian branches needed funds, and he brought funds from abroad debiting the account of the trustees in the foreign branch and crediting it in the British Indian one. He utilised the funds for his business and did not pay back the foreign branch. There were enough foreign profits to cover the remittance. The assessee needed the remittance and not the trustees. The trust funds had been mixed up with the assessee's foreign funds and had not been separately invested. It was held that the remittance was that of the assessee and not that of the trustees *AMK Firm v Commissioner of Income tax Madras* 1940 ITR 474. The money brought in should be the money of the assessee. Where an assessee brings into British India money from abroad, at the instance and on behalf of a client of his he is not bringing in any money of his own and there is therefore no remittance of his profits *Commissioner of Income tax, Burma v A K A R Family*, 1941 ITR 347. If however, the money is transferred at the instance of and the instructions of the assessee it could be held—if the other circumstances so indicate—that under the guise of the transfer he brought in his own profits *A K A C T V Firm v Commissioner of Income-tax, Burma*, 8 ITC 112

Partition of Hindu family—The words "accrued or arisen to him without British India" in section 4 (1) (b) (iii) do not necessarily mean that even in the first instance the profits must have accrued to the assessee, and can cover the case of a member of a Hindu undivided family who on partition takes over the accumulated profits in a foreign branch, i.e., profits accrued to the family and not to him, *Commissioner of Income tax, Madras v S N A S A Annamalai Chettiar*, 1944 ITR 226

Set-off—Where the remittance basis applies, e.g., under the second proviso to sub-section (1), it is the actual amount of foreign income brought into British India that is liable to tax. Where there is more than one current business abroad losses in particular businesses should be set-off against profits elsewhere before foreign profits available for remittance are computed, *Narayanan Chettiar v Commissioner of Income tax, Madras*, 1938 ITR 705

Question of fact and law—While the question of actual receipt of foreign profits in British India is a question of fact, it is a question of law whether on the facts income can be said to have been constructively received in British India. *Commissioner of Income tax, Bombay v New India Assurance Co, Ltd*, 1938 ITR. 603

Property abroad and business—Income from property abroad can be profits of a business for the purpose of the second proviso, if the income accrued as a part of the foreign business, e.g., rents received by a money lender from property coming into his possession, pending their sale and recoupment of his dues. See *A S P L V R Ramaswami Chettiar v Commissioner of Income tax, Madras*, 1933 ITR. 389, AIR 1933 Mad. 59, & also profits from agriculture if the agriculture constitutes a trade or business. See notes under section 2 (1), and *Commissioner of Income tax, Madras v Mathias* 1939 ITR. 48 in which the Privy Council observed that there is no inherent contradiction between 'agriculture' and 'business'. The profits from growing tea are profits of a business. Accordingly, the entire profits including the profits from agricultural operations from a tea garden outside British India are liable to tax when brought into British India. *R M S T Ponnuswamy Pillai v Commissioner of Income tax, Madras*, 3 ITC 378

Taking into head office accounts—The fact that income earned abroad has been taken into account not only in the balance sheet in British India but in determining the dividend to be paid in British India is not enough to constitute a remittance into British India. *Commissioner of Income tax Bombay v New India Assurance Co*, 1938 ITR 603

See however the cases referred to below. *Commissioner of Income-tax, Madras v Subramanian Chettiar*, 50 Mad 765 S V L L Lakshman Chettiar v Commissioner of Income tax, Madras, 3 ITC 421, also *Kanwalnen Hamur Singh v Commissioner of Income tax*, 1938 ITR. 675 (All), in which income due from abroad and not actually brought into British India but credited in the accounts of the assessee creditor in British India was taxed. In the first of these cases, the assessee took credit in his British Indian accounts for the interest on a debt due from abroad though not actually received or brought in while in the last the assessee had in earlier years included, in his return of income, foreign profits credited to his British India head office but not actually brought in, and similarly claimed losses abroad on the strength of mere debits to the head office. These decisions are partly grounded on section 13 and the assessee's own methods of book keeping it being held that bringing foreign profits physically into British India is not always necessary in order to attract tax. It is doubtful however whether by a mere rule of computation (section 13) the nature of income can be changed and the ambit of liability under section 4 is widened.

Income from abroad—Foreign taxes paid thereon—Though what is to be taxed on the remittance basis is the actual amount of profits brought into British India, it may sometimes be necessary to compute the profits from abroad with reference to the provisions of section 10 in order to determine the allocation of the amount brought into British India between capital and income. For this purpose foreign taxes actually paid abroad should presumably be deducted from foreign profits irrespective of their deductibility for the purpose of section 10 for levying British India tax or for Double Income tax relief under section 49 *et seq*

Remittance cases in the United Kingdom.—Notwithstanding the general warning against following United Kingdom decisions in interpreting the Indian Act these decisions offer guidance as to what constitutes a remittance. The money received by the agents in America remains in their hands and it remains in their hands for investment there. But then an equivalent for the amount of that interest is retained by the managers in this country out of money borrowed by them on debentures for the purpose of being sent out to America and invested upon foreign securities there so that the one sum is just set against the other in the books of the company, and it is for the Court to determine whether that *species facti* does not sufficiently satisfy the words of the rule.

that the interest upon the foreign securities has been received in this country. According to the way in which this company keeps its books, it has really converted a sum which was received in this country as capital into an equivalent for the interest upon the foreign securities. They have received it (the interest) in the most proper sense of the term that it enters their books in this country as such interest and is paid away as such' per the Lord President in *Scottish Mortgage Company v McKelvie*, 2 Tax Cases 165 24 Sc L.R. 87.

A Scottish Life Assurance Society lent out sums of money in Australia on interest. The interest accruing was not remitted to the United Kingdom *in forma specifica*, but retained abroad and invested or used to cover the expenses of the Australian branch. *effi* It was however, entered in the Revenue accounts of the Society as received. *Held* that interest not received in the United Kingdom was not assessable to income tax, and that the facts in the case did not amount to "constructive remittance", *Scottish Mortgage Company v McKelvie*, 2 Tax Cases 165, distinguished *Forbes v Scottish Widow's Fund and Life Assurance Society*, 3 Tax Cases 443, 33 Sc L.R. 228.

An English Fire Insurance Company doing business in America received there as part of its profits interest on American securities. The interest was brought to account in the books of the company in England as profits but it was not remitted to England, being invested in America in American securities in order to build up a reserve as required by the laws of the United States. *Held*, that the interest formed part of the profit of the company assessable under Case I of Schedule D, and also that the interest was in effect received in England.

Per *Wright, J*—"If there is a trade which cannot be carried on without making investments abroad, the interest arising on the investments necessarily made for the purpose of the trade is, it seems to me, part of the gains of the trade. (Also) in effect it seems to me that the £5 000 is received in this country because this money would have to be sent out from here if it were not otherwise provided", *Norwich Union Fire Insurance Company v Vague*, 3 Tax Cases 457, 73 L.T. 733.

(The second part of the decision must be taken as overruled by the *Gresham Society Case*, *infra*.)

An English Assurance Society with branches in India received there certain interest from securities in India and the colonies. This interest was applied in India towards the payment of the various obligations of the Society arising for settlement in India *inter alia*, its obligations under policies, and it was not remitted to England *in forma specifica*. It was,

however, treated in the accounts of the society as if it had been remitted to England. *Held*, that the interest was constructively remitted to England.

Per Kennedy, J.— Indian interest was not merely entered in the accounts of the Society which by itself would be a matter of little consequence but was retained in India merely as a matter of commercial convenience and but for such retention an equal sum must have been remitted to India to discharge the Society's liabilities there and that in reality the amount of this Indian interest was treated by the Society as part of the divisible property upon which dividends had been declared and paid in the United Kingdom.

In these circumstances it appears to me that there is a constructive remittance according to the law as applied in *Scottish Mortgage Company v. McKelvie* 2 Tax Cases 165 and in

the *Vorreich Union Fire Insurance Company v. Mayor* 3 Tax Cases 457 *Forbes v. Scottish Widows' Fund, etc.*, and *Forbes v. Scottish Provident Institution* 3 Tax Cases 443 appear to me to be

distinguishable. In neither case was the interest received and treated as forming part of the divisible profits. It was simply retained and used abroad for purposes of loan and investment. *Universal Life Insurance Society v. Bishop*, 68 L.J.Q.B. 902 4 Tax Cases 139.

This case was overruled by the House of Lords in *Grisham Life Assurance Society v. Bishop*, 4 Tax Cases 464 (1902) A.C. 287 (H.L.).

A Life Insurance Company established in the United Kingdom carried on business outside. The business was managed by directors abroad who had power of accepting risks but all investments abroad had to be sanctioned at the head office. Remittances in *forma specifica* of interest received abroad were not made and remittances out of the receipts abroad of interest and premiums were made only as required by the general policy of the company. At a quinquennial valuation and in the yearly statement of accounts the whole of the receipts abroad including the interest on investments abroad were brought into account in the division of the profits of the company. *Held* that the interest received abroad and invested or applied abroad was not received in the United Kingdom within the meaning of Case IV of Schedule D. *Scottish Mortgage Company of New Mexico v. McKelvie* 2 Tax Cases 165 distinguished (Lord Young dissenting). *Standard Life Assurance Company v. Allan*, 4 Tax Cases 446 38 Sc.L.R. 628.

A Life Insurance Company established in England carried on business abroad and re-invested abroad moneys including interest received abroad. The interest received abroad was not remitted to England but included in the company's yearly statement of accounts and in the triennial valuation on which the profits of the company were estimated. *Held* that interest so received abroad and applied or re-invested abroad was not received in the United Kingdom within the meaning of Case IV of Schedule D.

Per Lord Chancellor Halsbury.— Now, here the money has not actually been received in this country. The Legislature must be supposed to have contemplated the possibility of drawing a distinction between money received in this country and money accounted for or credited in account. If it were not for the difficulty of earmarking money I should think no one would have any doubt that the money must be received in this country to bring it within the words of the

statute If it were not money but some commodity, say tobacco, which a trader carrying on business in London and Paris was accounting for to his London house, no one would say that though the Paris tobacco was credited in account as a set-off against some expense or something that the supposed London firm had to set-off against the same claim, and that as the London firm was paid by the Paris tobacco, therefore, the tobacco was liable to the import duty on tobacco because it was taken into account in the books of the London firm

In no way that I can give any reasonable interpretation to, has the money reached this country or been received in this country It, like the tobacco in the case suggested, has not been imported, and if the Legislature had intended that bringing it into account was to be equivalent to its being received, it would have been easy to say so

Per Lord Macnaghten.—As my noble and learned friend Lord Robertson, when Lord President, observed in the case of the *Provident Scottish Institution*, 3 Tax Cases 443 Every man and every company having foreign or colonial investments of course knows of the interest arising from them, takes note of it, and enters it in any state ment of affairs which may require to be made up But that, as I think, and as the Lord President thought, is a very different thing from bringing the interest home, a very different thing from the receipt of the money here, *in specie* or as represented by a remittance, payable in this country

The difficulty seems to have arisen from a misunderstanding or a misapplication of the judgment in the *New Mexican case* That was a very special case Whether the decision was right or wrong it can have no bearing upon the question now before your Lordships Speaking for myself, I think the decision was right In that case, as it seems to me in the transmission to this country of money which the company, was free to distribute and the transmission to America by way of exchange of an equivalent amount which the company was bound to re invest, the company acted as their own bankers and did for them selves, by an entry in their books, what might have been done less conveniently and less economically by an ordinary bank or financial agent on their behalf

Per Lord Shand.— As they left that interest where it was gained it was never received in this country Where it was entered in the company's balance sheet in order to enable the ascertainment of the profits of the year, it was so entered as estate which had not been received in England, but as property belonging to the company which they acquired abroad, which had not been brought home or received here but which was part of their foreign assets Money or securities in that position was properly taken into account in the ascertainment of the year's profits, not because it had been received in England but because although not so received, it was part of assets of value which the company had acquired and held abroad In the *Scottish case* of the *Investment Company of New Mexico*, 2 Tax Cases 165, the *species facts* was different, for there the company treated the money as received in this country and merely saved themselves the expense of cross remittances

Per Lord Brampton.— , But it was argued that if not actually it was 'constructively' so received in the accounts of the Society I confess I do not like that expression, nor do I quite under-

income is invested abroad and eventually the investments are sold and the money remitted. The result seems to be dependent on the facts of each case as to how far the circumstances of investment change the nature of the money, i.e., as capital because of alienation abroad or otherwise and how far the remittance is merely of the nature of expenditure. If the mere purchase of securities with foreign profits changed their character from income to capital that in itself would have been a sufficient answer to the Crown both in *Scottish Provident Institution v Allan*, 4 Tax Cas 591 and *Ibid. v Farmer*, 6 Tax Cas 34. If that argument was sound there was no need to earmark remittances back from Australia as capital and therefore, as not being taxable. A resident cannot, merely by investing for the time being his foreign income change its character *vis-à-vis* the Income-tax Collector, it is quite different when he alienates the money abroad, and the alienee brings it as his income or capital as the case may be.

So, where a resident who had invested his foreign profits in securities abroad sold them and brought in the proceeds through a draft in favour of a hospital which he received and then gave away to the hospital, it was held that there had been a remittance of income. The assessee did not alienate the money abroad but retained control over it until he actually delivered the draft *Walsh v Randall*, 19 A T C. 92 (K B).

An assessee with a pension in America paid into his account there had an account with the same bank in London. He borrowed money from time to time from the bank's office in London on the security of stocks and shares in America. Every quarter the loan was transferred to America and eventually discharged there. Held following *Hall v Marians* that there were no remittances of foreign income to the United Kingdom, *Wild v King Smith*, 1944 K B D. *Macnaghten, J.*, considered that the mere fact that in *Hall v Marians* the lady had hoped at one time, that her husband would be able to pay off the debt due to the bank in London, while, in this case the assessee had intended all along to transfer the debts to America made no difference.

If a resident has foreign income and gives it away outside British India to another resident who brings it into British India the first resident cannot be taxed on the basis of his having brought the income in. In all such cases, the test is whether the gift was complete outside British India and irrevocable. In *Timpson's Executors v Yerbury*, 20 Tax Cas 159 (C.A.), where money was remitted by the donor's agents abroad to the donees in the United Kingdom by bills of exchange, it was held that the sums remitted were the income of the donor till the bills were actually cashed and that the donor was the person entitled to the income when it reached the United Kingdom. On the other hand, in *Carter v Sharon*, 20 Tax Cas 229 (K B), in which the facts were similar a contrary conclusion was reached, because according to the laws of California, a payment became complete when a draft was posted and a draft could not be stopped.

An assessee had received certain income from Trieste which was assessed to tax. He did not furnish the information required by the Commissioners but contended (1) that under the banking system in Trieste all sums deposited bore interest from the date of lodgment and therefore the remittance was of capital and not of income, (2) that the remittance was a loan to him from a trust of which he was trustee. The Commissioners found as facts that the account in the Trieste Bank was an omnibus account that stood in the assessee's name as an individual and that he had not attempted to discharge the onus that lay on him of distinguishing which

part of the income was capital, the remittances must be presumed to be his income. *Held*, that as the appellant had not disclosed the necessary information, the evidence before the Commissioners was sufficient to support the conclusions of fact at which they had arrived, *Schulze v Bensted*, 8 Tax Cases 259

(3) Any income, profits or gains falling within the following classes shall not be included in the total income of the person receiving them

History.—Prior to 1st April 1939, the corresponding words were "This Act shall not apply to the following classes of income"

The change of wording makes little change of substance for even under the old words the different classes of income referred to in this subsection could not be taken into account for any purpose under the Act, per *Krishnan, J*, in *Commissioner of Income tax, Madras v Arunachalam Chettiar*, 1 I T C 75

Exemptions granted under section 60, on the other hand may be partial, and even if the incomes are wholly exempted they may be included in the "total income" of the person, i.e., in order to fix the rate at which he is taxable on other income

Burden of proof.—It is for the assessee to prove that a particular item or the whole of his income falls under one or more of these exemptions, *In re Amritsar Produce Exchange, Ltd*, 1937 I T R. 307 (Lah)

Payments out of exempt income.—The fact that income is exempt under section 4 (3) does not remove the liability to tax of employees of charities or other recipients of income from these exempted sources, if the employees or recipients are themselves taxable under the Act. In fact, in the 1886 Act, there was an explicit provision to the effect that "An officer or servant is not exempt from taxation by reason only of the income of his employer being exempt therefrom"

"Receiving them."—The absence of the words "accrue or arise" or their derivatives and variants is apparently not intentional

(1) Any income derived from property held under trust or other legal obligation wholly for religious or charitable purposes, and in the case of property so held in part only for such purposes, the income applied, or finally set apart for application, thereto.

* * * * *

(ia) Any income derived from business carried on on behalf of a religious or charitable institution when the income is applied solely to the purposes of the institution and—

(a) the business is carried on in the course of the carrying out of a primary purpose of the institution, or

(b) the work in connection with the business is mainly carried on by beneficiaries of the institution.

(11) Any income of a religious or charitable institution derived from voluntary contributions and applicable solely to religious or charitable purposes.

* * * * *

In this sub-section "charitable purpose" includes relief of the poor, education, medical relief, and the advancement of any other object of general public utility; but nothing contained in clause (1), clause (1a) or clause (11) shall operate to exempt from the provisions of this Act that part of the income of a private religious trust which does not enure for the benefit of the public

CHARITIES

History—In the 1886 Act "any income derived from property solely employed for religious or public charitable purposes" was exempt, in 1918, the present form of clauses (1) and (11) and the main part of the definition of "charitable purpose" were adopted. Clause (1a) and the latter part of the definition excluding private religious trusts were inserted in 1939.

"Property"—In *In re Iachman Das Naram Das*, 1 ITC 378, 47 All 68 it was held that a share of profits of a registered firm belonging to a charitable trust which was a partner in the firm and actually devoted to charitable purposes was not exempt under this clause. The *ratio decidendi* is by no means clear, but if it rested on the assumption that "property" could not include a share in a business, this view must be taken as overruled by the Privy Council in the *Tribune case*, 1939 ITR 415.

"Property" is the generic term for all that a person has dominion over. Property is the most comprehensive of all terms which can be used inasmuch as it is indicative and descriptive of every possible interest which the party can have, *Jones v Skinner*, S.L.J. Ch 90" (Stroud)

"It seems to me therefore that the word 'property' in the exemption in question cannot import legal ownership. It imports the right of possession and exclusive enjoyment. Moreover that is the ordinary meaning of the term. The word 'property' is not a technical expression. No one in ordinary language would speak of land or buildings vested in a trustee and in which the trustee has no beneficial interest as his 'property'." I may observe that if your Lordships will turn to the Act of 1854 you will find the very expression 'property of the institution' used in more than one place to denote real and personal property held on trust for the purposes of the institution, though not legally vested in the institution itself" per Lord Macnaghten in *Mayor of Manchester v McAdam*, 3 Tax Cases 491 (1896) A.C. 500, 513.

The General Clauses Act (X of 1897) while not defining 'property' defines 'movable property' as all property that is not immovable. 'Property' has been held to apply to debts, in certain circumstances, to choses in action of all kinds, to copyrights, to patents, to debentures and even to Government annuities, but even this wide interpretation cannot include the right to a future salary, *Eggar v Commissioner of Income tax*, *Burma* 2 ITC 286, 4 Rang 538, A I R 1927 Rang 95. In this case, a

professor had agreed as a condition of his appointment to hand over his salary for the benefit of students and did so. It was held that the salary was not income from property held under trust. The money became trust money if at all only after it was paid over to the trust and not when received by the professor.

A possible distinction between income from business and that from property is that in the latter case the person to whom income accrues takes no active part in the operations producing profits or to put it in another way the distinction is between property and personal exertion, but this line of reasoning is ruled out to some extent by the decisions in *Excess Profits Duty* cases of which the leading one is *Commissioners of Inland Revenue v South Bihar Railway*, 12 Tax Cases 657 holding that it is possible to have a business without being busy! In *Malak v Commissioner of Income tax*, C P 2 ITC, 443 the Crown conceded that business was 'property for the purpose of clause (1). According to the Income-tax Manual the word property in section 4 (3) (1) does not bear the restricted meaning that it bears in section 9 of the Act but includes securities or business or a share in a business.

Clause (1) (a) which is based on the English law gives the concession to business profits only under stringent conditions viz (1) the business should be carried on in the course of the carrying out of a primary purpose of the institution or the work in connection with the business should be carried on mainly by the beneficiaries (2) it should be carried on on behalf of a religious or charitable institution and (3) the profits should be applied solely to the purposes of the institution.

In *In re Gadodia stores* 1944 ITR 385 (Lah) it was held that clause (1) applies to cases of trust or other legal obligation while clause (1-a) applies to cases not covered by a trust or other legal obligation. If clause (1-a) had been intended to be an exception to clause (1) it should have been expressed as a proviso as the clause stand it gives an additional concession in cases not covered by clause (1). If both the clauses were intended to refer to the same class of institutions the same set of words should have been used.

The word property is of wide import as held by the Privy Council in the *Currumbhoy Case* 1935 ITR 395 and so taken for granted at all stages (including before the Privy Council) in the *Tribune Case* 1939 ITR 415 and covers a business. Moreover the general provision in clause (1-a) (i.e. not confined to trusts) cannot override the special concession in clause (1) (relating to trusts).

In the *Tribune Case* the word property was held to cover the stock and goodwill of the press and the new paper while in the case of the *All India Spinners Association*, 1944 ITR 482 (PC) it was held to cover the organisation and undertaking and the fluctuating stock of yarn and cloth.

On behalf of probably includes also by for there is no reason why business carried on by an institution should be in a more disadvantageous position than a business carried on on its behalf. The various conditions imposed would all be questions of fact.

'Held under trust.'—These words refer to cases in which there is a regular trust. A formal deed however, is not necessary to constitute a trust, still less a legal obligation binding the trustees. The rules of the constitution will be enough for this purpose, a departure from the rules would be a breach of trust or legal obligation which the Court could restrain. *All India Spinners' Association v Commissioner of Income tax, Bombay, 1944 I.T.R. 482 (P.C.)*

'Other legal obligation'—This has not been defined, but it would clearly include Moslem *Wakfs* and Hindu Endowments, *In re Trustees of the Tribune, 1939 I.T.R. 415 (P.C.)* See also obligations in the nature of trusts contemplated in sections 80 to 95 of the Indian Trusts Act. The test of 'general public utility' applies as much to trusts in the English Sense as to other trusts or other legal obligation. A formal trust is not necessary to secure the exemption, *Eggar v Commissioner of Income-tax, 2 I.T.C. 286*. All that is required is a legal obligation to apply the income to charitable or religious purposes. But mere entries in the assessee's books will not in themselves constitute a trust or other legal obligation, *Rm Ar Ar Rm Ar Arunachalam Chettiar v Commissioner of Income tax 3 I.T.C. 38*.

Trust—Existence of—Question of fact—Though it is not necessary in order to create a trust that the person or persons in whose favour the trust is created or the public should know about it, or that the trustor should divest himself of control, *P. L. S. K. R. Chettiar v Commissioner of Income tax, Madras, 5 I.T.C. 50*, the absence of such knowledge is a circumstance to be taken into account in deciding whether or not there had been a real dedication to a charity and whether or not the fund so created or the trust so said to be created can be revoked. This is purely a question of fact, *Rm Ar Ar Rm Ar Arunachalam Chettiar v Commissioner of Income tax, 3 I.T.C. 38*.

Wholly—This word means 'solely' and not 'mainly', *Commissioner of Income tax v Maulana Malik, 105 I.C. 155, A.I.R. 1928 Nag 10*.

Property held in part for such purposes—In such cases the Income-tax Officer has to satisfy himself as to the actual application or setting apart of the income. It is not necessary that the income should have been so applied before the assessment or in the year of receipt. It will be sufficient if it is 'finally' set apart for application to charitable or religious purposes. 'Finally' evidently means irrevocably.

Where, however the trustee has discretion as to disbursements and some of the purposes are clearly not charitable, the trust is not charitable and cannot get the benefit of this sub-clause, *In re Probynabad Stud Farm, (1936) I.T.R. 114 (Lah.)*

Where the objects of a fund are distributive and the whole of the funds may be expended on any one of them at the discretion of the trustees and even one of the objects is not charitable, the trust is not charitable. On the other hand if there is a general charitable intention the trust will not fail merely because, within the ambit the trustees are given discretion, and if the trustee selects an object not charitable in law, the Court will intervene and rectify the error, *In re Tilak Memorial Fund, 1942 I.T.R. 26 (Bom.)*

A trust which, *inter alia*, among admittedly charitable purposes had for its objects the following *viz* "the agricultural, industrial, commercial and other pursuits" of a (religious) community, "entertaining guests, giving

at homes and parties contributions to memorials funds raised for holding social educational religious industrial or political conferences or congresses and for public entertainments which the spiritual head of the community for the time being may deem fit and in which no part of the property was set apart so as to be identified as appropriated exclusively for charitable or religious purposes was held by the Privy Council to be ineligible for the concession under this section *Moulana Malak v Commissioner of Income tax Central Provinces*, 57 I A. 260 AIR 1930 PC 226 affirming AIR 1928 Nag 10 Income from property dedicated to a wakf which is employed for the maintenance of an individual and his children, even if ultimately the income might be used for pious or charitable purposes is similarly ineligible *Umar Baksh v Commissioner of Income tax Punjab* 5 I T C. 402 *Commissioner of Income tax Bombay v Abudakar Abdul Rahman* 1939 ITR 139 *Commissioner of Income tax Sind v Ibrahimji Kakeemji, etc* 1940 ITR 500 *Commissioner of Income tax Madras v Jamal Muhammad* 1941 ITR 375 *Commissioner of Income tax Bombay v Karim Brothers Charity*, 1943 ITR 603 *Commissioner of Income tax Madras v Shirazi* 1944 ITR 179

Consequent on the observation of the Privy Council in the *Tribune Case* as to local custom etc there has been much litigation in respect of Muslim family charities as will be seen above

The maintenance of a Shebait may or may not come within the category of religious or charitable purpose It depends on the circumstances of the case If for instance a dedication is absolute and a small portion of the income is given to the Shebait for the remuneration for carrying out the trusts of the endowment it would not be secular It on the other hand a fixed sum is given to religious or charitable purposes and the residue of the income is given to the Shebait for his maintenance the residue would be held to be secular

The test is whether a suit for partition lies for division of the residue In any case any portion of the income dedicated under the trust which may be misappropriated would also be assessable—(*Income tax Manual*)

In any case after the amendment of 1939 that part of the income of a private religious trust (which expression may need judicial interpretation) which does not enure for the benefit of the public is not exempt

A trust in which the managing trustee the founder could borrow without limit which he could revoke or utilise for his own purpose or for that of his companies is not charitable The mere possibility that some day the undoubtedly charitable institution contemplated by the trust would come into existence is not sufficient to constitute a charity *Commissioner of Income tax Madras v G D Naidu Institute*, 1942 ITR 358. On the other hand, where a will ran My trustee shall utilise my residuary property for such acts of charity as he deems proper but if my trustee thinks fit he can give a one fourth part of my residuary property to X it was held that three fourths of the income of the residue was exempt from tax *Chaturbhuj Vallabhdas v Commissioner of Income tax Bombay*, 1946 ITR 144

Only to the extent that a mixed wakf (i.e., partly charitable and partly not) is charitable is its income exempt *Commissioner of Income tax Sind v Ibrahimji Hakimji etc* 1940 ITR 501

Where the property is under trust or other legal obligation wholly for religious or charitable purposes the Income tax Officer cannot enquire into the actual application of the income The trustee will take the consequences

under the law for any breach of trust, but the Income tax Officer cannot refuse exemption on the ground that the income is not in fact being applied to the purposes of the trust. Examples of partial trusts are where property is bequeathed subject to the maintenance of certain charities or when a manager of a charity gets a share of the trust income as his remuneration.

Expenses of management—Where property is held in part only for religious or charitable purposes a proportionate share of any expenses incurred on management is allowable—*Income-tax Manual*)

Religious—The word has not been defined, nor is a simple definition possible. The English law forbids bequests for superstitious purposes but there is no such prohibition in India. Whether a particular purpose is 'religious' or not would depend on the circumstances of each case, on the personal law of the person concerned, and on custom. It has been held, *Umar Baksh v Commissioner of Income tax, Punjab*, 5 I T C 402, see also *Humayam Raza Chaudhury v Commissioner of Income-tax, B & O*, 10 I T C 7 A I R 1936 Pat 532 that, since a taxing statute is intended to be of universal application in the absence of clear words to the contrary, the words 'religious and charitable' should be construed without reference to the personal law of the assessee and that further, since the law has been drafted in the English language by persons personally acquainted with English law on the point, it was only proper to construe the words with reference to English law.

Though this decision has not been overruled, not having been considered at all the Privy Council have made it clear in *In re Trustees of the Tribune* (1939) I T R 415 and in *All-India Spinners Association v Commissioner of Income-tax, Bombay*, 1944 I T R 482 that under the Indian Act the test of general public utility should be applied with reference to customary law and common opinion amongst the community to which the parties interested belong. There is nothing wrong however, in construing words in the Indian Act which is in the English language with reference to the meaning given to such words in the construction of similar statutes in the United Kingdom even though the actual tests to be applied e.g. the test of general public utility may be different in the two countries. *Commissioner of Income tax, Madras v Jamal Muhammad & Co*, 1941 I T R 375.

The promotion of religion means the promotion of spiritual teaching in a wide sense and the maintenance of the doctrines on which it rests and the observances that serve to promote and manifest it—not merely a foundation or cause to which such religion or teaching can be merely related. Therefore a society formed for the purpose of settling Jews in Palestine, which had power to own schools build factories, railways, etc., and own property for the purpose was held not to be charitable, *Commissioners of Inland Revenue v Keren Kayemeth Le Yisroel, Ltd*, 10 A T C 160, (1931) 2 K B 465.

Charitable purposes—The Act defines 'charitable purpose' as including 'relief of the poor education medical relief and the advancement of any other object of general public utility'. Analogous definitions in other Acts are the following. Section 3 of the Charitable Endowments Act (VI of 1890) defines 'charitable purpose' as including relief of the poor, education, medical relief, and the advancement of any other object of general public utility, but not a purpose which relates exclusively to religious teaching or worship. The latter part of this definition has been

omitted from the definition in the Income-tax Act, and religious' purposes also get exemption under the Indian Income tax Act. Section 17 of the Transfer of Property Act refers to religious and charitable' endowments as being 'for the benefit of the public in the advancement of religion, knowledge, commerce, health or any other object beneficial to mankind'

The question of determining whether a purpose is charitable usually arises in the administration of the law of property, and there is little difficulty in applying the same principles in determining the objects of an institution as in determining the purposes to which property is devoted.

As the word used is includes, the definition is not exhaustive. If the endowment is religious, it is not charitable for the purposes of this exemption to the extent that income from a private religious trust does not enure to the benefit of the public. This condition was formally included in the section in 1939. If the endowment is not religious, and at the same time it is meant to benefit a few persons, it can hardly be considered 'charitable'. There is no such thing as a private charitable trust. There may be a private trust for religious purposes and the amendment in 1939 makes it clear that such private trusts are not exempt from tax. *Commissioner of Income tax Madras v. Jamal Muhammad Sahib*, 1941 ITR 375.

The words 'general public utility' however, should be construed, in a negative sense as not confined to the advantage of a few specified persons and not as meaning to the benefit of the community generally irrespective of class or creed. It would be quite sufficient if the benefit went to a section of the community. See *Re Melody*, (1918) 1 Ch 228 a case of a bequest providing for an annual treat to some school children. The point in all such cases is that the donor does not intend the benefit to go to particular individuals nor to let them claim the benefit. A trust or gift is not charitable merely because it is beneficial to the public, see *In re Headmaster's Conference*, 10 Tax Cases 73. A benevolent purpose or a liberal purpose is not necessarily a charitable purpose, per *Lawrence LJ*, in *Trustees of Robert Marne Mansions v. Commissioners of Inland Revenue*, 11 Tax Cases 425. The guiding principle is given in *Re Vottage*, (1895) 2 Ch 649 in which a testator endowed a cup for yacht-racing, and the endowment was not considered charitable.

Per *Kekewich, J* (whose judgment was affirmed by the Court of Appeal) — 'In order to uphold this gift as charitable, I think I ought to see that it is by itself directly, and as its necessary and intended result, beneficial to the community. Almost any gift may in some sense be said to be beneficial to the community.'

The point is that the avowed object must be the benefit of the community, that is, there can be no charity, without there being a charitable intention. On the other hand, the mere intention of the donor will not be conclusive and it is for the Court to decide what is the nature of the object of the trust. In *re Trustees of the Tribune*, (1939) ITR 415 (PC). A gift 'unto my country, England' has been held to be charitable. In *re Smith Public Trustee v. Smith*, (1932) 1 Ch 153.

It has been held in England that disinterested or altruistic work is not necessarily charitable nor is public utility as such, *Anglo-Swedish Society v. Commissioners of Inland Revenue*, 16 Tax Cases 34, and, though the definition of 'charitable purpose' in the Indian Income-tax Act includes an object of public utility, the words 'public utility' should presumably be construed in an immediate rather than a remote sense.

ITR 415 (PC) The English decisions on the law of charities are not based on definite and precise statutory provisions. They have been developed in the course of more than three centuries by the Chancery courts. The list of charitable objects in the preamble to the Act of 1601 was taken as a sort of chart or scheme by the Courts which adopted it as a ground work for developing the law. In doing so they made liberal use of analogie, so that the modern English law can only be ascertained by considering a mass of particular decisions often difficult to reconcile. It is true that the definition in section 4 (3) of the Indian Act has largely been influenced by Lord Macnaghten's definition of 'charity' in the *Pemsel case*, 1891 A.C. 531, 3 Tax Cas 53, but that definition has no statutory authority and is not precisely followed in the most material particular, viz, the words of the section include 'the advancement of any other object of general public utility', whereas Lord Macnaghten's were 'other purposes beneficial to the community'. The difference particularly the use of the word 'public' in the one case is of importance. This would exclude the object of private gain such as an undertaking for commercial profit, on the other hand, it cannot exclude a purpose which may be of public benefit though there may be difference of opinion as to the wisdom of the object, e.g. helping the poor agriculturist through making him spin yarn or weave cloth. *All India Spinners' Association v Commissioner of Income-tax, Bombay*, 1944 ITR 182 (PC). It in instrument uses the word 'charity' generally, without any qualification it refers to public charity, and is covered by charitable purposes' in this sub-section. *Chathurbhujdas Vallabhdas v Commissioner of Income tax Bombay*, 1946 ITR 144.

Institution—The essential idea conveyed by it, in connection with such adjectives as 'Scientific or literary' is often no more than a system, scheme or arrangement by which literature or science is promoted, without reference to the persons with whom the management may rest, or in whom the property appropriated for these purposes may be vested save in so far as these may be regarded as a part of such system scheme or arrangement. That is certainly a well recognised meaning of the word. One of the definitions contained in the Imperial Dictionary is as follows: "A system plan or society, established by law or by the authority of individuals for promoting any object public or social", per Lord Herschell in *Mayor, etc., of Manchester v McAdam*, 3 Tax Cases 491 (1896) A.C. 500.

"It is a little difficult to define the meaning of the term institution in the modern acceptation of the word. It means I suppose an undertaking formed to promote some defined purpose having in view generally the instruction or education of the public. It is the body (so to speak) called into existence to translate the purpose as conceived in the mind of the founders into a living and active principle"—Per Lord Macnaghten (*Ibid*).

Applicable solely to religious etc., purposes—The income of the institution should be applicable solely to religious or charitable purposes before it can be exempted. It is not ordinarily the function of the Income-tax Officer to enquire whether in fact it is so applied. All that he has to see is whether under the rules and constitution of the institution the income is applicable. Where there is no clear condition in the rules of the institution, the fact that the income is not actually applied to the purpose may be evidence that it is not so applicable and to that extent the Income-tax Officer may enquire into the application of the income. The word 'applicable

cable in clause (ii) is not so strict as the words finally set apart for application in clause (i)

Voluntary contributions —In the United Kingdom where income of charities as such is not exempt but only in respect of specified sources of income the meaning of the expression has been the subject of discussion

It was said that the word payment was synonymous with contribution and that the word voluntary did not mean gratuitous but meant given without compulsion

In my judgment what is or is not a voluntary contribution must in each case depend on the object for which and the object to which the contribution is made In each case it seems to me it must be a question of fact

To pay £1 to a benefit match of a professional cricketer for his own pocket would I should say be a voluntary contribution To pay £1 to get access and right to a special seat upon the ground for the match I should myself not call a voluntary contribution at all

I decline altogether to attempt to give an exhaustive definition of what are or are not funds voluntarily contributed for if I did I should as it appears to me land myself in the same difficulties in which the learned Judges who decided the cases in question as it appears to me got themselves into

per *Smith J* in *Commissioners of Inland Revenue v Vera University Club* 2 Tax Cases 279 18 QBD 720

The Maharajbagh Club Nagpur a Social Club unsuccessfully claimed that subscriptions to it were voluntary and that it was an institution of public utility *The Maharajbagh Club Ltd v Commissioner of Income tax* 5 ITC 201

Law in the United Kingdom.—Under Schedule A (property tax) exemption is given to (1) public buildings and offices belonging to any college or hall in any University (not occupied by any member or by any person paying rent) (2) public buildings office and premises belonging to any hospital public school or alms house (not occupied by any officer whose income amounts to £150 a year or more or by any person paying rent) (3) any building being the property of any literary or scientific institution which is used solely for the purpose of such institution and in which no payment is demanded or made for any instruction given there by lectures or otherwise (if the building is not occupied by any officer or by a person paying rent) (4) rents and profits of lands tenements hereditaments etc belonging to a hospital public school or alms house or vested in trustees for charitable purposes in so far as the income is applied to charitable purposes (till 1921 this did not extend to the premises owned and occupied by the charity) (5) under Schedule C—Government and other securities—on stock belonging to charities In 1921 exemptions were given (1) in respect of Schedule B—occupancy tax—in respect of lands occupied by a charity provided that the work in connection with the husbandry is mainly carried on by the beneficiaries of the charity and the profits applied solely to the charity (2) in respect of Schedule D—trading—if the work is mainly carried on by the beneficiaries of the charity and the profits solely applied to the charity And in 1927 in respect of trade exercised in the course of the carrying out of the primary object of the charity even if the trade is not carried on by the beneficiaries As a result of these changes many of the leading decisions in England have become obsolete

As Pollock M R put it *Brighton College v Marriott*, 10 Tax Cases 235 (1926) A C 192 —

There is under the (United Kingdom) Income tax Acts no general exemption for charities as such from income tax. Unless the charity can justify a claim to the particular exemption allowed in respect of tax collected under the several Schedules it remains liable to the tax.

On the other hand in India there is a more or less general exemption in favour of charities leaving aside the limitations imposed by clause (1-a) added in 1939. English decisions are therefore of limited guidance in deciding what is or is not a charitable etc purpose and in any case an exemption should be determined by the language of the Indian Act in that behalf and not with reference to English Statutes. In *re Trustees of the Tribune* 1939 ITR 415 (PC) *All India Spinners' Association v Commissioner of Income tax Bombay* 1944 ITR 482 (PC.)

Under the English law all religious purposes are also charitable. In *re White White v White* (1893) 2 Ch 4152 *Special Commissioners of Income tax v Pemsel* 3 Tax Cases 53 but certain purposes which would be religious according to non Christian or rather non Anglican standards would be superstitious and not religious. A technical meaning has been assigned to the words charitable purposes by the Court of Chancery in England. Certain charitable objects were enumerated in the preamble to Statute 43 Elizabeth c 4 but the Courts have given a very wide interpretation to the words. The subjects are enumerated in the Mortmain and Charitable Uses Act 1888 as below.

Relief of aged impotent and poor people maintenance of sick and maimed soldiers and mariners schools of learning free schools and scholars in Universities repair of bridges ports havens causeways churches sea banks and highways education and preferment of orphans relief stock or maintenance for houses of correction marriages of poor maids supportation aid and help of young tradesmen, handicraftsmen and persons decayed relief or redemption of prisoners or captives aid in case of any poor inhabitants concerning payment of fifteenths setting out of soldiers and other taxes.

The meaning of the words charitable purposes in the income tax laws was threshed out in *Special Commissioners of Income tax v Pemsel* 3 Tax Cases 53.

Per Lord Macnaghten — In all English Statutes when there is no controlling context a technical meaning is attached to the word charity and synonymous therewith is the word charitable as used in such expressions as charitable trust etc.

Charity in its legal sense comprises four principal divisions—trusts for the relief of poverty trusts for the advancement of education trusts for the advancement of religion and trusts for other purposes beneficial to the community not falling under any of the preceding heads. The trusts last referred to are not any the less charitable in the eye of the law because they incidentally benefit the rich as well as the poor as indeed every charity must do either directly or indirectly.

The (Income tax) Act has nothing to do with casual alms giving or charity of that sort nor indeed has it anything to do with charity which is not protected by a trust of a permanent character. The provisions of the Act are concerned with the revenues of established institutions—the income of charitable endowments.

(1891) A C. 531 580 583 586.

Note that as regards the fourth head, the benefit of the community, there is no mention of poverty

The words in the preamble of 43 Elizabeth, c. 4, are not a definition of charitable cases but are a detailed statement of certain cases which are to be charitable and in dealing with the matter the course which the Court of Chancery has pursued has been to look at the enumeration of the charities in the statute and to include under the word 'charitable' any gift of funds for a public purpose which is analogous to those mentioned in the statute. *Per Lord Wrenbury in Verge v Somerville*, (1924) A.C. 496 502

In a United States Sunday Act charity has been held to include 'everything which proceeds from a sense of moral duty or kindness or humanity for the relief or comfort of another and without any regard to one's own benefit or pleasure', *Doyle v L & B R R*, 118 Mass 197

Question of law—Whether a trust is charitable within the meaning of the statute or whether a particular object is one of general public utility is a question of law, though it is for the Commissioner to find and state the relevant facts. In *re Trustees of the Tribunal*, (1939) I.T.R. 415, *Royal Choral Society v Inland Revenue (C.A.)*, 1944 I.T.R. (Sup.) 13, dissenting from the decision of Lord Hanworth, M.R., in *Yorkshire Agricultural Society v Inland Revenue*, 13 Tax Cas. 58, that the question is one of fact, *All India Spinner's Association v Commissioner of Income tax, Bombay*, 1944 I.T.R. 482 (P.C.)

Lands vested in trust for religious purposes—Lands were vested in trustees to apply the rents and profits in maintaining (1) the missionary establishments among heathen nations of the Moravian Church (2) a school for the children of ministers and missionaries, and (3) certain religious establishments denominated choir houses. *Held*, by Lord Watson, Herschell, Macnaghten and Morris (Halsbury, L.C., and Lord Bramwell dissenting) that the trust was one for 'charitable purposes' within the meaning of the Income tax Acts. In those Acts the words 'charitable purposes' are to be interpreted not according to their popular meaning, but according to their technical legal meaning. *Special Commissioners of Income tax v Pemsel*, 3 Tax Cases 53 (1891) A.C. 531. This is one of the leading cases on the subject.

Charity—Scottish Law—In *Wilson and others v The Crown*, 5 A.T.C. 378, the Scottish Court of Session held that in Scotland a charity should be construed according to Scottish and not English law.

Hospital—Paying patients—In *St. Andrew's Hospital, Northampton v Shearns*, 2 Tax Cases 219, 19 Q.B.D. 624, a hospital received paying patients at remunerative prices and applied its surplus income to the extension and improvement of the hospital buildings. *Held*, that the surplus was profit assessable to income tax as the institution was not 'charitable'. In *Needham v Bowers*, 2 Tax Cases 360, an institution for the insane in which some patients paid sufficiently well for all the inmates to be supported without payment and which was therefore self supporting was held to be not 'charitable' although it was founded by charitable donations and made no profit. In *Cause v Lunatic Hospital, Nottingham*, 3 Tax Cases 39, however, an asylum with substantial charitable endowments which took inpatients at remunerative prices was considered to be 'charitable'. The difference between these decisions was founded on the fact that in the one case

the institution was chiefly dependent on the fees while in the other it was so dependent on the endowments

College or School—Receiving fees—A college was built and endowed to enable young women to carry on their studies after leaving schools. Each student paid in fees £90 a year or upwards, the receipts from the endowment being as to fees in the proportion of about two to one. *Held*, that the college was not exempt as a charity school, *Southwell v The Governors of Royal Holloway College*, 3 Tax Cases 386, (1895) 2 Q B 487

See also per *Phillimore J*, in *Governors of Bradford Grammar School*, 6 Tax Cases 136 following the tests laid down in *Charterhouse School v Lamarque*, 2 Tax Cases 611 and *Southwell v The Governors of Holloway College*, 3 Tax Cases 386

"Now a school which is nearly self supporting but has some assistance from endowments is not a charity school. A school which is almost entirely supported by endowments but gets some little assistance from fees paid by scholars is a charity school and in the same way a hospital which is almost entirely charitable is exempt as a hospital although it has a few paying patients. *Per contra* if the hospital is almost entirely self supporting it is not exempt because it has some residual endowment. The whole matter therefore is a question of degree."

A school in which full fees are paid by the students, and the surplus is devoted to the improvement of the College, is not a charitable institution but conducts a trade—decided by the Court of Appeal in *Marriott v Brighton College*, (1925) 1 KB 312, reversing the decision of Rowlatt, J

Per Scrutton, L J—

When any person habitually and as a matter of contract supplies money's worth for full money payment, he trades within the meaning of Schedule D. This is not a case where persons subscribe to enable transactions to be carried on, which could not be carried on by the commercial returns alone. This decision of the Court of Appeal was upheld by the House of Lords in *Brighton College v Marriott*, 1926 AC 192 10 Tax Cases 213

Charities—Contingent and not exclusive—Mr Joseph Rank by an indenture made in March, 1917, settled upon trustees certain funds to be held, together with the income thereof, upon trust "for the benefit of such persons institutions or purposes as the said Joseph Rank shall by any writing under his hand or by will appoint. In default of any such appointment the trust funds and income were to be held by the trustees upon trust for the benefit of the Wesleyan Methodist Church. The whole of the income of the trust for the three years ended 5th April, 1918, 1919 and 1920 was applied by the trustees to certain charitable institutions in accordance with written directions given at various dates by Mr Joseph Rank. The trustees applied for repayment of the Income tax which had been deducted at the source from the trust income during the above three years on the ground that under the deed of trust the income in question was applicable to charitable purposes only and had been so applied. *Held*, that inasmuch as the settlor possessed, under the deed of settlement power to execute an appointment in favour of purposes that were not charitable, the deed did not create a trust for charitable purposes only, although ultimately powers were exercised by the settlor in favour of charity, *Re v The*

Special Commissioners of Income tax (Ex parte Rank's Trustees), 8 Tax Cases 286 38 T L R. 256 This was followed in India in *In re Probynabad Stud Farm*, (1936) ITR 114 (Lah)

The first seven objects of a trust were non-charitable, and the balance, if any, of the funds and income of the trust was to be applied to charitable purposes. There was only a single block of income. Even before fully meeting the first seven objects, the trustees spent money on the eighth, i.e., the charitable object. It was held that since the prior obligations in respect of the first seven objects had not been met the money actually applied to the charitable object was not 'applicable to charitable purposes only'. *Larrence v Inland Revenue*, 19 A T C 171 (K.B.)

Common pastures—Grazing charges used for the benefit of—The freemen of Bootham Ward had possessed certain rights of common pasture over certain lands. By a certain statute some of these lands were vested in the Mayor of the place for the benefit of the freemen. Grazing charges were made upon non freemen, and these sums were used for the benefit of some of the widows of the freemen. Claim was made that the property was legally appropriated and applied for a charitable purpose. *Held*, that although an interpretation short of and different from, the technical meaning assigned to the term charitable purposes, by the Courts and adopted by the House of Lords in the Income tax case of *Pemsel*, 3 Tax Cases 53, should be given to the same term in the Corporation Duty Act, yet that interpretation should be a sufficiently wide and liberal one. It would not, however, include a case in which the beneficiaries of the charity had no right to the benefits and received them only through the consent of the real owners, viz., the freemen. *In re Bootham Strays York Commissioners of Inland Revenue v Scott and others*, 3 Tax Cases 134, (1892) 2 Q B 152

Mutual Benefit Association.—The objects of an institution were to afford relief to decayed members in distress, sickness and old age, and to aid widows and protect children. Subscription was an essential condition of membership, but relief was claimable only where the circumstances were necessitous, and no members were entitled as of right to such relief, an absolute discretion in the matter vesting in the directorate. *Held*, that the institution was not a charitable institution, but substantially one for the mutual benefit of the subscribing members, who in the event of the directors misapplying the rules or declining to act upon them according to their proper construction, would have a right to redress in a Court of Equity. *The Linen and Woollen Drapers, etc., Institution v Commissioners of Inland Revenue*, 2 Tax Cases 651, 58 L.T. 959

Trade Societies—Benefit restricted to members—Exemption claimed on behalf of a Scotch Incorporated Trade Society on the ground that its income was legally appropriated and applied to a "charitable purpose" *Held*, (1) that the meaning of the words 'legally appropriated' is that the appropriation must be of such a kind as to create a legal obligation upon the part of the administrators of the property, to apply it in a particular manner, (2) that funds belonging to an incorporated body which are derived from entry moneys of members, and are solely applicable as pensions to decayed members, or widows of members, at the absolute discretion of a governing body, are not to be regarded as funds 'legally appropriated and applied for any charitable purposes' within the meaning of the statute *The Incorporation of Tailors in Glasgow v Commissioners of Inland Revenue*, 2 Tax Cases 297. 'Legally appropriated' in English Acts roughly corresponds to 'held under trust or other legal obligation' in this sub section.

A Chamber of Commerce is not a charitable institution even though it is not formed for the purpose of making profits and may be an object of general public utility in ordinary parlance. The fact that the Chamber maintains a hospital out of its funds will not in itself make the hospital or Chamber a charitable institution especially if the hospital is for the limited benefit of the members and their constituents. *Chamber of Commerce, Hapur v Commissioner of Income tax, UP*, (1936) ITR 397, AIR 1936 All 764

The Bombay Grain Merchants' Association the income of which had to be spent "as per the resolutions of the Committee from time to time on matters of commercial and other small as well as big works of public utility" was held to be not charitable since the benefit was confined only to a section of the public, *viz*, those interested in Commerce, *Commissioner of Income tax, Bombay v Bombay Grain Merchants' Association*, (1938) ITR 427. The ruling must not however be considered to imply that a charity must extend its benefits to all members of the public without any limitation.

Masonic Lodge—A Grand Lodge of Masons claimed exemption in respect of the income of certain funds devoted to the relief of necessitous Masons, or their dependants, at the discretion of the administering bodies. Every Mason by whom, or by whose dependants, benefit was received from the funds, had to some degree contributed thereto through his Lodge, but the funds were largely derived from other sources than such contributions and the greater proportion of each individual Mason's contributions to his Lodge did not go to these funds. *Held*, that the exemption applied.

Per the Lord President—The meaning of "legally appropriated and applied" does not necessarily mean that there never can be any change—as if a thing is fixed back but it means that the practical condition of the Fund is that it is so applied and that it is in terms of either the direction of the trust or the constitution of the body which owns it. Therefore the first thing to be got at is whether any particular portion of corporate property is really what may be called (to use more general words) dedicated to charity. The funds are entirely used for the relief of distress in some form or other, and accordingly, *prima facie* I think there would be no question but that they fall within the exemption.

Per Lord Mackenzie—It appears to me that the question whether a particular fund falls within the exemption of the statute or not is largely a question of degree. If the objects of the Corporation are purely mutual benefit if the individual corporators make their contributions as an investment, the case would be governed by the principles laid down in the *Incorporation of Tailors in Glasgow*, 2 Tax Cases 297. From the bye laws which govern the Tailors' Incorporation it appears that all that was left was for the mutual benefit of the individual members. So, too, in the English case *Re The Linen and Woollen Drapers etc, Institution*, 2 Tax Cases 651, which was founded upon by the Crown, it appears from the opinion of Pollock, B, that the institution was a Mutual Benefit Society.

In the present case it does not appear to me that the contributions by individual Freemasons are of such a character or amount as to necessitate the Court arriving at the conclusion that the funds in question are not legally appropriated and applied for a charitable purpose. The individual pays not to any of these funds but to a daughter lodge

makes these payments in order to become a Freemason. From the rules the consequence results that a small proportion of his contributions goes to these funds. That however, is not the main object he has in view when he makes his contribution. He makes his contribution in order to share in the benefits of Freemasonry and this is not confined to making payments from these funds, *Grand Lodge, etc of Masons etc v Commissioners of Inland Revenue* 6 Tax Cases 116 (1912) Sess Cas 1064.

Temperance Institutions—The Temperance Council of the Christian Churches of England and Wales the principal object of which was united action to secure legislative and other temperance reform was considered not to be a charitable institution but an institution established for political purposes as its object was to secure legislative reform. *Commissioners of Inland Revenue v The Temperance Council etc* 10 Tax Cases 748 42 T L R 618.

The object of a trust was 'to assist the inhabitants of Falkirk by providing them with comfortable rooms where wholesome refreshments may be obtained, where they are free from the temptation of intoxicating liquors.' The trustee maintained two cafes in one of which prices were charged as in ordinary restaurants and in the other at lower rates in order to benefit the working classes. There were free reading and recreation rooms. The trustees avoided making profits as far as possible.

Held that the promotion of temperance was a charitable object and that as the only way in which the trust could be given effect to was by the adoption of commercial methods that feature should be ignored and that the trust should be exempt. Lord Sands however thought that if the Crown had shown that there was a separable branch working at a profit it might have been different. *Commissioners of Inland Revenue v Falkirk Temperance Cafe Trust* 11 Tax Cases 353 (1927) Sess Cas 261.

Simplified Spelling Society—A trust the fund of which was to be distributed to the Simplified Spelling Society or to any other similar society or association was not considered to be charitable. *Trustees of Sir G B Hunter v Commissioners of Inland Revenue* 8 ATC 149 73 SJ 284 45 T L R 344.

Anglo Swedish Society—The promotion of a closer and more sympathetic understanding between countries is not a charitable purpose. *Commissioners of Inland Revenue v Anglo-Swedish Society* 16 Tax Cases 34 47 T L R 295.

Social Club—Establishing and maintaining an institute meeting place in London for the benefit of Welsh people in or near or visiting London with a view to creating a centre in London for promoting social, spiritual and educational welfare of Welsh people, and fostering the study of the Welsh language and of Welsh history literature music and art were the purposes of an association which used its premises for public lectures debates music club and literary and educational classes and also as a lounge library etc. The Special Commissioners held that the institution was essentially a social club the charitable features being unimportant. The Court declined to interfere. *Sir Horace Jones William's Trust v Inland Revenue* (1945) 2 All E R 236 (C.A.).

Foreign bond holders.—A Society for the protection of holders of foreign securities is not charitable. It protects the interests of a limited

class only even though in a broader sense the country as a whole may benefit incidentally from the activities of the society. After all such a society merely enables certain private investors to look after their interests better and there is no charity in it. *Corporation of Foreign Bond holders v Inland Revenue*, 1944 (CA)

Widows and orphans of members—Society for the relief of— According to its Charter the object of a Society was to relieve the widows and orphans of the deceased members who might need assistance and according to the same Charter the Society claimed to unite the advantages of a provident with those of a benevolent society inasmuch as by a small yearly subscription the members were enabled to protect their widows and orphans from destitution should they need relief and it was benevolent inasmuch as its benefits were conferred only to those in straitened circumstances. The funds of the Society were raised by interest of moneys, legacies and donations and subscriptions of members. By far the greater portion of the members were in such circumstances that the dependants would not in the ordinary course require relief. *Held* that the funds of the Society were solely devoted to the relief of individuals and that this was a charitable purpose on the authority of the decisions given in the Court of Chancery *Spiller v Maude*, 32 Ch D 158 followed *Cunnack v Edwards* 12 TLR 614. *Re Clarke*, 1 Ch D 497, distinguished, *Commissioners of Inland Revenue v Society for the Relief of Widows and Orphans of Medical Men* 11 Tax Cases 1 42 TLR 612.

A Society was established to help (1) members disabled by illness or accident and in needy circumstances (2) the dependants of deceased members in necessitous circumstances and (3) in the education of the children of disabled members. The members of the Society were also themselves eligible for relief and subscriptions and donations were received also from persons unconnected with the medical profession. This case was decided along with the case of the Society for the Relief of Widows and Orphans etc. and it was held in the same judgment that this Society also was charitable. *Commissioners of Inland Revenue v Medical Charitable Society for the West Riding of Yorkshire* 11 Tax Cases 1 42 TLR 612.

Per Roxlatt J—A purely mutual society among very poor people whose dependants would be quite clearly always poor would not I think, be a charity: it would be a business arrangement. (the beneficiaries in the present case) have not the right to anything: the funds are vested in trustees who have to do their duty of course faithfully but they have to select the objects with a view to making as far as their resources go a due and fair relief of indigence. The immateriality of the element of private subscription seems to be emphasised in the case of *Spiller v Maude* 32 Ch D 158.

Nursing facilities—Society giving—An association whose object was the provision of nursing facilities to poor people had three classes of members paying subscriptions at different rates the bulk of the members being in the lowest class. Facilities were given only to members in most cases at less than cost the deficit being met out of donations or income from investments of donations etc. from the public. *Held* that the association was charitable. *Commissioners of Inland Revenue v Peebleshire Nursing Association* 11 Tax Cases 335 (1927) Sess Cas 215.

Library—A Corporate body possessed buildings which were occupied as a library and owned also mortgages railway shares and bank deposits.

It claimed total exemption. *Held*, (1) that the Society's library was not property legally appropriated and applied for the promotion of education, literature, science or the fine arts (note the difference in the wording of the English and the Indian law) (2) that the income of the Society was exempt only to the limited extent that it was legally appropriated by contract to the perpetual endowment of a chair of conveyancing in the University of Edinburgh (3) that the words legally appropriated did not mean lawfully appropriated but that the appropriation was to be of such a kind as to be legally binding upon the parties. *Society of Writers to the Signet v Commissioners of Inland Revenue* 2 Tax Cases 257. A building belonging to the Magistrates and Town Council of Dundee was used mainly as a Free Library but in one of the rooms accommodation was afforded by special arrangement for the books belonging to a Subscription Library. These books were under the control of the Librarian of the Free Library and after being a year in circulation among the subscribers were handed over to and became the absolute property of the Free Library. *Held* that the building was not within the exemption in favour of buildings used solely for the purposes of a literary or scientific institution. *Musgrave v Magistrates and Town Council of Dundee*, 3 Tax Cases 552. 34 Sc L R 702.

A building was owned by a Municipal Corporation and was maintained for the purposes of a Free Library under the provisions of the Public Libraries Act 1892. *Held* (by Lords Herschell Macnaghten and Morris Halsbury L C dissenting) that the building was within the exemption from income tax granted to Literary or Scientific Institutions. *Mayor, etc., of Manchester v McAdam* 3 Tax Cases 491 (1896) A C 500.

University College—The University College of North Wales was founded to provide instruction in all the branches of a liberal education except theology. It derived income from investments of which a part was appropriated specifically to various educational purposes and part applied to the general purposes of the College. *Held* that the College was a Corporation established for charitable purposes only within the meaning of the Income-tax Acts that the revenues applied to the general purposes of the College were applied to charitable purposes only and the College was entitled to exemption. *The King v Special Commissioners of Income Tax* (Ex parte University College of North Wales) 5 Tax Cases 408. 25 T L R 368.

Professional Associations—Exemption claimed on the ground that the property and income of an Institution of Civil Engineers were legally appropriated and applied for the promotion of science. *Held* by Lords Watson and Macnaghten (Lord Halsbury L C dissenting) with reference to Corporation Duty that the primary object of the Institution was the promotion of science in the abstract and that the property and income were legally appropriated by Charter and applied in fact to that object, that if the further object of the advancement of the professional interest of members was to be also inferred, it was at least secondary to the main and chief object. *Commissioners of Inland Revenue v Forrest* 3 Tax Cases 117. Following the above the Court of Appeal held with reference to income-tax. *Institution of Civil Engineers v Commissioners of Inland Revenue* 16 Tax Cases 138 that the institution was of a charitable nature, the professional benefits to the members being only incidental. That professional engineers alone could be members did not militate against the view that

the primary object of the society was the advancement of knowledge only professional engineers could possess the requisite scientific knowledge for membership. The question of construing the charter and bye laws of a society is not a pure question of fact.

The Royal College of Surgeons was incorporated for the advancement of the science of surgery within Her Majesty's Dominion. It granted various surgical qualifications and was both an examining and teaching body in surgical subjects. *Held* that the objects of the College were mainly professional that it was not a 'scientific institution' and was therefore not entitled to exemption for buildings belonging to it used as a library museum etc. for the purposes of the College. The question being a mixed one of fact and law this judgment did not follow that of the House of Lords in *Commissioners of Inland Revenue v Foxrest* 3 Tax Cases 117 15 App Cas 334.

Per Lord Adam —

If in the sense of the Act the main and leading purpose of the institution is the advancement of science it will not be the less entitled to the exemption claimed because it aids incidentally consequentially the promotion of professional purpose and that appears to be the case or very much so of the Institution of Civil Engineers in London. On the other hand if the main and leading object be that of advancing a profession then that it may also incidentally and as a consequence of that promote science will not (the less) make it other than a professional institution. *Sulley v Royal College of Surgeons Edinburgh* 3 Tax Cases 173 29 ScLR 620.

By the Customs and Inland Revenue Act 1885 a duty was imposed by way of compensation to the Revenue for Death Duties which obviously cannot be levied on Bodies Corporate and Unincorporate the rate of Duty being five per cent per annum on the net annual value income and profits of real and personal property belonging to such bodies. Property which or the income or profits whereof shall be legally appropriated and applied for any charitable purpose or for the promotion of education literature science or the fine arts [48 and 49 Vict c 51 section 11 sub sections (2) and (4)] (Customs and Inland Revenue Act 1885) was exempt and the Royal College of Surgeons claimed exemption from this duty. *Held* that the College had two main objects neither of which was subsidiary to the other (1) The promotion of the science of surgery (2) The promotion of the practice and encouragement of surgery including the interests of those practising surgery as a profession and including also the examination of students and others to qualify for practice or honours in surgery. There was no legal obligation either to apply the property or the income to the first main object or not to apply them to the second main object and as there was no appropriation by the college by conveyance declaration of trust or otherwise there was no legal appropriation for a purpose exempting from duty. Neither was the property and income brought into charge applied so as to exempt it from duty. *The Royal College of Surgeons of England v Commissioners of Inland Revenue* 4 Tax Cases 344 (1899) 1 QB 871.

The objects of the Medical Council in England were to keep a Register of Medical Practitioners and regulate their conduct to supervise and control medical studies and examinations and to prepare and to revise from time to time the British Pharmacopœia. It was held by the Court of Appeal that

the purpose of the Council was not charitable *General Medical Council v Commissioners of Inland Revenue*, 7 A T C 121 13 Tax Cases 819

Following the above case it was held that the General Nursing Council for Scotland the purpose of which was partly educational and partly the professional advantage of registered nurses was not charitable *The General Nursing Council for Scotland v Commissioners of Inland Revenue* 14 Tax Cases 645 8 A T C 384

An association does not however cease to be one with a charitable object merely because incidentally and in order the better to carry out the charitable object it is necessary to cover certain special benefits to members see per Atkin L J in *Commissioners of Inland Revenue v Yorkshire Agricultural Society* 13 Tax Cases 58 (1928) 1 KB 611 reaffirmed by the C. of A in *Geologists' Association v Commissioners of Inland Revenue* 7 A T C 298 14 Tax Cases 271

The Honourable company of Master Mariners was held to be of the nature of a craft guild and not a charitable (literary or scientific) institution because its main purpose was to set up a central body representative of and qualified to represent the senior officers of the Merchant Navy on all occasions and in all matters and things relating to or affecting the Merchant Navy or the interest or status of its officers. It was claimed for the society that this object was really machinery to secure other objects which were charitable *Society of Master Mariners v Commissioners of Inland Revenue* 17 Tax Cases 298.

An Association formed for the promotion of the interests of the teaching profession in Preparatory Schools though it also furthered the advancement of education was considered to be not charitable *R v Special Commissioners (Ex parte the Incorporated Association of Preparatory Schools)* 10 Tax Cases 73 41 TLR 651

The Headmasters' Conference—an Association for the promotion of the interests of the teaching profession the settlement of disputes affecting members of the profession etc, though the association was interested in the cause of secondary education generally was similarly treated to be not charitable. *R v Special Commissioners (Ex parte the Headmasters' Conference)* 10 Tax Cases 73 41 TLR 651

Per Lord Eldon in *Morice v The Bishop of Durham* 10 Vesey 532—quoted in *R v Special Commissioners (Ex parte Rank's Trustees)*, 8 Tax Cases 286 and again in the Headmasters' Conference case above. The question is whether if upon the one hand he might have devoted the whole to purposes in this sense charitable he might not equally according to the intention have devoted the whole to purposes benevolent and liberal and yet not within the meaning of charitable purposes as this Court construes these words.

The mutual intellectual benefit of members is not a charitable purpose otherwise every club could be a charitable institution. A charity implies as a necessity work for the benefit of others. The nature of the purpose is a question of fact *Geologists' Association v Commissioners of Inland Revenue*, 14 Tax Cases 271 7 A T C 298.

The Aberdeen Medico Chirurgical Society was held not to be a literary or scientific institution since despite its library and the facilities for interchange of ideas on medical and scientific subjects it was essentially a professional society to which the other features were only incidental *Commissioners of Inland Revenue v Aberdeen Medico Chirurgical Society*, 16 Tax

Cases 237 Where there are two main purposes *viz*, (a) public benefit and (b) creation of a professional body, and neither can be considered to be subsidiary to the other the institution is not charitable *Pharmaceutical Society of Ireland v Commissioners of Inland Revenue* 17 ATC 587 (Ir) The Madras Bar Council was allowed exemption on its income from investments earmarked for legal education but not on its income from enrolment and examination fees 1943 ITR 1

It should be remembered that according to the Indian Law where a trust is only partly charitable the part of income which is applied or set apart for charitable purposes is exempt But the trust should clearly lay down that a part is charitable and it is not sufficient that the trustee spends a part on charity at his own discretion

Choral Society—The Royal Choral Society which sought no profit and trained choir singers (who were not paid for their singing) was held to be charitable the object being educational *Per Lord Greene MR* It was said the public goes to be entertained the singers sing in order to have the pleasure of singing and the ten gentlemen (members) encourage and assist these operations in order to have the pleasure of running a choir and listening to the performance Curiously enough some people find pleasure in providing education Still more curiously some people find pleasure in being educated but the element of pleasure in these processes is not the purpose but a by product which is necessarily there. Further education need not be confined to the education of the executants *i.e.* the singers in this case and can cover the education of public taste also *Royal Choral Society v Inland Revenue* 1944 ITR (Sup) 13

Political trusts—In the *Bonar Ia v Trust Memorial* case 12 ATC 164 17 Tax Cases 508 the Court affirmed that the test in all such cases is what is the dominant purpose of the trust A trust which was in truth for educational purposes mainly would not cease to be such merely because the trustees were a political party On the other hand a trust for the propagation of political principles would not become educational merely because it simulated or adopted educational methods

The same view has been taken in India also *see In re Trustees of the Tribune* 1939 ITR 415 (PC) and following this *In re Tilak Memorial Fund* 1942 ITR 26 (Bom) in which two of the objects were not charitable *viz* political propaganda of a particular kind and any object at the discretion of the trustees of national or international importance and the trustees had absolute discretion as to the money to be spent on the several objects On the other hand even if an association is set on foot by a political organisation and is closely connected with it the connection with the political organisation will not make the object of the associations any the less charitable if its real object is the relief of poverty *All India Spinners' Association v Commissioner of Income tax Bombay*, 1944 ITR 482 (PC)

Technical education—A college imparting technical education in all branches of the woollen industry and maintained mostly out of subscriptions from woollen manufacturers was held to be an educational institution *Scottish Woollen Technical College v Commissioners of Inland Revenue (C of S)* 11 Tax Cases 139 On the other hand 'flying' is not education even though it may be for the good of the community and in any case where the benefits are confined to the members of a club there can be no charitable purpose however easy it might be to become a member of the club

Scottish Flying Club v Commissioners of Inland Revenue, 20 Tax Cas 1, (1935) S C 817

Agricultural Society—A society numbering about 3000 members, unincorporated and without any deed of trust held annual shows and interested itself generally in the improvement of agriculture including *inter alia* the improvement of agricultural lands. The income comprised gate money, subscriptions, etc. and the excess of income over expenditure was invested. *Held* by the Court of Appeal that there was a charitable purpose. *Commissioners of Inland Revenue v Yorkshire Agricultural Society*, 6 A T C 862 (1928) 1 K B 611. The law however has been amended in the United Kingdom in respect of such income of agricultural societies. See section 23 of the United Kingdom Finance Act of 1924.

Though live stock may conceivably include hounds, fox hunting is not directly beneficial to the community and a Foxhound Show Society is not therefore charitable. *Peterborough Royal Foxhound Show Society v Commissioners of Inland Revenue*, 20 Tax Cas 249 (1936) 2 K B 497.

Col Probyn of Probyn's Horse obtained in 1864 certain lands on lease from Government (purpose not stated in lease) and with these lands and certain funds from various sources founded a stud farm. There was no trust deed but the main object of the farm was to supply remounts to the regiment and to improve horse breeding. The bulk of the horses were sold to the Army and those unfit for the Army were sold to outsiders. The officer commanding the regiment administered the farm and he had discretion as to spending the funds, e.g. a large sum was once paid as bonus to the regiment and other sums had been given for such items as a farewell party to the Commander-in-chief and a wedding party. It was held that the purpose of the trusts was not charitable. *In re Probynabad Stud Farm* 1936 I T R 114 (Lah).

Convalescent Home—A home established for the benefit of members of the drapery and allied trades obtained its income from the original endowment and other investments from donations and subscriptions from concerns in the trades and from payments by visitors. The persons using the home were convalescents from illness, persons requiring rest and change of air and persons taking a holiday and the last class had to pay higher rates than the others. The visitors were admitted either on the recommendation of the donor and subscriber firms or on special letters of introduction.

Held by the Court of Appeal following *Re Estlin* 72 L J 687 and *Re Gardon* (1914) 1 Ch 662, that the home was charitable. *Commissioners of Inland Revenue v Trustees of Robert's Marine Mansions* 11 Tax Cases 425 43 T L R 270.

Benovolent Society—Commercial methods—In *Trustees of Psalms and Hymns v Whitwell* 3 Tax Cases 7 it was held that the business of selling a hymn book was a trade even though the resulting profits were distributed among widows and orphans of ministers and missionaries. In *Religious Tract and Book Society v Forbes*, 3 Tax Cases 415 in which the society whose primary object was the diffusion of religious literature, incidentally carried on a book selling shop it was considered to that extent to be engaged in a trade. At the same time it was held that a colportage agency carried on by the same society in which the chief business was not so much

Government with" should be construed to mean 'entitled by the law of British India to or entrusted by a Government authority in British India with' It follows therefore that there can be no "local authority" outside British India within the meaning of clause (iii) of sub-section (3) of section 4 of the income tax Act This view does not of course apply to local authorities in British administered areas in Indian States to which the Income tax Act and the General Clauses Act have been applied (Income tax Manual)

Trade or business—In view of the definition in section 2 (4), the words 'trade or' are superfluous

Computation of income—A local authority was authorised and required to supply water and to obtain payment from the persons to whom the water was supplied but such payment was by law restricted to an amount which was insufficient to meet the cost of supplying the water, and the authority was empowered to meet the deficit by levying a general rate through other local authorities The revenue so received was held by Macnaghten J, not to be a trading receipt but the Court of Appeal decided the contrary The sums paid by the local authority to other local authorities, whether under precepts or not, for water supplies to it were considered to be part of the price of the water, and therefore held to be trading expenditure, *Ostime v Pontypridd and Rhodda Joint Waterboard* 1944 C A

(iv) Interest on securities which are held by, or are the property of, any Provident Fund to which the Provident Funds Act, 1925, applies

History—The exemption in this sub section was given by Notification before 1918 when it was incorporated in the Act

Exemption of Provident Funds—This clause which applies only to funds covered by the Act of 1925 exempts the interest on securities held by certain provident funds, while under section 15 (1) contributions paid by subscribers to such funds up to a certain limit are exempt from the tax The accumulated balances paid out of those funds are capital in the hands of the recipients, see *Shaw Wallace & Co v Commissioner of Income-tax, Bengal*, (P.C.) 59 Cal 1343, 59 IA 206, also perhaps interest thereon though the question is arguable

The exemption granted to Provident Funds which comply with the provisions of the Provident Insurance Societies Act, 1912, or which were exempted from the provisions of that Act was withdrawn by the Income-tax (Amendment) Act, 1924 (XI of 1924) Provident Insurance Societies to which the Provident Insurance Societies Act, 1912, applies, or which have been exempted from its provisions and which were in existence before the 1st April, 1924, continue, however, under executive instructions to enjoy the exemptions under section 4 (3) (iv) and section 15 (1), to which they were entitled under Act XI of 1922, before it was amended by the Act XI of 1924

As regards "recognised provident funds", see section 4 (3) (ix), section 15 and chapter IX A

"Securities"—The words "interest on securities" do not bear the same restricted meaning as in section 8 of the Act In section 4 (3) (iv), they cover interest on a mortgage Nor is the meaning for example,

restricted to the ordinary limited legal sense, in which it must always have reference to a loan. Provident Funds are entitled to invest in any trustee security, and it has not been the intention of Government to discriminate between the various classes of investments which are thus legally authorised. The word 'securities' in section 4 (3) (iv) is therefore to be interpreted as covering all securities mentioned in section 20 of the Indian Trusts Act. (Income-tax Manual)

Provident Funds to which this clause applies.—The Provident Funds Act, 1925 (XIX of 1925) applies to all Government and Railway Provident Funds and to such provident funds as may have been established for the benefit of its employees by any local authority as defined in the Local Authorities Loans Act 1914 to which the Local Government may by notification extend the Provident Funds Act.

Court of Wards servants—In an estate under the Court of Wards the officers are appointed by Government their salaries are fixed by them whose orders the officers must obey. The receipt of salaries from the estate merely means that Government direct the officers to help themselves to a limited extent from the estate funds i.e., Government direct the Ward to pay for a particular class of Government employees. Whether a person is an employee of a particular authority for the purpose of the Provident Funds Act depends on whether membership of the fund is controlled by that authority and not on from which sources the employee's salary is paid or on the legal relationship between him and that authority. *Held* accordingly that a servant of the Court of Wards is a Government servant for the purpose of the Provident Funds Act *Rutherford v Commissioner of Income tax, Bihar and Orissa*, 5 ITC 71 10 Patna 315, AIR 1931 Patna 451

(v) * * * *

History—This clause which ran as below was deleted in 1939 as being superfluous

'any capital sum received in commutation of the whole or a portion of a pension, or in the nature of consolidated compensation for death or injuries, or in payment of any insurance policy, or as the accumulated balance at the credit of a subscriber to any such Provident Fund.

Rulings—Accumulated bonuses paid out of a provident fund are of the nature of capital irrespective of the employee's legal right to them and even though the bonuses are not of the nature of a windfall but are paid on a plan. There is no essential difference between such a payment and a sum payable under a policy of insurance on its maturity, *Commissioner of Income tax, Madras v Fletcher*, (1937) 1 ITR 428 (PC)

It was ruled in *Rutherford's Case*, 10 Pat 315, 5 ITC 71 by the Patna High Court that as in the case of terms like 'penalty' and 'liquidated damages', the real nature of a transaction should be examined, and that merely calling a payment a gratuity will not make it such if it is really of the nature of a commuted pension. A lump sum actuarially equated to a hypothetical pension is a commuted payment of pension for the purpose of this clause. It is not necessary that a pension should be first sanctioned, or even claimable as of right. Further the concession given by this clause is not confined to pensions granted by Government

A lump sum gratuity in lieu of pension was held to be taxable in *Balaji Rao v Commissioner of Income-tax, Madras*, 8 ITC 80, but the ruling

is of doubtful authority in view of the Privy Council rulings in *Shaw Wallace and Co's Case*, 59 I A. 206 and *Fletcher's Case*, (1937) I TR 428

(vi) any special allowance, benefit or perquisite specifically granted to meet expenses wholly and necessarily incurred in the performance of the duties of an office or employment of profit

History—In the 1886 Act the corresponding provision was partly contained in the definition of salary which ran as below —

Includes allowances fees commissions perquisites or profits received in lieu of or in addition to a fixed salary in respect of an office or employment of profit but subject to any rules which may be prescribed in this behalf it does not include travelling tentage horse or sumptuary allowances or any other allowance granted to meet specific expenditure.

Perquisite or benefits not capable of conversion into money—The provision in section 3 (2) (ix) of the Act of 1918 that any perquisite or benefit which is neither money nor reasonably capable of being converted into money was not liable to tax was omitted in 1922. At the same time section 7 (1) of the Act was amended to provide for the tax on of perquisites in the form of rent free residences. The old provision was based on *Tennant v Smith* (1892) A C 150 referred to later

The following instructions are found in the Income tax Manual —

All perquisites received by an employee in lieu of or in addition to salary or wages are liable to the tax. House-rent allowances and the value of rent free quarters form additions to the remuneration of an employee and even where residence in a particular town or building is necessary for the proper performance of the employee's duties such allowances or perquisites cover expenses of a personal character which the employee would otherwise have to incur. They do not therefore meet expenses wholly and necessarily incurred in the performance of the duties of an office or employment of profit and are therefore not covered by the exemption in section 4 (3) (vi) of the Act and are taxable.

Two conditions have to be fulfilled before the exemption specified in section 4 (3) (vi) can apply. The expenses incurred by the employee must be wholly and necessarily incurred in the performance of his duties as an employee and the allowances or perquisites must have been granted by the employer with the said purpose of meeting the extra expense thus caused to the employee and the extra expense only. It is thus a question of fact in each case whether a house rent allowance or the value of rent free quarters is exempt from the tax but the following examples are given for the purpose of general illustration —

(a) A currency officer is granted rent free quarters in his currency office. Even though his residence in that office is necessary for the proper performance of his duties he will be liable to the tax on the value of his rent free quarters since he would in any case have had to provide himself with a residence and the perquisite does not therefore meet expenses wholly incurred in the performance of the duties of an office or employment of profit.

(b) A firm in Calcutta makes a practice of providing its employees with rent free quarters and houses some of its employees in its business premises as resident clerks. The employees of the firm including the resi-

dent clerks will, as in the previous case, be liable to Income tax on the value of their rent free quarters

Such perquisites as (for example) tuition, domestic services or the value of passages by rail or steamer provided by employers free of charge for their employees are not taxable but passage money paid in India by an employer to his employee to enable him to go on leave is liable to tax

Rewards granted to officials for passing compulsory examinations must be distinguished from grants made to assist candidates to meet the expenses of preparing for such examinations. Such tuition grants fall under section 4 (3) (iv) of the Indian Income tax Act (XI of 1922) and are not liable to tax even if they are paid only to the successful candidates

Wholly and necessarily—The words 'wholly and necessarily' are stricter than the words 'wholly and exclusively' used in section 10 (2), and the word 'solely' in section 12 (2). In the case of salaried persons a deduction may be made only if the allowance is given for meeting expenditure which is not only wholly incurred in the performance of the person's duties but also necessarily incurred. See first proviso to sub section (1) of section 7—where the words "wholly necessarily and exclusively" are used

Expenses—Means actual disbursements, not allowances for loss of time, (*Jones v Comorthen*), 1 O L J Lx 401. The position is made clear, in the sub section, by the word 'incurred'. 'Incurred' can only mean that there has been, or would be an actual outgo, and notional expenditure cannot be 'incurred' except by express provision to that effect. Actual outgo however, need not be in cash

Perquisite—The word dates from feudal times, and meant casual income arising to a feudal chief (see *Stroud*). The meaning of the word was considered in *Tennant v Smith*, (1902) A C 150, 3 Tax Cases 158 which decided that a perquisite should be capable of conversion into money before it can be taxed. This was the law in India also till 1922, see notes under section 7 (1)

In *MacDonald v Shand*, 8 Tax Cases 420 in which the question was whether a perquisite should be taxed on the year's income as part of salary or on an average of three years (this question cannot arise in India), Lord Birkenhead said. Infinite disputation is possible as to what, in different contexts, may be the proper connotation of a term such as 'perquisite.' In one context it may have a bad or an irregular connotation, in another it may be normally ranged under payments which are both frequent and regular in commercial transactions.

According to Murray's Dictionary, the word means 'any casual emolument, fee or profit attached to an office or position in addition to salary or wages'

Rent-free residences—This clause applies only to cases in which the assessee is actually put to expense and is recouped therefor. Accordingly, the value of a rent-free residence given by an employer to enable the employee to entertain the employer's guests is not exempt from tax *Abbot v Commissioner of Income tax, Bihar and Orissa*, (1935) 9 ITC 9. As regards the law in the United Kingdom, see *Tennant v Smith* 1892 A.C. 150 and other rulings referred to later

Lambardari fees—Such fees (in the Punjab) are remuneration for collecting land revenue, and whether or not the out of pocket expenses of

the lambardar can be deducted from such fees the fees as a whole are not covered by this clause *Conville v Commissioner of Income tax*, (1936) 11 R. 137 (Lah.)

Uniform grant.—A detective-sergeant in the employment of a Municipal Corporation was assessed on his salary which included a cash allowance given to him for clothing in lieu of free supply of uniform. The clothing which the officer must purchase with the cash allowance was specified, and was subject to the approval of a superior officer. The allowance for clothing was not regarded as income for superannuation purposes, and, apart from this allowance, detective officers received the same rates of pay as uniformed officers. *Held*, that the allowance was a payment accruing to the assessee by reason of his office and was assessable to income-tax, *Jerguson v Noble* 7 Tax Cases 176. The Court suggested, however, that it would only be fair to permit such detectives to deduct from their income the expenditure incurred by them in making clothes suitable for their duties and this is reported to be allowed in practice.

Provident Scheme—Employee's Contribution.—A sum of £35 was placed to the credit of an assessee—a teacher in Dulwich College under the Provident Scheme for the Assistant Masters of the College. Of this sum no part was payable until the assessee left the College, or until his decease, he could not raise money on it, and as regards one moiety, payment was contingent on a certain length of service and on good conduct. This moiety represented the employer's contribution, and the other moiety the employee's, his salary having been raised correspondingly. *Held*, that the whole sum (both the employer's and employee's contributions) was a taxable addition to the assessee's salary, *Smyth v Stretton*, 5 Tax Cases 36. Apart from the difference between the English and the Indian Acts, the correctness of this ruling was doubted by the Rangoon High Court, *Bombay Burma Trading Corporation, Ltd v Commissioner of Income tax*, (1933) 11 R. 152. The scheme of the Acts both in this country and in the United Kingdom is to tax actual and not potential sources of income. The amendment of section 7 in 1939 which taxes salaries on an accrued instead of a cash basis would not seem to affect the position in this respect.

Boarding—Cost of.—A man and his wife were employed at an asylum at separate fixed salaries payable weekly, but were given board, lodging, etc., the necessary deductions being made from their wages. *Held* that the assessee should be assessed on their gross income.

Per Rowlatt, J.—These (i.e., cases like *Tennant v Smith*), are the cases in which there is a fixed salary plus something else. (But) if we get a case where a person is paid a salary and out of that salary has to pay a counter amount to secure himself some necessities—

there is no relevance in the question whether what he gets by the counter payment can be disposed of for money.

He has been paid a salary, and what he does with the salary is immaterial. *Cordy v Gordon*, 9 Tax Cases 304, (1925) 2 K.B. 276.

A was entitled to pay at £30 plus free board, lodging, washing and uniform valued at £40 per annum. Later on the free allowances with the exception of the uniform were abolished, and an increased rate of pay given, but the cost of food, etc., was deducted from the pay every week. A claimed that the board, lodging, etc., were not convertible into money and that only the net money received after deduction for food etc., should be taxed. The General Commissioners held that A had not entered into any fresh contract for service when the method of remunerating him was

changed and that his claim was correct. *Held* that the Commissioners were wrong and that the gross salary should be taxed. *Machon v McLoughlin* (1926) 11 Tax Cases 83 5 A.T.C. 381 (C.A.) *Cordy v Gordon* 9 Tax Cases 304 *Bell v Gribble* 4 Tax Cases 522 (1903) 1 K.B. 517 followed.

Per Ro-latt J—If a person is paid a wage with some advantage thrown in you cannot add the advantage to the wage for the purpose of taxation unless that advantage can be turned into money.

But when you have a person paid a wage with a necessity—the contractual necessity if you like—to expend that wage in a particular way then he must pay tax upon the gross wage and no question of alienability or inalienability arises. the question is whether he is

paid a wage part of which he has to expend in a particular way by way of counter account or whether it is that he receives as his wages the net sum after allowing these amounts. (Confirmed by the Court of Appeal.)

Clergyman—Expenses of—A minister of the Church of Scotland was allowed to deduct—(1) expenses actually incurred in visiting the members of his congregation living beyond the limits of his parish (2) travelling expenses incurred in the discharge of duties imposed on him by his ecclesiastical superiors (3) cost of stationery and (4) communion expenses but not the cost of books or the rent of the part of his house used for his work. *Charlton v Commissioners of Inland Revenue*, CS 1890—27 Sc L.R. 647.

A clergyman claimed deduction in respect of his expenditure on (1) Horse and Carriage (2) Communion Element (3) Process of Augmentation and (4) Pulpit Supply during holidays. The Commissioners had only allowed so much of the amounts claimed under heads (1) and (2) as they were satisfied had in fact been incurred wholly exclusively and necessarily in the performance of his duty and had altogether disallowed the amounts claimed under heads (3) and (4). *Held* as regards (1) and (2) that the amount allowable was a question of fact, and that the finding of the Commissioners thereon was final and as regards (3) and (4) that the allowance had been rightly refused. *Jardine v Gillespie* 5 Tax Cases 263 (1907) Sess Cas 77.

The expenses incurred by a curate removing from one curacy to another which he had taken up were held not to be expenses incurred wholly exclusively and necessarily in the performance of his duties as a curate and were therefore inadmissible as deductions in arriving at his liability to income tax. *W. Friedson v The Rev F H Glyn-Thomas* 8 Tax Cases 302.

Domestic servant—Cost of employing—A man and his wife were appointed master and mistress of a school on a joint salary. The master claimed a deduction of £30 in respect of the cost of a domestic servant employed to carry on the duties of his household while his wife was engaged at the school. *Held* that this was not an expense incurred in the performance of the duties of the offices of master and mistress of the school. *Bowers v Harding* 3 Tax Cases 22 (1891) 1 Q.B. 560.

Motor cycle—Cost of—For going to place of work—A store keeper employed by a shipbuilding company contended that, owing to the abnormal shortage of houses in that town he was compelled to take a house at some distance outside, and claimed to deduct from his salary the expenses

of maintaining a motor-cycle to get to his work. The General Commissioners on appeal allowed the deduction sought, but the Crown appealed against this. *Held*, that the expenses in question were not incurred in the performance of the duties of the office, and that the deduction claimed was not admissible, *Andrews v Astley*, 8 Tax Cases 589.

Recorder—Travelling expenses of—A member of the Bar who resided and practised in London was appointed as Recorder of Portsmouth. He claimed as deductions from his assessable income the expenses incurred by him in travelling from London to Portsmouth and back, and hotel expenses at Portsmouth. *Held*, that the deductions were inadmissible.

Per Lord Chancellor Cave—“

They are incurred, not because the appellant holds the office of Recorder of Portsmouth, but because, living and practising away from Portsmouth, he must travel to that place before he can begin to perform his duties as Recorder, and, having concluded those duties, desires to return to his home. They are incurred not in the course of performing those duties but partly before he enters upon them, and partly after he has fulfilled them.

“A man must eat and sleep somewhere, whether he has or has not been engaged in the administration of justice. Normally he performs those operations in his own home, and if he elects to live away from his work so that he must find board and lodging away from home, that is, by his own choice, and not by reason of any necessity arising out of his employment, nor does he, as a rule, eat or sleep in the course of performing his duties, but either before or after their performance.”

Per Lord Blanesburgh—“

Undoubtedly its (r 9, Sch E) most striking characteristic is its jealously restricted language, some of it repeated apparently to heighten its effect.”

Ricketts v Colquhoun, 10 Tax Cases 118, (1926) A.C. 1.

On the analogy of the above case, it was held in *Nalder v Walters*, 9 A.T.C. 251, that the cost of a telephone kept at an employee's residence to facilitate his receiving instructions from his employers is not an admissible deduction from his taxable income. On the other hand if the employee incurs, out of his pocket, expenditure over and above any allowance given by his employers for the purpose of discharging his duties, such extra expenditure can be deducted.

Perquisites—Not capable of conversion into money—A banking company assigned to its agent, as a residence, a portion of the bank premises occupied by them, in respect of which they were assessed to income-tax. The agent was required to reside in the buildings as the servant of the bank, and for the purpose of performing the duty which he owed to his employers. He was forbidden to sublet the residence. *Held*, that the value of the residence was not an emolument of office in respect of which the agent was chargeable with income-tax, and was not to be included in estimating the total amount of the agent's income, for the purposes of a claim of abatement, *Tennant v Smith*, 3 Tax Cases 158, (1892) A.C. 150 (H of L).

A Minister of the Free Church of Scotland claimed that the annual value of the manse occupied by him which was vested in trustees and which he could not let was not to be taken into account in calculating his total income for the purposes of his abatement. *Held*, that the annual value of the manse did not form part of his income for such purposes, *McDougall v Sutherland*, 3 Tax Cases 261; 31 Sc.L.R. 630.

(These decisions are not applicable to India in their entirety, in view of the explanation to section 7 (1) see notes on that section)

In another case, in which also a minister of the Established Church claimed that the annual value of his manse was not to be taken into account in calculating his total income for the purpose of his abatement but he could let the manse it was held that the annual value of the manse formed part of his income for such a purpose and *McDougall v Sutherland* was distinguished *Corke v Fry* 3 Tax Cases 335 32 Sc.L.R. 341

In *Lady Mellor v Inland Revenue* 15 Tax Cases 25 Lord Warrington felt that *McDougall v Sutherland* had been wrongly decided and that while *Corke v Fry* was rightly decided it had been so decided on an irrelevant factor viz the ability to let. His view also rested on certain provisions peculiar to the United Kingdom Law. In *Reed v Cattermole* 21 Tax Cases 35 *Lady Mellor's* case was distinguished and it was held that the value of a rent free house required to be occupied by the incumbent of an office and maintained at the cost of the employer was not assessable on the employee as his income *re Tennant v Smith* was strictly followed

(ii) any receipts, not being receipts arising from business or the exercise of a profession vocation or occupation, which are of a casual and non recurring nature or are not by way of addition to the remuneration of an employee

History—Section 4 (3) (iii) was introduced at the instance of the Select Committee in 1918 to remove doubts. There was no provision under the previous law *re* of 1886, except indirectly in the definition of salary and there are no rulings on the subject under that Act

Casual—According to Murray's New English Dictionary 'casual' means—

'subject to depending on or produced by chance accidental fortuitous occurring or coming at uncertain times not to be calculated on uncertain unsettled occurring or brought about without design or premeditation coming up or presenting itself as it chances

In the United Kingdom law the nearest corresponding words are not annual as to the meaning of the word annual however see *Ryall v Hoare* 8 Tax Cases 521 (1923) 2 K.B. 447

Non recurring—As to the meaning of the word non recurring see decisions cited *infra* and particularly *In re Chumal Laljan Das* 1 J.T.C. 118 47 All 372 A.I.R. 1925 All 265

Capital receipts.—Under section 3 capital receipts are not taxable. Section 4 (3) (iii) therefore applies only to revenue receipts such receipts being exempt only if they satisfy both the conditions laid down viz., (a) they are casual and non recurring and (b) they do not arise from a business etc

Profession.—A profession in the present use of language, involves the idea of an occupation requiring purely intellectual skill or manual skill controlled as in painting and sculpture or surgery, by the intellectual skill of the operator, as distinguished from an occupation which is substantially the production or sale or arrangements for the production or sale of commodities. It appears to me clear that a journalist whose contributions have any literary form as distinguished from a reporter, exer

cises a 'profession', and that the editor of a periodical comes in the same category. It seems to me equally clear that the proprietor of a newspaper or periodical, controlling the printing, publishing and advertising but not responsible for the selection of the literary or artistic contents, does not exercise a 'profession' but a trade or business, per *L J Scrutton in Commissioners of Inland Revenue v Maxse*, (1919) 1 KB 647, 12 Tax Cases 41.

Only an individual can exercise a profession. See *William Esplen Son v Inland Revenue* (1919) 2 KB 731, *Inland Revenue v Peter McIntyre*, 12 Tax Cases 1006, individuals in partnership can no doubt exercise a profession.

Occupation—'Occupation' means the Trade or calling by which a person seeks his livelihood, *Luckin v Hamlyn*, 31 LT 366, or the business in which he is usually engaged to the knowledge of his neighbours (*ibid.*) and the statement of which would be sufficient to identify him to persons who have had dealings with him *Throssell v Marsh*, 53 LT 321 (The above with reference to the Bills of Sale Acts). Under the Label and Registration Act when applied to a person, it means his trade or following (Stroud). In interpreting restrictive covenants, it has been held that teaching or carrying on a school is a 'calling', notwithstanding that the calling may be under an illegal organisation, e.g., *Society of Jesus, Galway v Barden*, (1899) 1 IR 514.

Vocation—'I do not think employment' necessarily means a case in which a person is set to work by other men to earn money. A man may employ himself in order to earn money in such a way as to come within that definition, but I think the word 'vocation' is a still stronger word. It is admitted to be analogous to the word 'calling' which is a very large word; it means the way in which a man passes his life and it is a very large word indeed. In my opinion if a man were to make a systematic business of receiving stolen goods the Income tax Commissioners would be quite right in assessing him. There is no limit as to its being a lawful vocation, per *Denman, J*, in *Partridge v Mallandaine*, 2 Tax Cases 179 18 QBD 276.

"'Vocation' and 'calling' are synonymous terms, and if anybody were asked what was the calling or vocation of these gentlemen, the answer would be 'professional book makers', per *Hawkins, J*, in *Partridge v Mallandaine, supra*.

Note however that sections 7 and 10 of the Indian Act distinguish between "employment", on the one hand, and "profession" or "vocation" on the other. See also *Davies v Braithwaite*, 18 Tax Cases 198, (1931) 2 K.B. 628, referred to under section 7.

Remuneration—Is a wider term than salary (*see Stroud*). It means a 'quid pro quo' for service rendered. If a person was in receipt of a payment or a percentage or any kind of payment, which would not be an actual money payment, the amount he would receive annually in respect of this would be 'remuneration', per *Blackburn, J*, in *R v P M G*, 1 QBD 663.

Law in the United Kingdom—There is no specific exemption in the Acts in the United Kingdom, as in India, of casual incomes. Difficulty arises usually only in respect of Schedules D and E. Profits may

be taxed broadly speaking only if they (i) arise from a trade—Schedule D Case I or (ii) are annual profits or gains from other sources—Schedule D Case VI or (iii) arise from a vocation occupation profession or employment—Schedule E or Schedule D Case II

Trade means for this purpose practically the same as though a little narrower than business under the Indian law. Whether particular transactions constitute a trade or not has been held to be a question of fact. *See* rulings quoted under sections 2 (4) Business and 3 Capital or Income. In *Graham v Green* 9 Tax Cases 309 the General Commissioners held that the profits from backing horses, were in the circumstances of that case liable to income tax. Rowlatt J reversed the decision and the Crown did not appeal. In *Stubbs v Cooper* 10 Tax Cases 29 (*see* below)—the Special Commissioners held that the profits from speculating in cotton futures were not in the circumstances of that case liable to income tax—whether under Case I or VI—not liable under Case I because there was not sufficient continuity in the business to constitute them into a trade nor under Case VI because they were pure gambling transactions i.e. irregular and not recurring at intervals. Rowlatt J reversed the finding and held that the profits were from trade (Case I) but the Court of Appeal (the M of R dissenting) reversed the decision of Rowlatt J on the ground that the question was one of pure fact. As regards the second part of the finding of the Commissioners which involved a question of law the Court of Appeal held that the profits were taxable under Case VI as other annual profits i.e. not from trade. (The M of R considered that a question of law was involved in the finding as to trade and that Rowlatt J rightly reversed the decision of the Special Commissioners.)

Per Atkin J J—

There is no doubt that speculations in commodities of this kind are just like speculations in shares. You have to look at the facts

this gentleman has been making his profits not by investing his capital because he never invested any money in this matter but by making executory contracts which he closed by other executory contracts

But where a cotton broker enters into a speculative transaction in futures with a cotton dealer the transactions are not purely wagering transactions as they rest upon real and enforceable contracts in which the differences could have been sued for on one side or the other. Profits from such transactions are taxable and iteration is not necessary under Case VI. *Townsend v Grundy* 18 Tax Cases 140 12 ATC 293. In this case the assessee was a manufacturer of agricultural implements who speculated in cotton futures. The brokers knew that the contracts were not to be fulfilled but the merchants for whom the brokers acted did not

As to how far speculative transactions constitute trade, Atkin LJ said

For my part I see some difficulty in trying to form an opinion of a trade which consists of entering into transactions which would merely result in differences and when the supposed trader never intends to get possession of any commodity so that he may in fact have the disposal of it by himself or of any third party

The meaning of the word annual as used in the English Income tax Act schedules with reference to annual profits and gains¹ was discussed

in great detail by Rowlatt, J in *Ryall v Hoare*, 8 Tax Cases 521, (1923) 2 K B 147, referred to later

Rewards—Examination—Prizes, etc—If the receipts recur, they are clearly taxable. Otherwise it has to be examined whether the reward or fees arise from a profession or occupation. If for instance the passing of an examination is obligatory, the income undoubtedly accrues by virtue of the assessee's office and is therefore taxable as salary. If on the other hand the passing of the examination is optional it may still be income arising from his profession even if he receives it only *ex gratia*. If a person not holding the office would not be eligible for the reward the reward would clearly arise out of the office.

Rewards for arresting or tracing offenders would not be taxable if paid to a person whose ordinary duty was not that of arresting or tracing offenders but if paid to a man whose main duty was that for example to a Police Officer or an Excise or Opium Officer or a Customs Officer these rewards would undoubtedly be taxable as they would arise from the office or profession. A prize given for an essay would not be taxable but not so the premia received by say an architect who frequently tendered plans invited by public competition. Similarly fees for setting or valuing examination papers would clearly be taxable if such duties were part of the assessee's professional or other duties. Even if it was not part of his duties a person who is an expert in a subject and who is frequently called upon to examine in it would still be taxable but the tax would be not a part of salary, but income from other sources or professional earnings as the case may be. Examples of this would be a professor in a college setting papers for a University or a lawyer setting papers in law. See *Sir Hari Singh Gour's Case*, 3 ITC 350. Border line cases are easily conceivable for example a Government servant say a policeman setting a paper for a University in a subject like Mathematics or History for a number of years in succession. In such a case the presumption would be that he was an expert in that particular subject and exercised the vocation of an examiner. Fees for giving expert evidence are clearly taxable as they undoubtedly arise from the exercise of a profession. Similarly fees paid to a Government servant for doing work for local bodies which are first credited to Government and then paid to the officer are clearly taxable as part of the salary and so also honoraria paid by Government to its officers.

Rulings—The following questions viz, whether receipts are capital or income whether transactions constitute a business whether receipts are casual and non recurring and whether they arise out of a business etc. are all often so closely connected with each other that the rulings referred to under this clause should be examined along with those under section 3 (capital and income) section 2 (4) (business) and section 7 (perquisites of office).

As regards income from unlawful transactions see notes under section 3.

Gifts—Even gifts would be taxable if recurring and regular and not casual and isolated. *Kedar Narain Singh v Commissioner of Income tax UP*, (1938) ITR 157 (All). As to gifts from an employer see notes under section 7. A voluntary payment of gratuity made personally by the

head of an associated company to the employees of a company that gone into liquidation and was under no obligation to pay any gratuity its employees was held to be exempt *Commissioner of Income tax, Bt v Johnstone* 1934 ITR 390 7 ITC 330

It has been held in the United Kingdom that a mere gift is not a profit or gain at all the fact that it recurs will not make it a profit or gain. Accordingly where a company voted recurring payments (which in two instalments were stopped) virtually amounting to pension to its ex Managing Director who became an ordinary director and hardly attended any meeting because of ill health he having no claim to such payment although the company had often made such payments to its employees Revenue disallowed such payments in computing the income of the company and their action was not interfered with. The recipient was also considered not taxable on these gifts *Beynon v Thorpe*, 14 Tax Cases 1 ruling as also *Stedeford v Beloe* 1932 AC 388 16 Tax Cases were nullified by the United Kingdom Finance Act of 1932 under which voluntary payments made to employees and their dependants are deemed to be income taxable under schedule E i.e. as salary of an officer.

Gifts from employers to employees whether in cash or in money worth and debited to the profit and loss account of the employer are taxable as salary irrespective of whether the payments are as of right or merely *ex gratia* *Weston v Hearn* (1943) 2 All ER 421 25 Tax Cases (KBD)

Betting—Book maker—Profits of—A person who attends races and systematically bets is liable in respect of the profits he derives from his vocation of betting i.e. that of a book maker *Partridge v Mallandaine* QBD 276. On the other hand in the case of a person whose sole means of livelihood was betting on horses from his private residence with bookmakers at starting prices it was held that the earnings were neither profits nor gains *Graham v Green* 9 Tax Cases 309 (1925) 2 KB 37. The *ratio decidendi* was that there must be a certain amount of organisation before there could be profits or gains.

Per Rowlatt J—The question arises under Case VI whether the winnings on his bets as bets are profits or gains within the meaning of that case and under Case II as to whether assuming the winnings from the bets themselves are not profits or gains the aggregate of his winnings as the result of his sustained and continued activity are the profits or gains of a vocation within the meaning of Case I or possibly as it might have been put, of a 'trade or adventure with the meaning of the general words of Case I.

My attention of course was drawn to my decision in *Ryall v Hoar* (1923) 2 KB 447 8 Tax Cases 521, which was the case of a gentleman who had guaranteed an overdraft for a company of which he was a director he got a commission for it and it was the only thing in his life he ever did anything of the sort. The question before me there was not whether a commission paid to a man for a service of this kind, was a profit or gain in itself which it obviously was as payment for commercial services rendered but whether it was an annual profit or gain. In the course of my judgment I said that mere receipt by finding an object of value or a mere gift was not profit or gain and I hardly feel much doubt about that. I further said that the winning of a bet did not result in a profit or gain. Until I an-

corrected I think, I was right in that Whether it is a gift, or whether it is a *finding*, there is *nothing* of which there is a profit There is no increment, there is no service, there is merely the picking up of something either by the will of the person who had it before, or because there is no person to oppose the picking up

"When one comes to the question of a bet it seems to me, the position is substantially the same What is a bet? A bet is merely an irrational agreement that one person should pay another person something on the happening of an event A agrees to pay B something if *C's horse runs quicker than D's* or if a coin comes one side up rather than the other side up There is no relevance at all between the event and the acquisition of property The event does not really produce it at all It rests, as I say on a mere irrational agreement

So much for Case VI But then there is no doubt that if you set on foot an organised seeking after emoluments which are not in themselves profits, you may create, by way of a trade or an adventure or a vocation a subject matter which does bear fruit in the shape of profits or gains Really a different conception arises a conception of a trade or vocation which differs in its nature in my judgment from the individual acts which go to build it up just as a bundle differs from odd sticks You may say I think without perhaps an abuse of language there is something organic about the whole which does not exist in its separate parts.

"It is said that this gentleman by continually betting with great shrewdness and good results from his house or from any place where he could get access to the telegraph office, had set up a vocation That is contended by the Revenue on the facts of this case and certainly the contention is one which if sound, has very startling results because a loss in a vocation or a trade or an adventure can be set off against other profits and we are face to face with this result, that a gentleman earning a profit in some recognised form of industry, but having the bad habit of frequently persistently continuously and systematically betting with book makers might set off the losses by which he squandered the fruits of his industry, for Income tax purposes against his profits—a very remarkable result indeed and one I am afraid, of very wide application Allowances are granted to the income tax payer because of the family he has to support and we are now threatened with a further allowance in respect of the loss which he makes by habitual betting It certainly sounds very remarkable, and would entitle a person when he wastes his earnings by betting to make the State a partner in his gambling However the question must be faced

"As I have said there is no doubt that one might create a trade by making an organised effort to obtain emoluments which are not in themselves taxable as profits and the most familiar instance of all, of course is a trade which has for its object the securing of capital increment. A person who buys an object which subsequently turns out to be worth more than he gave for it, and which he sells, does not thereby make a profit or gain for income tax purposes But he can organise himself to do that in a commercial and mercantile way, and the profits which emerge are taxable profits, not of the transaction but of the trade In the same way he may carry on the trade of selling things which he has not got and buying them when the price has fallen That is a capital accretion, only the operations are reversed He sells

first and buy afterwards. And in that way he may make losses or he may make profits. If he makes losses the losses cannot be said to be the result of the individual acts. They are the results of the trade as a whole. Test it in this way. A person may organise an effort to find things. He may start a salvage or exploring undertaking and he may make profits. The profits are not the profits of the findings, they are the profits of the adventure as a whole. Again he may make a loss. One cannot say that the loss was due to the failure to find. The loss is due to the trade. That is a good test because it shows the difference between the trade as an organism and the individual acts.

So much is clear. I think about the case of making a trade or a vocation of an adventure of obtaining differences in prices or obtaining things which are the subject of finding. The trade or vocation which has to do with differences in prices may be popularly spoken of as gambling because there is no intention really to accept or deliver the thing bought and sold. But they are operations in relation to the differences of prices of commodities and there is an element of fecundity in those and indeed those operations form the subject matter of a great deal of trade.

Now we come to betting pure and simple. (I do not mean to say that mercantile bargains are tainted with the element of gambling.) It has been settled that a bookmaker carries on a taxable vocation. What is the bookmaker's system? He knows that there are a great many people who are willing to back horses and that they will back horses with anybody who holds himself out to give reasonable odds as a bookmaker. By calculating the odds in the case of various horses over a long period of time and quoting them so that on the whole the aggregate odds if I may use the expression are in his favour he makes a profit. That seems to me to be organising an effort in the same way that a person organises an effort if he sets out to buy himself things with a view to securing a profit by the difference in what I may call their capital value in individual cases.

Now we come to the other side the man who bets with the bookmaker and that is this case. These are mere bets. Each time he puts on his money at whatever may be the starting price. I do not think he could be said to organise his effort in the same way as a bookmaker organises his. I do not think the subject matter from his point of view is susceptible of it. In effect all he is doing is just what a man does who is a skilful player at cards who plays every day. He plays to day and he plays to morrow and he plays the next day and he is skilful on each of the three days more skilful on the whole than the people with whom he plays and he wins. But it does not seem that one can find in that case, any conception arising in which his individual operations can be said to be merged in the way that particular operations are merged in the conception of a trade. I think all you can say of that man in the fair use of English language is that he is addicted to betting. It is extremely difficult to express but it seems to me that people would say he is addicted to betting and could not say that his vocation is betting. The subject is involved in great difficulty of language which I think represents great difficulty of thought. There is no tax on a habit. I do not think habitual or even systematic fully describes what is essential in the phrase trade, adventure employment or vocation.

All I can say is that in my judgment the income which this gentleman succeeded in making is not profits or gains", *Graham v Green*, 9 Tax Cases 309 (1925) 2 KB 37. See, however, observations in the Court of Appeal in *Cooper v Stubbs*, (1925) 2 KB 753, 10 Tax Cases 29, suggesting that the above dicta of *Rozulatt, J*, are too wide, and leaving open the question whether continuous betting bringing an income receipt might not be profits or gains' and therefore taxable. The Allahabad High Court, in *In re Lala Indra Sen*, 1940 ITR 187, shared the doubts of the Court of Appeal. In the Allahabad case, two of the Judges considered that on the facts (which as set out in the case were meagre) the racing and betting transactions of the assessee (a money lender and dealer in precious stones) were not business' though there was a difference of opinion as to whether the racing (i.e. the maintenance and running of horses) and the betting might be a single business or separate ones while the third Judge *Iqbal Ahmad* considered that there was no evidence to hold that the transactions did not constitute business.

Per *Braund J*—I should for myself be very unwilling to try to lay down any general definition of what a business' 'profession' 'vocation' or occupation' is because it is a matter which to my mind, must necessarily depend in every case on the circumstances of the assessee, the particular things he does and the degree to which and the object with which he does them. A philatelist collects stamps for his own entertainment. A stamp dealer collects them for his profit. A country gentleman maintains a garden for his pleasure while a market gardener or florist does so for his profit. And yet in neither case would it be right to say that either the desire for or an indifference to profit as the case may be was an exhaustive test for business and pleasure may well be combined. And still less is it possible to my mind that an actual profit would necessarily convert what was primarily a hobby or a pastime into a business. For I do not doubt that many stamp and coin collectors entertain a secret hope that they may one day by good chance and to their profit acquire a rare and valuable specimen. And I think they would be surprised to know, if that were to happen that they had been carrying on a business'. The truth I think is in this as in so many other cases that no exhaustive test can be applied but that all the surrounding circumstances must be considered and common sense applied. If there is one test which is as I think, more valuable than another, it is to try to see what is the man's own dominant object—whether it was to conduct an enterprise of a commercial character or whether it was primarily to entertain himself.

A father and son who claimed to forecast accurately the results of horse races and contributed a betting system' in the shape of articles to newspapers claimed unsuccessfully that their remuneration for writing the articles was not taxable, *Graham and others v Arnott* 1941 KBD.

The mere fact that a person is persisting with an activity in spite of losses year after year will not make it a hobby, if otherwise the activity is a business or a source of income e.g. the running of a dramatic troupe on commercial lines *P S Varier v Commissioner of Income tax Madras* 1940 ITR 628.

Winning on bets on golf matches played by a golf professional do not arise out of his vocation as a professional *Dowd v Compston*, 16 ATC. 64, (1938) ITR 596 (KBD).

There are many rulings under the Australian law as to when profits from horse racing and betting are taxable, the broad trend of the rulings being the same as in the United Kingdom *viz*, that the profits are taxable if there is continuity and organisation, otherwise not.

Isolated transactions—Profits from—A sum received by a businessman as brokerage on the sale of immovable property was held to be assessable to income-tax, although such a transaction was not apparently in the assessee's ordinary line of business and might or might not be repeated. In *re Chunn Lal Kalyan Das*, 47 All 368.

'The particular transaction is certainly one of the business of a broker, and it comes within the definition of business. It is not possible to exclude from the expression 'adventure', indeed 'successful adventure, the negotiation of a sale of a large mill which resulted in a commission payable to the value of Rs 75,000.

'In our view his transaction, although an isolated transaction was not of a casual or non recurring nature. To some extent the discussion of this question overlaps the question whether a particular receipt is a receipt arising from business or the exercise of a vocation. In taking the view we do, we found ourselves mainly upon the use of the word 'nature' in the exemption. The word is not 'occurrence'. If the language were 'a casual or non recurring occurrence' there would be much to be said for the contention of the assessee. But the expression 'nature' appears to us to be a word used independently of the accident of the event happening in fact once only or more often in a fortunate year. It connotes a class of dealing which might occur only once, but which might occur several times. Now the adventure of a businessman who is enabled through his business association to negotiate a large transaction and thereby to earn a heavy commission, may undoubtedly be in fact non recurring in the sense that so successful an adventure would not be likely to occur again. But, on the other hand, it is a class of transaction which might occur to any such businessman once only or half a dozen times again during the course of the year. The Government Advocate put what may be said to be a decisive illustration of the true meaning of the word 'nature' when he pointed out that if you sold your own house at a profit, although the question would also arise as to whether the result of that transaction was a profit at all but rather only enhanced capital it would in any discussion as to whether it was brought within this exemption undoubtedly be a transaction of a non recurring nature. You could not do it twice. But if, on the other hand you engaged in a solitary transaction of bringing two of your friends together, and negotiated the sale of the house of one of them to the other, and thereby earned a commission, you would, in our opinion, be carrying out a transaction which although casual in fact, would not be of a non recurring nature, because, having done so once with success, you might be asked by some vendor to do it again. Our answer therefore is that the particular profit in question was not of a casual and non recurring nature within the meaning of the section". In *re Chunn Lal Kalyan Das*, 1 I.T.C. 419, 47 All 368, 370-371, A.L.R. 1925 All 469.

A banker and money lender, remitted from Madras sums aggregating over 4 lakhs of rupees to Penang such sums being invested there in Straits Settlements dollars and ultimately reconverted into rupees and remitted back to Madras. The remittances were made on eight occasions within a

period of four months in 1919 and the retransfer to Madras was on thirteen occasions covering a period of four months from the end of 1920 to the beginning of 1921. Owing to the fluctuations in exchange which varied between 83 and 175 rupees per hundred dollars, he made a profit of a considerable amount on the transaction and was assessed to income tax on that profit.

Per Sir Walter Schabbe, C J (Coutts Trotter, J, concurring) —

Transactions need not be part of some already established business but they must together form a business. If the transactions form part of the ordinary business of the assessee the profits or losses on them must, of course, be brought into account. But where the transactions are outside the scope of the ordinary business of the assessee it is often a difficult question to decide whether or not they are to be treated as subject to income tax. Profits made on an isolated speculation are not liable to income-tax but those made in speculation of a similar kind as a part of business would be liable. A difficult question may however, arise as to whether transactions are of such frequency as to amount to carrying on a business.

The right inference to be drawn from the facts is that in this case those dealings in exchange had become part of the assessee's banking business and I think too that even looked at apart from his ordinary business he did not enter into these transactions as an isolated investment of capital or speculation, but as a business of a dealer in exchange. *Board of Revenue v Arunachalam Chettiar*, 1 ITC 238, 47 Mad 197.

Whether a purchase of shares has been made as an investment of capital or with a view to resell at a profit is a question of intention and can only be inferred from the circumstances of each case. The question therefore is one of fact on which the findings of the Commissioner will be final so long as there is evidence for them. *In re Seth Ganga Sagar*, 1934 ITR 149, AIR 1934 All 370.

An assessee consented to be appointed under a power of attorney to dispose of cotton bales for and on behalf of a firm that had got into difficulties to pay what was due to several Muccadams and Banks and after deducting from the net sale proceeds of the cotton bales all his costs charges and expenses in respect thereof and his remuneration to distribute the balance amongst the several persons and firms whose names had already been submitted by the firm to the assessee. Under that power of attorney the assessee sold over 100,000 bales which realized about Rs 1,63,00,000 and received as his remuneration Rs 1,88,750. The assessee claimed exemption for this sum under section 4 (3) (vi) of the Income tax Act.

Per Macleod C J —

It has been argued that business connotes continuity, and that only the receipts arising from a business which is carried on continuously can be assessed. But the section refers to receipts arising from business and not to receipts arising from a business. It is not necessary according to the definition of 'business' in section 2 (4) that the receipts should arise from a business continuously carried on during the year to make them liable to assessment. Even if they arose from a single adventure in business they would be liable to be taxed.

'Now it seems clear that the profession or occupation of the assessee being that of a cotton merchant any receipts arising from the buying and selling of cotton would be considered as arising from trade or

commerce and the argument that receipts from an extraordinary transaction connected with business such as the one in this case which has only occurred owing to exceptional circumstances and which would not be likely to occur again for many years can be placed in the same category as receipts entirely disconnected with business or the profession or vocation or occupation of the assessee which might be considered of a casual and non recurring nature cannot be accepted *Commissioner of Income tax Bombay v Sir Purshottamdas Thakurdas* 2 ITC 8 AIR 1925 Bom 318

Where however a hide merchant acted as arbitrator in a dispute between the heirs of a rich friend and the Court granted him remuneration as arbitrator though nothing had been stipulated in the first instance it was held that the receipt was casual and non recurring and not arising from a profession etc and therefore not taxable *Commissioner of Income tax Madras v Ahmad Badsha* 1943 ITR 590

A money lender took over a rubber estate and certain debts in settlement of an outstanding loan. As monies were realised the loss in recovering the debts was allowed as a business deduction. The expenses on the estate and its income were also included in the business account. When the estate was sold there was a gain and it was claimed that it was a capital appreciation. Held that the profit from the sale was part of the profits of the money lending business. *O R M O M S P Lakshmanan Chettiar v Commissioner of Income tax Madras*, 4 ITC 200. It cannot however be assumed without evidence relating to each case that merely because the prevalent practice among similarly circumstanced persons is to buy and sell property as part of the business the assessee's transactions in property are part of his money lending or other business. *R M V R M Veeappa Chettiar v Commissioner of Income tax Madras* 4 ITC 204 AIR 1930 Mad 123

Where the assessee a money lender received from his father a going money lending business and certain plantations and treated the plantations as part of the capital of the money lending business debiting the business with the cost of maintaining the plantations and taking credit for the income therefrom and finally sold the plantations and credited the proceeds to the business it was held that the profit on the sale was a part of the profit of the money lending business. *A Ar S T Arumachalam Chettiar v Commissioner of Income tax Madras* 1946 ITR 61

For a small consideration in cash a money lender got an assignment of a mortgage on certain house property carrying certain other encumbrances. Eventually in a circuitous manner and after litigation he took over the houses and sold them after enjoying the rents for some time. Held, that though the original transaction was speculative and isolated it was not essentially different from the assessee's other business transactions and that the profit was not a capital appreciation and therefore not exempt from tax. *S R M S Subramania Chettiar v Commissioner of Income tax Madras* 1934 ITR 295. A mining engineer prospecting for minerals and taking out licences but with no capital of his own to work the mines and selling the rights therefor to others was taxed on the profits made on the portions sold. Held that the question whether the transactions amounted to a business was one of fact. *Warwick Smith v Commissioner of Income tax, Burma*, 5 ITC 451. On the other hand where in return for a loan given to a mining engineer the lender received the sale proceeds of certain mining rights held by the borrower it was held that the gains of the lender was not taxable since it was not his business to finance such mines.

A firm of stone, marble and granite merchants in England, made a contract with a firm for the supply to them of marble and contemplated acquiring some of this marble in Italy. In order to facilitate their purchase of this marble later on they bought Italian lire at a premium. The lire rose in value and the firm brought the money back in sterling when the lire fell in value and the firm converted the money again into lire. Held that the profits on the lire were not taxable.

I do not think it has anything to do with the principle of the contract itself (that of the supply of marble). It was a mere appreciation of something which they had got in hand — Per *Roulatt J* in *McKinlay v Jenkins & Sons Ltd*, 5 A.T.C. 317, 10 Tax Cases 372.

In this case it was found as a fact by the Commissioner that it was no part of the company's business to speculate in the exchange. The money was lying idle in the bank.

On the other hand if the transactions from which the profits arise are part and parcel of the trading operations of the assessee the fact that the cause of the profit is abnormal e.g. England's going off the gold standard is no reason to hold that the profits do not arise from the trade. *Landes Bros v Simpson* 13 A.T.C. 489 (K.B.D.) 19 Tax Cases 62.

Similarly where a shipowner (not a coal merchant) who had contracts for the supply of coal to him in excess of his needs transferred the contracts at a profit it was held that the profit was trading profit, the coal being consumable stores on revenue account essential for the purpose of the assessee's trade. The claim of the assessee was that the profit represented appreciation of capital (on the analogy of *John Smith v Moore*, 12 Tax Cases 266) or a casual profit since the assessee was not a coal merchant and coal was not his trading stock. *George Thompson & Co v Inland Revenue* 12 Tax Cases 1091.

In *Imperial Tobacco Co v Kelly* (C.A.) 1943 25 Tax Cases 292 the company used to accumulate dollars in America throughout the year so as to be in a position to purchase virginia leaf at auction sales. It had a large accumulation of dollars when war broke out. The Treasury asked it to stop buying leaf and took over the dollars at a price which left a profit to the company. It was held that the profit was taxable. The company merely sold a surplus stock of dollars that it had on revenue account like any commodity and it was immaterial that the sale was forced and not voluntary.

An assessee who was a money lender and had been connected with the film business and also been a dealer in real property purchased while on a visit to Germany a large quantity of toilet paper at cheap rates from a bankrupt German firm and sold the whole to one person and made a heavy profit. Held that it was trade. The appellant was himself liable for the purchase of this vast quantity of toilet paper for no individual or personal purpose of his own but plainly and manifestly (for the purpose of) re-selling it at a profit. The element of adventure accordingly entered into it from the first. — Per *L. P. Clyde J* in *Ruledge and Sons v Commissioners of Inland Revenue*, 8 A.T.C. 207, 14 Tax Cases 490 (1929) 555 Cas. 379.

A company whose business embraced prospecting for and acquiring options over mineral properties all over the world and purchasing and re-selling such properties to development companies invited another (not

shareholders) to participate in individual ventures by subscribing towards the cost of prospecting and acquiring the options over particular properties. If the prospecting was satisfactory, the options were exercised and development companies formed in which the subscribers, *viz.*, the parent company and the outsiders had to—and did—take shares. On the other hand, the parent company was under no obligation to form a development company, *e.g.*, it could sell the rights and hand over cash to the subscribers. The outside subscribers took no part in the management beyond being consulted as to any increase in the initial commitments. The parent company was taxed on the value of shares held by it in the development companies and the money invested by itself in the various ventures since the ventures constituted its trade. But the outsider subscribers were not similarly taxed since the ventures were not part of their trade and their profits were therefore capital accretion. *Lojry v Field*, *Lojry v Williams*, *etc.*, 20 Tax Cases 679. See also *Pickford v Quirke* 6 A T C 525, 13 Tax Cases 251 (C.A.), referred to under section 2 (4).

Two individuals who had been for some years buying, selling and developing building lands bought certain undeveloped lands in equal shares and almost immediately each of them gave his share of the land to his wife. And soon after, each of the ladies sold her share to a company in which the husbands were the only directors and in which each of the latter held half the shares. Two years afterwards a similar transaction occurred. The question arose whether the ladies carried on a trade in respect of these two transactions and the Special Commissioners decided in the negative. The High Court declined to interfere on the ground that the Commissioners had evidence to support their decision. *Williams v Davies & Nisbet*, (1945) 1 All E R. 304.

An assessee, instead of purchasing an annuity laid out a large sum of money in buying 63 endowment insurance policies and a life policy on the lives of other people, so arranged that he could get regular receipts every year from these policies as they fell due for payment. At a later stage, owing to a change in his circumstance *viz.*, receiving a physical injury in war service and having to change his residence permanently he asked his solicitors to gift away some of the policies and sell the others. The question arose whether the profit from the sale of policies was taxable, and the Special Commissioners decided that in view of the number of transactions and the organised manner of purchases and sales, there was a trade and that the profits were therefore taxable. *Macnaghten*, J reversed this decision on the ground that buying something with the intention of keeping it cannot be trade and that a subsequent intention to sell it cannot by itself make the transaction trade, *Smith Barry v Cordy*, (1945) 1 All E R 695.

Where an assessee whose business activities were confined to money lending owning land and to an interest in certain mills bought on speculation an interest in certain legacies and after protracted litigation recovered a substantial sum, it was held that the transaction was not an adventure in the nature of trade, *Mothay Gangaraju v Commissioner of Income tax*, Madras, 1935 I T R 58, A I R. 1935 Mad. 387, 58 Mad 363.

Where an assessee agreed to advance money to another for the purpose of litigation on condition that if the case was won the borrower was to pay a bonus to the lender and that if the case was lost the lender was to lose the money, and eventually received a bonus, it was held that the bonus arose

from business, i.e., the business of investing money in financing litigation. The speculativeness of the transaction or the absence of a specific rate of interest did not in themselves make the transaction any the less an investment of money. In *re Gaya Prasad and Chotoy Lal*, 8 ITC 64 A.I.R. 1935 All 195 1935 ITR 177 (All). A Full Bench of the same Court however, dissented from this ruling later on. In *re Major John* 1938 ITR 434 (All). In that case, the assessee who held the greater part of the debentures of a company obtained a decree against the company the assets of which were auctioned in the execution of the decree. The assessee was allowed by the Court to act as auctioneer and received on that account 5 per cent of the sale proceeds as commission under the orders of the Court. The question arose whether this 5 per cent was capital or income, and the Court held following the observations of the Privy Council in *Slaw Wallace Company's case*, 59 Cal 1343 59 I.A. 206 that it was capital.

Where an assessee, not a stock broker or a company promoter but an employee of a sugar factory sold a large number of shares in a company floated by his employer to take over the factory and the Directors in recognition of the assessee's work allotted some shares to him at their own accord and without any previous arrangement it was held that the value of the shares was a windfall and not income. It also did not arise from business since there was no activity having for its object the acquirement of profit which could be claimed legally. In *re Mohammad Faruq* 1938 ITR 1 (All).

A mere adventure, however, will not attract tax unless it is in the nature of trade. A purchase therefore on speculation even if made with a view to sale does not lead to taxable profit unless the transaction is in the nature of trade. What constitutes trade is a question of fact. Where the wife of a partner in a money lending firm which also dealt in bullion (she having a money lending business through the agency of the firm but not a bullion business) bought a quantity of silver on speculation with a view to sale and sold it at a profit through her husband's firm there being no other activity on her part in respect of the transaction it was held that there were no materials for a finding that the transaction was in the nature of trade. The fact that the husband's firm dealt in bullion or that other persons were also speculating in silver at that time was considered irrelevant, *Mrs Somram Poddar v Commissioner of Income tax, Burma*, 1939 ITR 470. The above decision was dissented from by the Lahore High Court in *In re Beharilal Jhandumal* 1944 ITR 209. In that case, a Hindu undivided family with a money lending business brought a large quantity of gold when England went off the gold standard and paid for it by borrowing or prematurely withdrawing fixed deposits from banks. After five years, it sold off one fourth of the gold at a profit, and it was held that the profit was taxable there being evidence for a finding that the adventure was in the nature of trade.

The governing factor in deciding whether isolated transactions are ventures in the nature of trade is the intention of the assessee at the time of purchase, but his subsequent conduct may have a material bearing on the question of his original motive. *Kahanchand and Kishenchand v Commissioner of Income tax, Punjab*, 1944 ITR 472.

An assessee purchased an inam village near a city, with borrowed money and laid out a part of this area for development as a middle class suburb spending money in the process. He sold a substantial number of plots, but not all of them, in two consecutive years and it was held that

there was evidence for a finding that the transactions constituted a business. In re *Mody* 1940 I T R 179 (Bom)

An architect was told on a social occasion by the owner of an estate that he wanted to sell it and the former brought about a meeting between a client of his and the owner. The estate was bought by the client on behalf of his company, and subsequently it was agreed between the architect and his client's company that in return for his attempt to dispose of the estate he was to get $\frac{1}{4}$ of the net profits. The estate was sold soon and the architect received his share of the profits. He did not however do any work beyond preparing a plan which was not used. It was held that his share of the profits was taxable. *Brocklesby v Merricks* 18 Tax Cases 576 (CA)

Grants to Clergymen—A gift of money raised by voluntary subscription and made annually to a minister of religion by his congregation was held to be assessable.

Per the Lord Ordinary—It is true that it is a voluntary contribution by the parishioners one which they are under no obligation to make and which they may withdraw at any time. But still it is a payment made to the appellant as their clergyman and it is received by the appellant in respect of the discharge of his duties of that office. In re *the Rev George Walter Strong* 1 Tax Cases 207; 15 Sc I R 704

In a case in which the Queen Victoria Clergy Sustentation Fund made grants to a Clergyman in augmentation of the income of his benefice it was held that the grants were assessable on the Clergyman as profits accruing to him by reason of his office. In this case the Court considered the precise form of the application for the grant and of the resolution authorizing the grant. The decision was given in favour of the Crown on the ground that (1) no enquiry was made as to the *personal* means of the incumbent but only as to the income of the *benefice*, it being left to the incumbent to ask for the grant if he needed it and (2) if the benefice was vacant the grant was divided between the outgoing and incoming incumbents. It followed therefore that the income accrued by reason of the office. *Turner v Cuxson* 2 Tax Cases 422 was distinguished on the ground that the grant in that case was as a *personal* gift of an eleemosynary character and the principle underlying the decision in *In re Strong, supra* was approved.

Per Collins MR—Now that judgment (the *Strong* case) is certainly an affirmation of a principle of law that a payment may be liable to income tax although it is voluntary on the part of the persons who made it and that the test is whether from the standpoint of the person who receives it it accrues to him in virtue of his office. That seems to me to be the test and the liability to income tax is not negatived merely by reason of the fact that there was no legal obligation on the part of the persons who contributed the money to pay it. *Rev G N Herbert v J A McQuade* 4 Tax Cases 489 (1902) 2 K B 631

A curate received from a religious society a grant renewable annually at discretion on certain conditions. The grant was in recognition of faithful service as a clergyman but not in respect of the particular curacy the clergyman held. *Held* that it was not assessable to income-tax. In re *Strong* 1 Tax Cases 207 distinguished.

Per *Coleridge, CJ*—‘Now here the payment is made, not for services in the parish at all not by the persons whom he serves and not in respect of the particular services which he renders—but it is an honorarium paid by a society to a deserving man because he has done his duty well’ *Turner v Cuxson*, 2 Tax Cases 422, 22 QBD 150

A gratuitous payment with no conditions attached made to the Lord Bishop of Lucknow as such i.e. *ex officio* by the Colonial Bishopric Fund was held to be a perquisite of his office, *Saunders (Dr) v Commissioner of Income-tax, UP (Oudh)* 5 ITC 454, 54 All 223

In a case in which the grants were to cease on the Minister's death or his resignation of the pulpit i.e. the grant was given on quasi-personal grounds, it was nevertheless held that the grants were assessable to Income-tax, having regard to the facts of the case, viz., (a) the ability of the congregation to make adequate provision for their minister, (b) the fact that the minister had been regularly educated for the vocation (c) the amount of his income, *Paynting v Faulkner*, 5 Tax Cases 145 (C of A.) 21 TLR 428

A portion of a collection made in Church was given by way of ‘Easter offerings’ to an incumbent by reason of his office, but the gift would not have been made had not the recipient besides being the incumbent, been also poor. Held, that the offerings were not given as an additional remuneration for services but on account of personal poverty, and that, in these circumstances, they were not assessable to income-tax *Turton v Cooper*, 5 Tax Cases 138 21 TLR 546

The correctness of this decision was however doubted in *Cooper v. Blakiston*, 5 Tax Cases 347, *infra*

Easter Offerings were given to a Vicar by parishioners and others in response to an appeal made by the Bishop and supported by the Churchwardens. The offerings were mainly received through collections in Church the residue consisting of sums sent to the Churchwardens or directly to the Vicar. Held by the House of Lords that the offerings were assessable to income tax.

Per *Buckley, LJ*—‘The question is not what was the motive of the payment but what was the character in which the recipient received it. Was it received by him by reason of his office?’

Per the Lord Chancellor—‘In my opinion, where a sum of money is given to an incumbent substantially in respect of his services as incumbent, it accrues to him by reason of his office. Here the sum of money was given in respect of those services. Had it been a gift of an exceptional kind, such as a testimonial, or a contribution for a specific purpose, as to provide for a holiday, or a subscription peculiarly due to the personal qualities of the particular clergyman, it might not have been a voluntary payment for services but a mere present.

‘In this case, however, there was a continuity of annual payments apart from any special occasion or purpose, and the ground of the call for subscription was one common to all clergymen with insufficient stipends, urged by the Bishop on behalf of all alike. What you choose to call it matters little. The point is, what was it in reality?’

‘It was natural, and in no way wrong, that all concerned should make this gift appear as like a mere present as they could. But they acted straightforwardly, as one would expect, and the real character

of what was done appears clearly enough from the papers in which contributions were solicited ' *Cooper v Blahiston*, 5 Tax Cases 347, (1909) A C 104

The proceeds of voluntary collections from a congregation at Whitsuntide for the benefit of an assistant stipendiary curate have been held to be taxable as part of the emoluments of office, *Slaney v Starkey*, 16 Tax Cases 45, (1931) 2 K B 148. In all these cases, if these grants had been made (say) on the retirement of the clergyman or his golden wedding, the amounts would not have been taxable. See the Lord Chancellor's observations in *Cooper v Blahiston* above.

Income from profession—For income to arise from a profession or employment it is not necessary that the income should be paid only by the person or persons engaging the services. Where a solicitor who represented his client (from whom he received fees) in a meeting of shareholders and got some proposals through was given gratuitously Rs 10,000 by persons—not his clients—because they benefited by his action in the meeting, it was held that the Rs 10,000 arose from his profession. In re *Susil Sen*, 1941 I T R 261 (Cal).

Liquidation—Honorarium—An assessee acted as Secretary of a Company without remuneration from the date of its incorporation until his appointment as Liquidator of the Company. When the liquidation of the Company was completed there was a sum in hand, after discharge of all liabilities which according to the Company's Memorandum of Association was divisible amongst the ordinary shareholders of the Company. By a unanimous resolution, these shareholders voted the sum in question in equal shares to the Chairman of the Company, and to the assessee. The assessee contended that this payment was a voluntary gift and that the whole of his duties as Secretary and Liquidator had terminated before the gift was made. Held by the Court of Appeal, that the sum voted by the shareholders of the Company to the assessee did not accrue to him in respect of an office or employment of profit and that therefore he was not chargeable to income tax in respect of the sum in question.

Per *M R Sutherland*—The argument was rather narrowed to this, that a voluntary payment cannot be a profit of the office after the office has terminated unless that office had been an office of profit before hand. Now I cannot accept that as a broad proposition. It seems to me that there may very well be a payment in respect of an office which had been gratuitous up to its end but which still may be a payment for the services of that office and therefore be a profit accruing by reason of the office. I do not think that a hard and fast line can be drawn.

In *Duncan's Trustees v Farmer*, 5 Tax Cases 417, Lord Dunedin says

My Lords I confess I have never been able to see how it could possibly be said to be in respect of his office when the whole reason it was given to him was that he was no longer in the office. At first sight that may seem to bear out the proposition that was contended for. I do not think that it does because it will be seen that the noble Lord was speaking of the facts of that case.

An annuity was granted to a Minister of the Church on retirement through ill health and therefore it was given to him as a sort of compassionate allowance and could not be obtained except when he had resigned his cure. Therefore I do not think that

proposition can be maintained. But the fact that the office is at an end is a fact of very great weight, and when you add to it that the payment is made, not by the employer, because it was not made and could not be made here by the Company which was the employer but by other persons—in this case it was the shareholders individually—the facts still more point to it not being a payment for services or a profit accruing by reason of the office. To my mind that points to this not being a payment in respect of services rendered, but being something in the nature of what is referred to by Lord Loreburn in *Cooper v Blackiston*, 5 Tax Cases 347, (1909) A.C. 104. *Cowan v Seymour*, 7 Tax Cases 372 (1920) 1 K.B. 500, 509 (C.A.) reversing the judgment of *Roulatt, J.*, in (1919) 2 K.B. 146.

Overdrafts—Guarantee of—Commission for—The bankers of a company refused to allow its overdraft to be increased except upon the joint and several personal guarantee of its directors, of whom the assessee were two. In consideration of such guarantee the company granted to each of the directors a commission of two per cent of the whole amount guaranteed. The original guarantee was for one year only but, similar circumstances arising in the following year, the directors renewed their guarantee (for a still greater amount) for a further year and were granted commission thereon at the same rate as before. The assessee contended that the commissions arose from casual unsought and exceptional transactions and were not chargeable to Income tax. *Held*, that the commissions were annual profits or gains within the meaning of Case VI of Schedule D, and had been properly assessed to Income-tax thereunder.

Per Roulatt, J.—"It was not in the line of business of either of them to give a guarantee, and one of them at any rate who is a solicitor, had never done it before, and probably will never do it again, they did it unwillingly. It seems to me that, on the view of the facts taken by the Special Commissioners, by which, of course, I am bound, I must treat this case as just on the same footing as if a person, not connected with business at all, received a commission from another person, also not connected with business for doing him the favour of guaranteeing his account at a bank. 'Profits or gains' mean something which is in the nature of interest or fruit, as opposed to principal or tree. A person may have an emolument by reason of a gift *inter vivos* or testamentary, or he may acquire an emolument by finding an article of value or money, or he may acquire it by winning a bet. It seems to me that all that class of cases must be ruled out, because they are not profits or gains at all. Without pretending to give an exhaustive definition, I think one may take it as clear that where an emolument is received, or, rather, where an emolument accrues, by virtue of some service rendered by way of action or permission, or both, at any rate that is included within the words 'profits or gains'. Now what is the meaning of the word 'annual'? It may mean, and perhaps its most obvious meaning is 'annually recurring', like the seasons, or if not recurring in perpetuity like the seasons as a matter of nature, 'annually recurring' in the ordinary way for a considerable space of time, or it may conceivably mean 'lasting only for a year', as you speak of an annual plant, but I do not think that is really a very true meaning of the word 'annual', because I think when you speak of an annual plant what is in your mind is the necessity of annual sowing, the plant is not annual, it is the sowing that is annual.

At any rate that is a possible meaning of the word annual. Thirdly, it might mean "calculated with reference to a year", that is, like interest of so much per annum. If there is anything in the suggestion that 'annual' means or includes 'lasting for a year' I must point out that this guarantee did last for a year, and it was renewed for another year, but there is nothing in that, because it was renewed *de novo* and did not run on—it was a transaction for a year twice repeated. Those are three possible meanings of the word "annual", but I do not think any of them is applicable in this particular case dealing with Income tax. One is not left entirely without guidance, at any rate as a matter of practice. Take the case of letting a furnished house. It has been recognized that if a furnished house is let even for a few weeks in any one year the letting will attract Income tax, under this case, upon the profits so made. That is the inveterate practice, and although it has never been relied upon in principle, by the Courts, it has been tacitly assumed by the Courts in Scotland, and it seems to me out of question that a Court of First Instance at any rate, could possibly say that that is wrong. The letting in such a case is not recurring yearly, nor does it last for a year nor is it calculated with reference to a year, because it is calculated with reference to the amenities of a few particular weeks. Again take the case of a person who is appointed to perform some services which might possibly be by way of an office, a person appointed not carrying on any trade or any business, but who happens to be appointed—as a retired Judge was appointed some years ago to hold a very important arbitration in connection with the London water—appointed with a lump sum remuneration to do a particular piece of work, or to take a humbler instance, which is more familiar perhaps to us here the clerk of a Judge's marshal, who gets a little appointment for a week or two he suffers a deduction of income tax when his modest emolument is paid to him. Now recognizing that position, it seems to me that 'annual' here can only mean 'in any year', and that the 'annual profits or gains' means 'profits or gains in any year as the succession of years comes round'. That being the position in which I think I am this litigation seems to me to raise the whole question of casual profits. I have already referred to the furnished house illustration. Now, a man may carry on no business and no profession, he may not be a journalist he may not be an author but he may be called upon to write an article for a paper for reward. He may find that there would be a demand for a single book from his pen, as a traveller, a soldier, a sailor or a statesman or what not. Now it seems to me that all cases of that kind, like this case of these gentlemen who gave this guarantee are instances of casual profits which cannot in any way be distinguished from the profit which is obtained by a man who lets his house furnished. *Ryall v Hoare and Honeywell* 8 Tax Cases 521, (1923) 2 K.B. 447.

Following the above it was held that a bonus received by a solicitor from his client in return for guaranteeing an overdraft granted to the client by a bank was taxable even though the overdraft did not continue beyond a single year, *Sherman v Barnes*, 16 Tax Cases 278.

Similarly, when a solicitor lent money or arranged for a loan of money on two occasions to a builder to enable the latter to purchase certain properties and received a bonus on the loans when the properties were

eventually old it was held that the bonuses were taxable not being of the nature of accretion of capital but payments for the finding of money and (having) the character of income. The decision of the Commissioners was overruled. The assessee contended unsuccessfully that the bonuses were analogous to premia on repayment of debentures *Wilson v Mannooch* 16 A TC 121, 21 Tax Cases 178 (K B).

The case however was near the border line and the fact that it is usual for a solicitor to arrange for finance may have influenced the decision and outweighed the isolated nature of the transactions.

Compensation for loss of office—A firm of ship managers were employed as such by a steamship company and remunerated by a percentage of the company's annual net profits. The company went into voluntary liquidation and transferred £50,000 of 5 per cent bonds to the firm as a compensation for loss of office. Held that on the finding of the Commissioners as to the nature of the payment which there was evidence to support the sum was not a profit liable to income tax.

Per Rowlatt J—I think everybody is agreed that in cases of this kind the circumstance that the payment in question is a voluntary one does not matter.

You must not look at the point of view of the person who pays and see whether he is compellable to pay or not; you have to look at the point of view of the person who receives to see whether he receives it in respect of his services or in respect of trade.

If it was a payment in respect of the termination of their employment I do not think that is taxable as profit.

A payment to make up for the cessation for the future of annual taxable profits is not itself an annual profit at all.

I should not have thought that either damage for wrongful dismissal or a payment in lieu of notice at any rate if it was for a long period—I will not say a payment in lieu of notice. I will say a voluntary payment in respect of breaking an agreement which had some time to run—would be taxable profits. But at any rate it does seem to me that compensation for loss of an employment which need not continue but which was likely to continue is not an annual profit within the scope of the income tax at all. *Chibbett v Joseph Robinson & Sons* and *Commissioners of Inland Revenue v Joseph Robinson & Sons* 9 Tax Cases 84.

According to the articles of a company, a director vacating office except in certain specified circumstances after not less than five years' service as a director, was entitled to certain compensation. There was no contract of service between the directors and the company. Following *Chibbett's case* Rowlatt J held (in a group of three cases) that the compensation was not taxable but the Court of Appeal reversed the decision on the ground that the compensation was really not for loss of office since it was also payable in the event of death or voluntary resignation and therefore amounted really to a holding over of a part of the remuneration till the director vacated office. In the *De-hurst case*, the director wanted to retire but the other directors wanted him to remain; he accordingly resigned office as chairman received a lump sum as compensation and continued as a director on a lower salary. The Court of Appeal however saw no material difference between the three cases. The House of Lords reversed the decision in the *De-hurst case* on the ground that the compensation given in consideration of the assessee's not receiving remuneration

service as chairman as agreed. A sum of money paid to obtain a release from a contingent liability under a contract of employment is not received under the contract of employment and is not remuneration for services rendered under or to be rendered under the contract. The other two cases did not go to the House of Lords *Henry v 4 Foster*, *Henry v J Foster*, and *Hunter v Dechurst* 16 Tax Cases 605.

On the other hand when a director of a prosperous private company who wished to resign was induced to remain as director on a lower salary (doing less work) by payment to him of a large lump sum at once, it was held that this payment arose from his office. There were two contracts, one for the payment of the lump sum and the withdrawal of the resignation, and the other for the lower salary. The question was whether the lump sum was paid in virtue of the office of director or as consideration for the withdrawal of the resignation. The consideration for the payment was his agreeing to remain in office and there was no discharge of any contingent liability as in *Dechurst's case*. There is in substance no difference between a promise not to resign and a promise to continue and the essence of the contract was the continuance in the office. It was wrong to think (as the dissenting view in the lower Court held) that the continuance was merely a by-product of the undertaking not to resign, *Prendergast v Cameron* 19 ATC 69 (HI).

An employee when entering into an agreement of services for five years (determinable earlier in certain events) simultaneously agreed in the event of his service being determined from whatever cause earlier not to work in a competitive capacity for a specified period in a specified area and received a lump sum in consideration of the latter undertaking. It was held that the lump sum was not received as remuneration of his employment and represented only the value of a covenant that would arise after termination of employment *Beak v Robson* (HI), 1943 ITR (Sup) 23.

The Managing Director of a Company was entitled to a salary of £6,000 a year and if he vacated the post to a pension of £4,000 a year for ten years. He gave up the latter right and agreed to receive salary at £2,000 a year and a lump sum of £40,000 to be paid in two instalments. The House of Lords held that neither the pension nor its commuted lump sum arose from office and that part of the £40,000 which represented the drop in salary was taxable as salary i.e., profit from office of director. The ordinary way of remunerating an employee is by periodical payments and an arrangement which reduces future payments by a larger payment in the first instance cannot convert the latter into capital *Tilley v Wales* 1943 ITR (Sup) 69.

Following the above it was held in *Wilson v Nicholson, Sons and Daniels*, 1944 KBD (?) that a sum received by a dominant Managing Director as compensation on his voluntarily resigning his office was income. Where a Society under the Industrial and Provident Societies Act formed itself into a company and one of the directors received compensation for the loss of his rights as a director but continued as a director on the same term it was held that the compensation was income from the office of director *Jac v Boardland*, 1945 KBD (?).

Where, under a contract, a lump sum was paid to the representative of a deceased employee to whom or whose representatives the sum was due

on the termination of his service from any cause other than wilful negligence on his part, it was held that the payment was a profit from office, the death being the occasion for and not the cause of payment *Allen v Trehearn*, 22 Tax Cases 15

Compensation for loss of office' is a well known term and means a payment to the holder of an office as compensation for being deprived of profits to which as between himself and his employer, he would but for an act of deprivation by his employer or some third party such as the legislature have been entitled *Per Romer, L.J.*, in *Henry v Arthur Foster*, 16 Tax Cases 605

In the earliest ruling in India of this type of cases, the Calcutta High Court held that compensation received by a company for the loss of one of the managing agencies held by it was not exempt under this section *Turner Morrison & Co v Commissioner of Income tax, Bengal*, 3 ITC 214, but the same Court observed in a later case *Mundy v Commissioner of Income tax, Assam*, 4 ITC 370 that the above ruling was based on the particular facts of the case. The Madras High Court ruled that compensation paid to a Government servant for his premature retirement on the basis of a proportion of the difference between his pay and his pension was taxable as salary, *Commissioner of Income tax, Madras v Panchapakesa Iyer* 62 M.L.J 656 6 ITC 69. The Patna High Court held that a commuted pension paid in lump to an employee was not exempt under section 4 (3) (vi) because it arose from the office *Rutherford v Commissioner of Income tax, Behar and Orissa*, 10 Pat 315. All these rulings however have been superseded by the ruling of the Privy Council that in this clause 'receipts from business, etc.' can only mean receipts from the carrying on of business etc. Therefore the compensation paid to an agent for the cessation of his agency is not taxable since the receipt does not arise from the carrying on of the business. *Turner Morrison's case* was definitely disapproved by the Privy Council *Commissioner of Income tax, Bengal v Sha v Wallace & Co* 59 IA 206

Where an agent on termination of his agency and in consideration of past services and also of refraining from competing with the principal, opened his own office, and received from the principal a monthly payment for five years the payment being continued to his son, if necessary, to make up the period of five years, it was held that the payment was taxable *Commissioner of Income tax (Sind) v Katrak* 1937 ITR 527. The case was different from *Shaw Wallace & Co's case* 59 IA. 206 59 Cal 1343, A I R 1932 P.C. 138 and really governed by *Gopal Saran's case*, 62 IA 207, 14 Pat 552, 1935 ITR 237, the agent being allowed, so as to speak, to continue to enjoy a part of the fruits of the tree which he had watered, provided he did not destroy it by competing.

Commission—Addition to salary—An Incorporated Accountant who was Secretary and Director of a Company received a salary as such. He negotiated a sale of a branch of the company's business, and received £1,000 as commission for his services in negotiating the sale. *Held*, that the £1,000 was part of the profits from his office.

Per Roulatt, J.—"If an officer is willing to do something outside the duties of his office, to do more than he is called upon to do by the letter of his bond and his employer gives him something in that respect, that is a profit, it becomes a part of his office which is enlarged a little so as to receive it, *Mudd v Collins*, 9 Tax Cases 297, 41 T.L.R. 358. Under a verbal arrangement, the Secretary of a Company negotiated

for the sale of the Company's works and the Directors confirmed by a minute the verbal promise that the excess of the sale proceeds over a certain figure would be paid to the Secretary. The Company went into liquidation after the sale and the liquidator paid the agreed amount to the Secretary. The Special Commissioners held that the case was governed by *Cowan v Seymour* 7 Tax Cases 372 and that the payment being a gift was not taxable but *Finlay J* overruled the decision. On the evidence only one conclusion was possible *viz* that the money was paid for services rendered since the liquidators could not give away the assets of the Company as presents to persons with no claims against the Company, *Shipway v Skidmore* 16 Tax Cases 748.

In another case *Dunne v Reed* 18 Tax Cases 254 12 A.T.C. 433 it was held on the evidence that certain voluntary payments paid to an employee in addition to his salary and regularly deducted from the employer's taxable profits were perquisites of the employee's office.

An assessee was the chairman of a British Company. In addition to his ordinary fee he was allowed a certain remuneration for inspecting the Company's agencies in China and negotiating with the Chinese Government. Held that the additional remuneration was part of the appellant's profits as chairman notwithstanding its being given for work done abroad.

Per Rowlatt J—There appears to be no power for a Director to divide himself into two and to be a Director in China as well as a Director in England so as to be capable of being regarded as filling two severable capacities. *Barson v IRC*, 5 A.T.C. 65 (C. of A.) 10 Tax Cases 609.

An assessee whose remuneration as general manager of a limited company consisted partly of a fixed annual salary and partly of a commission or bonus on the company's net profits, had been assessed to income-tax on the basis of the total amount of salary and commission or bonus received or receivable by him from the company in respect of each of these years. Held by the House of Lords that the commission or bonus was perquisites and therefore assessable. *McDonald v Shaud* 8 Tax Cases 420. The chairman of a company was voted along with other directors a bonus in addition to his ordinary remuneration. Held, setting aside the decision of the commissioners that the bonus was taxable as it arose from the assessee's office. *Radcliffe v Holt* 11 Tax Cases 621.

Profits from underwriting shares—An assessee whose ordinary business was that of a rope manufacturer underwrote 15,000 shares in an Oil Company for which he received a commission. It was contended on his behalf that the profit arose from an isolated transaction and were therefore of the nature of capital receipts. Held by *Rowlatt J* following *Ryall v Hoare* 8 Tax Cases 521 that the profits were taxable. *Lions v Corcher*, 5 A.T.C. 226 10 Tax Cases 438.

Bonus dividend—A bonus dividend is not exempt under this clause. *Forbes v Commissioner of Income tax, Behar and Orissa* 6 I.T.C. 208 as to the extent of its liability, see section 2 (6-A).

Professionals—Benefits—An assessee was a professional cricketer. A match was played for his benefit and in accordance with the rules of the club which employed him the net proceeds of the match and certain other sums obtained by public subscription were invested in the name of the trustees of the club. After a few years the investments were realised and the proceeds made over to the assessee who with the consent of the club bought a farm. It was admitted by the Crown that receipts from public

subscriptions were not taxable but that the gate-money was on the ground that it was a perquisite of his employment as a professional cricketer. It was held by Rowlatt J. that the gate money was not taxable. The *ratio decidendi* was that such receipts come to a man only once in a lifetime and were really of the nature of an endowment, that there was really no difference between the gate money and the other public subscriptions and that the assessee had no control over the money except with the consent of the club. This decision was reversed by the Court of Appeal (Sargent L.J. dissenting) but the House of Lords restored Rowlatt J.'s judgment (Lord Atkinson dissenting). *Reed v. Seymour* 11 Tax Cases 625 (1927) AC 574.

In *Davies v. Harrison* 6 ATC 136 11 Tax Cases 707 in which a professional footballer was given a benefit on transfer from one club to another it was held that the benefit was liable to tax, the case being distinguished from *Reed v. Seymour* 11 Tax Cases 625 on the ground that having regard to the rules of the clubs and the league controlling the clubs the benefit was really a business arrangement being a pre-arranged reward for service and not a voluntary gift or compensation for loss of employment.

Reed v. Seymour was distinguished also in *Corbett v. Duff* 1942 ITR (Sup.) 15 in which benefit payments from matches (in accordance with the Football League Regulations) were made to a professional. The test laid down in *Cooper v. Blakiston* and *Reed v. Seymour* is whether the payment is in respect of office or a mere personal testimonial. The regulations of the Football League contemplated such payments which though not contractual were expected. The benefit was given for a certain length of service and for loyal and meritorious services and was therefore of the nature of accrued pay. The case was almost on all fours with *Davies v. Harrison*. It was therefore held that the payments arose out of the office or employment.

In *Wing v. O'Connell* 1927 IR 84 it was held by the Irish Supreme Court (Murnaghan J. dissenting) reversing the decision of the High Court that the presents received by a jockey from the owners for whom he rode were taxable even though the presents were given voluntarily and after the employment had ceased.

(viii) Agricultural income

See notes under section 2 (1)

(ii) Any income received by trustees on behalf of a recognised provident fund as defined in clause (a) of section 58 A

History—This clause was introduced by Act XII of 1929

See section 58 A. The funds referred to are not governed by the Provident Funds Act 1925. Funds governed by that Act are exempt from tax on their investments by virtue of clause (iv) of this subsection.

(x) Any income received—

(a) by a person accredited as representative in British India for political purposes of an Indian State or the Ruler thereof, as his remuneration from the State or Ruler for service in such capacity,

(b) by a Consul General, Consul, Vice Consul or Consular Agent of a Foreign State, as remuneration from such State for service in such capacity,

(c) by a person employed by the consulate of a foreign State, not being a British subject or the subject of an Indian State, as remuneration from such foreign State for service in such capacity,

(d) by a Trade Commissioner or other official representative in British India of the Government of any other part of the British Empire or of a Foreign Government, as his official salary, if the official salary of the corresponding officials, if any, of the Central Government resident for similar purposes in the country concerned enjoy a similar exemption in that country,

(e) by a member of the staff of a Trade Commissioner or official representative referred to in sub-clause (d), as his official salary when such member is a subject of the country represented and the country represented has made corresponding provisions for similar exemptions in the case of members of the staff of the corresponding officials of the Central Government

(xi) With effect from the 2nd day of September, 1939, the income chargeable under the head 'salaries' of a Nepalese member of the Nepalese Military force serving with His Majesty's Forces or of any member of an Indian State Force so serving and any other income accruing or arising without British India which is received in or brought into British India by any such member while the Force to which he belongs is serving with His Majesty's Forces

History—Sub clauses (x) and (xi) were added in 1941. Before 1939 such exemptions were given by notification under section 60 but since that date that section cannot be used for such purposes and it is necessary to amend the statute itself.

(vii) Any income chargeable under the head "income from property" in respect of a building the erection of which is begun and completed between the 1st day of April 1946 and the 31st day of March 1948 (both dates inclusive) for a period of two years from the date of such completion

History—This clause was added by Act VIII of 1946. It is a part of the post war reconstruction policy of the Government in order to stimulate building.

Notes—It will be observed that both the beginning and the completion of the erection must fall within the two stated dates. Erection will probably include earthwork preliminary to building such as levelling and digging for foundations and so forth but it is not so clear what it will

include at the stage of completion. Perhaps it should be confined to those processes that make the house inhabitable, and probably the Municipal or other report of fitness for occupation will be a piece of evidence. It is hoped that the clause will not be attempted to be construed too meticulously.

The freedom from tax is only for two years from the date of completion. This period may run into three accounting or financial years, for the clause does not refer to the two next taxable periods but to two years *i.e.*, continuous periods of twelve months each.

Exemptions generally—United Kingdom Law.—Under the English Acts, there is no provision corresponding to section 60 of the Indian Act giving power to the executive to grant exemptions, and the exemptions are in the Acts themselves. There are certain exemptions under the English law which have no counterparts here. These are the exemption of Friendly Societies, Savings Banks, Trade Unions, Industrial and Provident Societies (corresponding to Co-operative Societies here—but the English Societies enjoyed greater concessions than those given to Co-operative Societies in India under section 60) National Insurance Funds, Unemployment Schemes, and Superannuation Funds (about this however, see notes under section 10 and Chapter IX-B). The exemptions in favour of Friendly Societies and Co-operative Societies have however been mostly withdrawn since 1933. All exemptions in the United Kingdom have to be claimed from the Special Commissioners who are an official body—see notes under section 5.

Residence in British India **4-A.** For the purposes of this Act—

(a) any individual is resident in British India in any year if he—

(i) is in British India in that year for a period amounting in all to one hundred and eighty-two days or more; or

(ii) maintains or has maintained for him a dwelling place in British India for a period or periods amounting in all to one hundred and eighty-two days or more in that year, and is in British India for any time in that year; or

(iii) having within the four years preceding that year been in British India for a period of or for periods amounting in all to three hundred and sixty-five days or more, is in British India for any time in that year otherwise than on an occasional or casual visit; or

(iv) is in British India for any time in that year and the Income-tax Officer is satisfied that such individual having arrived in British India during that year is likely to remain in British India for not less than three years from the date of his arrival;

(b) a Hindu undivided family, firm or other association of persons is resident in British India unless the control and management of its affairs is situated wholly without British India; and

(c) a company is resident in British India in any year (a) if the control and management of its affairs is situated wholly in British India in that year, or (b) if its income arising in British India in that year exceeds its income arising without British India in that year.

History—This section was first inserted in 1939 as a consequence of the radical changes made in section 4. Sub clause (iv) of clause (a) was added in 1941 in order to cover a lacuna.

Individuals—The words "any year" in clause (a) clearly refer to the "previous year", since the section has to be read with reference to section 4. From the definition in section 2 (11), the "previous year" may be more or less than 365 days according to circumstances.

The word "is" in sub clause (i) refers to physical presence. Fractions of days will evidently be reckoned as days, for there is nothing in this definition to require the presence of the individual for any minimum number of hours in a day. It should be noted that the different sub-clauses are alternatives and the fulfilment of any one of the conditions will make the individual resident.

Under sub clause (ii), two conditions have to be satisfied, viz, (a) the maintenance of a dwelling place for not less than 182 days in the year and (b) physical presence in British India, no matter for how short a period (even a few hours would seem to suffice). There is nothing to require that the physical presence in British India should synchronise with the maintenance of the dwelling place or that this assessee should actually live in that dwelling place or anywhere near it.

A "dwelling place" need not be a house and can include accommodation reserved in a hotel or a boarding house. But it should be maintained by him *viz*, at his cost and under his control or maintained for him, *viz*, intended for his occupation whether at his cost or not.

Under sub-clause (iii), three conditions have to be satisfied, viz, (a) within the four years ('previous years' or periods of 365 days?, presumably the former) preceding the previous year under assessment, the individual should have been physically present in British India for 365 days or more in all, (b) he should be physically present in British India during the previous year under assessment for any time, and (c) such presence should be otherwise than on an occasional or casual visit. Having regard to (c) the 'any time' referred to under (b) cannot be a few days. What is "occasional or casual" must be a question of fact, and these words bring out the idea that the visit must not be part of the assessee's plan of living. Periodical visits would not be occasional or casual, and even isolated visits if in connection with an established business or profession, could hardly be considered casual. All such questions, however, must, as already observed, be questions of fact.

Sub-clause (iv) was added in 1941 in order to deal with new arrivals in British India.

Physical presence—It will be seen that each of the alternatives requires the presence of the individual in British India for at least some time, however short, during the year in question. Cf *Cooper v. Cadwaladar*, 5 Tax Cases 101.

As a consequence, and because a person cannot be ordinarily resident and non resident simultaneously and also because a remittance into British

India by a non resident is not taxable under section 4 an individual even though ordinarily resident, can by remaining away from British India for the whole of a 'previous year' and remitting foreign profits into British India during that year escape tax in so far as it has not been already taxed in earlier years on the basis of his residence (and ordinary residence) In the United Kingdom, a British subject whose ordinary residence has been in that country, remains assessable though absent abroad if such absence is for occasional residence abroad only This rule was applied in *Rogers v Inland Revenue*, 1 Tax Cases 225 in which a master mariner was absent the whole year on a voyage

Residence in Burma before 1st April, 1937—Having regard to the definition of British India in the General Clauses Act, 1897, as amended by the Adaptation of Indian Laws Order 1937 residence in Burma before its separation from India amounts to residence in British India during that period *Commissioner of Income-tax Madras v Papammal*, 1942 ITR 349

Residence of firm—In *T S Firm v Commissioner of Income tax, Madras*, 50 Mad 847, 2 ITC 320 it was held (before 1939) that the residence of a firm does not depend on the physical residence of the partners but on the place of control, and also following, *Swedish Central Railway v Thompson*, 9 Tax Cases 342 (H.L.), that a firm can have more than one residence A similar decision was given in *In re Sarupchand Hukamchand*, 1945 ITR. 245 (Bom) Both these decisions relate to the pre 1939 law when there was no statutory definition of 'residence' In the latter case the assessee's claim was that the principal place of his world business was outside British India, and not the same place as the principal place of the assessee's business in British India

In *Mahomed Jamaluddin v Commissioner of Income-tax, Madras*, 1942 ITR. 484, a firm of Colombo opened a branch in British India where one of the partners resided and managed that part of the business It was held that the firm resided in British India as its management was not situated wholly outside British India.

Hindu undivided families—In a case before 1939, the Madras High Court held that a Hindu undivided family even if a trading family, resided in all the places where its members resided, *Commissioner of Income-tax, Madras v V S K S Somasundaram Chettiar*, 6 ITC 96, 55 Mad. 885 The Rangoon High Court observed in *Commissioner of Income tax, Burma v S P K AR M family*, that the dictum in the Madras case was too wide, though the decision in the particular case was rightly made if regard be had to the amendment in 1939 which merely clarified the law The *karva* in that case visited British India periodically for the purpose of supervising the business What the law means is that the residence of a family should not be inferred from the fortuitous residence of individual members but from whether they reside for the business

De facto control—The definition of 'residence' in this section relates to actual events and it is residence in fact that attracts tax. There is nothing in the section to impose tax because of mere power to control and manage even though in fact the power is not exercised at all If mere power was the test, every firm in which any partner was in British India would be resident The power may be a relevant consideration but is not conclusive, *Nair v Commissioner of Income tax, Bombay* 1945 ITR 124 The test is not where the individuals who can control and manage

in fact reside but where 'control and management' is 'situated' This applies to all cases and not only to firms. A partnership of six individuals owned a rubber estate in Malaya. All the partners had money lending business of their own in Malaya. According to the partnership deed two partners in rotation had the control of the estate from year to year, and it was open to the controlling partners to act through their money-lending agents. During a particular year, of the two controlling partners, one resided in British India. The firm claimed that copies of correspondence between the controlling partners and the persons in charge of the plantation had not been preserved, but it was seen from a letter written before the year under issue that the agents in Malaya had asked for instructions for the disposal of profits whether they were to be spent in replanting etc and there was nothing to show that the nature and extent of control during the year under issue was different. *Held*, that part of the control was in British India and that therefore the firm was resident in British India. *Commissioner of Income tax, Madras v Shanmugham Rubber Estate*, 1945 ITR 329.

The omission of the words "in any year" should be noted, unlike sub-clauses (a) and (c) under which residence depends on events during the previous year sub clause (b) regulates residence with reference to locus of control and management which is not likely to change from year to year.

It will be noted that unless the control and management lie wholly outside British India the family, etc. will be resident, so even if a part of the control and management is in British India the firm will be resident. It will be a question of fact where and to what extent control and management are situated.

Where a family and its *karta* reside outside British India and the business of the family is carried on in British India through agents the mere visit of the *karta* to British India for a few days will not in itself make the family resident. What is required to make the family resident is evidence that during the visit the *karta* exercised control or management. *Commissioner of Income tax, Madras v Gangabishun Mohanlal*, 1945 ITR 20.

It should also be noted that, both in sub clause (b) and in sub-clause (c), the reference is to "control and management" and not to central control and management.

Note also that in both (b) and (c) the words 'control and management' are followed by the singular *is* and not by the plural *are*, the two words together therefore, constitute a single activity. Consequently the control must be effective, i.e., of the nature exercised by an owner, and not restricted like that of a mere paid manager. Therefore if the partners of a firm do not reside in British India, the firm could not be resident. So also, if there is only a sleeping partner in British India who exercises no 'control and management'.

Companies—There are two alternative conditions to be fulfilled by a resident company, (a) either the control and management lie wholly in British India, or (b) its income arising in British India in the previous year exceeds its income arising abroad. It will be noted that whereas a Hindu family or firm or other association will be considered to be resident unless the control lies wholly abroad a company will be deemed to be non resident unless its control lies wholly in British India. So, in cases of

divided control and management a firm or other association or a Hindu family would be resident while a company would be non resident (apart from the effect of the alternative condition about proportion of British Indian to foreign profits)

The words used in condition (b) of sub-clause (c) are "arising in British India" and not "arising to the company in British India." Are the British Indian profits then to be calculated with reference to receivability in British India or with reference to sources in British India? In the latter alternative, difficult problems of mixed fact and law will arise with reference to the place of arising of profits of business like shipping, banking, insurance and even imports and exports. Such questions however arose even under the law as it stood before 1939, not with reference to the determination of residence but with reference to that of liability of profits to tax. Where the British Indian profits cannot be easily separated Rule 33, and in respect of insurance businesses Rule 8 of Schedule will evidently have to be applied.

According to the Income tax Manual it is only the income arising in British India and not the income which may be deemed to arise in British India, that has to be taken into account in determining whether or not a company is resident in British India. The whole of the income arising in British India (including agricultural income and any other income which may be exempt from tax) has to be taken into account in determining whether more than half the income arises in British India. This view is evidently based on the use of the word 'income' and not 'total income' in this section, as in sections 3 and 4.

It is submitted that 'arising in British India' in this context refers, not to receivability but origin or derivation from a source in British India.

In order to determine the residence of a company with reference to the relative magnitude of the profits abroad and in British India, sums paid to a company for a particular purpose *viz.*, for payment of interest on debentures and earmarked for that purpose are not part of the profits of the company abroad, they do not belong to the company, at all. *Commissioner of Income-tax, Bombay v B B & C I Ry*, 1943 ITR 578.

Whether section 4-A (c) (b), *ultra vires*—The validity of this provision has been questioned unsuccessfully on the ground that it was beyond the jurisdiction of the Indian Legislature. It was held by the Federal Court that the legislature which has the power to impose tax has also the power to determine who should pay and for that purpose to lay down rules as to who is to be regarded as resident and what income is to be regarded as accruing etc., in British India. There is also nothing in the Government of India Act, 1935 precluding the legislature from passing extra territorial legislation. *Wallace Brothers, Ltd v Commissioner of Income tax, Bombay*, 1945 ITR 39. See also notes under Explanation 3 to section 4 (1) (c) in respect of which also the jurisdiction of the Indian legislature has been unsuccessfully challenged.

English rulings—The following rulings in the United Kingdom where there is no definition of residence will be of interest.

'Residence' signifies a man's abode or continuance in a place. 'When there is nothing to show that it is used in a more extensive sense (it) denotes the place where an individual eats, drinks and sleeps or where his family and servants eat, drink and sleep,' per *Bayley, J.*, in *R v North Curry* 4 B & C 959, but it is an ambiguous word per

Cotton, L J—In *re Bowie ex parte, Barnell*, 16 Ch. D 484 *Per Pollock, C B*—‘The word *reside*’ does not necessarily mean ‘*dwell*’

Per Martin, B—‘Strong ground for contending that one who spends the day at his shop attending to his business, and may there be seen and conversed with on matters of business, and does not choose to be communicated with elsewhere is *residing* there’ *Attorney-General v McLean*, 1 H & C 750

The words ‘*residence*’ and ‘*place of abode*’ are flexible and must be construed according to the object and intent of the particular legislation where they may be found *R v Tyrone Justices*, (1901) 2 I.R. 510 (from Stroud)

In connection with house keeper’s allowance, which, under the United Kingdom law, can be claimed by widowers in certain circumstances, it has been held that ‘*residing with*’ means ‘*sleeping at the place of*’ *Brown v Adamson*, (1937) 2 A.L.R. (K.B.D.) 792, 16 A.T.C. 90

Domicile has nothing to do with residence, *Attorney-General v Coote*, (1817) 4 Price 183 A man can have two or more residences in two or more different countries but can have only one domicile, *Lloyd v Sulley*, 2 Tax Cases 37 See also *Walcot v Botfields*, (1854) Kay 534 (a case of construction of a will) The domicile of an infant may be in a country to which he has never been physically ‘*Residence*’ connotes the idea of the person’s bodily presence at some time or other In *re Young*, 1 Tax Cases 57 a master mariner who was abroad for the greater part of the year was considered to be ‘*resident*’ because his wife and family resided in the United Kingdom in a house of which he was the tenant A similar decision was given in *Rogers v Inland Revenue*, 1 Tax Cases 225 and *Lloyd v Sulley*, 2 Tax Cases 37 (in the latter case the assessee resided mostly at Leghorn where he carried on business) In *Turnbull v Foster*, 6 Tax Cases 206 it was laid down that “the test of liability is not having a residence in the United Kingdom, it is *residing* in the United Kingdom”—*Per Lord Trayner*

If the person does not reside even for a day in the United Kingdom during the year of assessment, he is not a ‘*resident*’ for this purpose. In *Cooper v Cadwaladar*, 5 Tax Cases 101, an American ordinarily resident in New York, and with no place of business in the United Kingdom who had rented a house and shooting rights in Scotland for a term of years and spent two months there every year was held to ‘*reside*’ in the United Kingdom

Per the Lord President—“A person may have more than one residence if he maintains an establishment at each of them”

In *Brown v Burt*, 5 Tax Cases 667 the assessee—an alien, who had lived for 20 years on board a yacht anchored near the shore in an English port—was held to ‘*reside*’ in the United Kingdom In *Thompson v Bensted*, 7 Tax Cases 137 it was held that a person employed by an English company in Nigeria who was the rated owner of a residence in England where his wife and family resided and who spent four months a year there ‘*resided*’ in the United Kingdom

Per L J Clark—“I think, in the sense of the Income tax Acts a man may reside in more than one place at the same time.”

“When you are considering a question like residence, you are considering just a bundle of facts”—*Per Rowland, J*, in *Loewenstein v De Salis*, 10 Tax Cases 424

must be a question of degree and of fact

I suggest as a characteristic factor for consideration even if it does not fulfil the nature of a test, to ascertain if the suggested alternative place of residence is one which the subject seeks willingly and repeatedly in order to obtain rest or refreshment or recreation suitable to his choice where for a time he is embedded in the enjoyment of what he desired to attain and found in the abode of his own option. Another factor may be found and an important one—if he returns to and seeks his own fatherland in order to enjoy a sojourn in proximity to his relations and friends' Per *M R Hamworth in Levene v Commissioners of Inland Revenue* 6 A TC 323 12 Tax Cases 486 (1927) 2 KB 37 (1928) AC 217

See also *Karupiah Kangan v Commissioner of Income tax Madras*, 3 ITC 282 We entertain no doubt that he could properly be described as residing here he owned a house in the Rammad District where his second wife and her children by him lived and he stayed in the house whenever he came to British India'

An establishment is not necessary in order to have a residence in a country. Even a tramp must be resident in a country. If a man chooses to live in hotels or even to stay with friends or relations it makes no difference. *Lysaght v Commissioners of Inland Revenue*, 6 A TC 64 13 Tax Cases 511 (1928) AC 234

Decisions on the question of residence under Statutes other than Taxation Acts e.g. Military Service Acts would evidently not be applicable to Income-tax

Residence of companies—Per Lord Loreburn in *De Beers v Howe*, (1906) AC 455 5 Tax Cases 198

"A company cannot eat or sleep but it can keep house and do business. We ought therefore to see where it really keeps house and does business. The decisions of Chief Baron Kelly and Baron Huddleston in the *Calcutta Jute Mills v Nicholson*, 1 Tax Cases 83 and the *Cesena Sulphur Company v Nicholson*, (1876) IR 1 Ex D 428 1 Tax Cases 88 involved the principle that a company resides for purposes of income tax where its real business is carried on. These decisions have been acted on ever since. I regard that as the true rule and the real business is carried on where the central management or control actually abides

A company registered both in the United States of America and Ireland, purchased raw linen goods in Scotland and Ireland arranged for manufacture by other firms and folded the finished goods themselves and sold them chiefly in the United States of America. The registered office of the company was in Belfast where general meetings were held, the minute book was kept, the accounts were audited and dividends were declared. But the sole director who had exclusive control resided in the United States of America. Held that the company was resident in Ireland, *John Hood and Co v Magee* 7 Tax Cases 327

In *New Zealand Shipping Company v Theu*, 8 Tax Cases 208 the company was incorporated in New Zealand with its registered office there, with two boards of directors, one in London and the other in New Zealand. The London Board had exclusive control over finance and administration and bigger questions of policy. The other board conducted the business in Australasia and negotiated independently of the London Board most of

the freight contracts. General meetings were held and the share registers kept in both countries but the accounts were kept and the dividends declared in London. *Held*, that the Commissioners had sufficient evidence before them to arrive at the finding that the company was resident in London, and that where a company or a person resides is a question of fact.

An English company which was registered in the United Kingdom and carried on business there promoted a company to own certain cotton mills in the U.S.A. the latter company being incorporated and registered in the U.S.A. No part of the output of the mills was sold in the United Kingdom. The entire stock of the American company was owned by the English company either directly or through trustees. Under the bye-laws of the American company there had to be seven directors of whom three had to reside in America. The current business of the company was to be directed by an executive committee of three directors resident in America and the regular meetings of the Board were to be held in America extraordinary meetings being held in the company's office in England. The more important powers could be exercised only by the extraordinary meetings of directors in England for example, the appointment of higher officials the filling of casual vacancies among directors, entering into contracts for over one year, the appointment of directors, the borrowing of money, etc. In practice dividends also were declared in the extraordinary meetings in the United Kingdom. *Held* that there was sufficient evidence before the Commissioners to justify their finding that the American Company was resident in the United Kingdom. *American Thread Company v Joyce*, 6 Tax Cases 1 and 163 28 T.L.R. 233 29 T.L.R. 266.

The 'head and brain' of a business cannot be a paid employee, or in the case of a company any one else than the Directors however valuable might be the services of such employee or manager. *See per Roulatt, J.*, in *Noble v Mitchell* 11 Tax Cases 372 (1927) 1 K.B. 719.

See also incidentally San Paulo Railway v Carrier, 3 Tax Cases 407, (1896) A.C. 31 *Apthorpe v Peter Schoenhofen, etc.*, 4 Tax Cases 41 *Groce v Elliotts and Parkinson*, 3 Tax Cases 481 and *St Louis Breweries v Apthorpe* 4 Tax Cases 111, referred to in the notes under section 4.

Can a Company have more than one residence?—As to whether a company could have more than one residence there had been *obiter dicta* in the affirmative—*see per Channell J.*, in *Goetz & Co v Bell*, (1904) 2 K.B. 136, per *Phillimore, J.*, in *De Beers v Howe*, (1906) A.C. 455 (the House of Lords did not disapprove of this *obiter dictum*), per *Buckley, L.J.* in *American Thread Company v Joyce*, 6 Tax Cases 1. The decision in *Mitchell v Egyptian Hotels, Ltd.*, (1915) A.C. 1022 6 Tax Cases 542 though it did not expressly decide this point, is, as pointed out by *Lord Cave* in *Swedish Railway Co v Thompson*, (*infra*), inconsistent with the view that company cannot have more than one residence. A definite pronouncement was made on this question for the first time in *Swedish Central Railway Company v Thompson*, 9 Tax Cases 342 *infra*.

A company owned a railway in Sweden, which was let to a company in Sweden. The income of the former company whose registered offices were in London consisted only of the rent received for the railway. The Secretary resided in London but the directors resided in Sweden. The control was exercised in Sweden and only the formal administrative business was conducted in London by a Committee residing there. *Held* (Lord Atkinson dissenting) by the House of Lords that a company which

is controlled from abroad but which is registered in the United Kingdom can for the purpose of Income tax reside both in the United Kingdom and abroad *Scottish Central Railway Co v Thompson* 9 Tax Cases 342 (1925) A.C. 495

Per Lord Chancellor Case—An individual may clearly have more than one residence *Cooper v Cadwalader* (1904) 5 Tax Cases 101, and on principle there appears to be no reason why a company should not be in the same position. The central management and control of a company may be divided and it may keep house and do business in more than one place and if so it may have more than one residence.

(But) I am not prepared to say that registration in the United Kingdom would itself be sufficient proof of residence here that point does not arise in this case and I express no opinion on it. But however that may be I am satisfied that the fact of registration together with the other circumstances which were found by the Commissioners to exist were sufficient to enable them to arrive at a finding.

Per Lord Buckmaster—The reference to the registered office is important it is to my mind one of the critical facts in determination of residence in this country but not necessarily the sole and exclusive fact. It varies in consequence in every instance. Nor even if it were the sole fact would it follow that a company incorporated and with a registered office elsewhere could not also be resident here for purposes of income tax.

In *Todd v Egyptian Delta Land and Improvement Co* 14 Tax Cases 119 (1929) A.C. 1 the Lower Courts decided that a registered office in itself involved residence but the House of Lords did not accept this view. The reasoning was as below. The Companies Acts say nothing about residence. Down to 1853 most tax payers were natural persons. Throughout the United Kingdom Income tax Acts therefore the word resident with its various qualifications actually ordinarily occasionally temporarily and so forth is used in a sense in every way appropriate to natural persons but only artificially applicable to incorporated persons and never really appropriate. Indeed the words a person ordinarily resident in the United Kingdom are so inappropriate a term for a person though an artificial one who is always and by law immovably resident in the United Kingdom that it cannot be sustained. When the question of residence of companies under Income tax Acts first came before Court, they might well have left it to the Legislature to enact what residence of artificial persons meant but the Courts applied the word by analogy from natural persons. In the case of the latter residence depends on personal facts. Place of birth nationality and allegiance are not the tests nor is domicile. What does matter is voluntary choice and habitual and repeated action—such as making a home, keeping an establishment pursuing a settled object in a particular place. Therefore there can be no real analogy between natural persons and artificial persons except that both must carry on business somewhere and it is really this that settles the residence of companies.

Under the Companies Act no business need be done at its registered office and no profits or losses made there. The obligation to have a registered office to keep registers for inspection etc. is intended to help creditors and not to attract tax. The latter is to be done by a Taxing Act and not by the Companies Act.

In the *Swedish Railway case* it was unnecessary for the House of Lords to decide more than that a company could reside in two places. The question is one of degree on facts, and that was really a case of divided control at the two places. You cannot have one test of residence for foreign companies *viz*, place of control of business and another for local companies *viz* place of incorporation. You must be consistent.

4 B For the purposes of this Act—(a) an individual is not ordinarily resident" in British India in any year if he has not been resident in British India in nine out of the ten years preceding that year or if he has not during the seven years preceding that year been in British India for a period of or for periods amounting in all to more than two years (b) a Hindu undivided family is deemed to be ordinarily resident in British India if its manager is ordinarily resident in British India (c) a company firm or other association of persons is ordinarily resident in British India if it is resident in British India

History—This section is new and dates from 1939

Clause (a)—In any year *i.e.* the previous year a defined in section 2 (11). It is with reference to that year that the various tests of residence and ordinary residence as laid down in sections 4-A and 4-B have to be applied. *Commissioner of Income tax Madras v V E K R Saumamurti*, 1946 I.T.R. 185. It will be noted that even ordinary residence may vary from year to year and that it does not depend as in the United Kingdom on the general impression formed by the Commissioners as to the general course and order of the assessee's life over a period of time but on a rigid formula as a consequence of which the assessee's status may change from year to year. The meaning of this section gave considerable difficulty to the Legislature as will be seen from the proceedings of the Legislative Assembly. The reasons for the definition are given in the following speech of the Honble the Finance Member in the Legislative Assembly

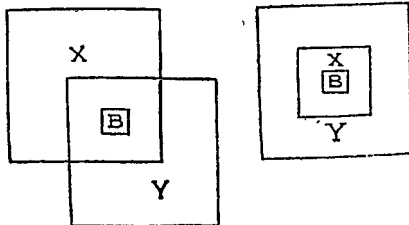
The Honourable Sir James Grigg Sir I will do my best to solve these conundrums. In the first place we were trying to cover rather compendiously two entirely different classes of cases firstly the European official or the trader for that matter in the early years of his stay in India before it has become established that his career is in India. The other is the case of the Indian trader abroad who has an ancestral home in India to visit very irregularly but possibly enough to become technically resident in every year. The conditions to be satisfied are cumulative that is a man has to be resident in nine out of ten years preceding the year of assessment. Now that means that there are three ways in which a man can become resident. He can become resident by being in the country for six months he can become resident if he has got a house in the country and comes here for one day he can become resident in a year if he is here for one day and if he has been here before that year for one year out of four, *i.e.* a regular visit of about three months a year. Any one of these definitions of resident or one or other of these definitions of

'resident' has got to be satisfied in nine out of ten years. Then, you come to the second wing, to the case where a man becomes resident technically in every one of the ten years although his visits are very short and he becomes resident in the main, in fact entirely, because, he keeps an ancestral house in British India, and, therefore, unless he is in India for a substantial period over seven years he is to be regarded as not ordinarily resident. That was the objective which the Leader of the Muslim League party had, that is, to cut out the Indian trader whose connection with India had become rather attenuated and only existed at all because he had an ancestral house and come back to it at odd intervals for short periods. So that a man is not ordinarily resident unless he satisfies both of those conditions and both of those conditions amount to saying that he must have been resident in nine out of ten years and he must have been here for substantial periods in the preceding seven years. And those are the criteria we have invented to cover two different types of cases. There are two cases in which a man may become resident by being in India for a single day for a tax year. The first is that he has got a furnished house and he occupies it and the second is, if he has been a regular visitor for substantial periods for four years preceding that year, and the criterion for that is that he has been here for one year in the preceding four. And in both those cases a man can technically become resident by being in the country for one single day. And you cannot exclude the rather absurd extreme case where a man has been here for (say) one day in nine years out of the preceding ten and becomes ordinarily resident by that criterion alone. And that was the objective which not only Mr Jinnah but the Leader of the Congress Party had in mind, to cut out the person whose connection with India had become so attenuated as to be non-existent.

Mr S Satyamurti: Are these accumulative or alternative conditions?
The Honourable Sir James Grigg: They are accumulative."

Individuals—From the fact that the words "not ordinarily resident" are enclosed in quotation marks, it can be argued that they show signs of being intended to connote a positive concept and not merely the negative of ordinary residence, especially since the second proviso to section 4 (1) to which the definition in this section is related does not use the positive form and determine in terms the liability of a person ordinarily resident but merely seeks to limit liability, subject to certain conditions, of a person *not ordinarily resident*. On the other hand, clauses (b) and (c) of section 4 B use the positive form "ordinarily resident". It is obvious that the fulfilment of either of the negative conditions in clause (a) will make the person "not ordinarily resident". It should be noted that while under the first alternative, the criterion is residence during preceding years as defined in section 4-A, the criterion under the second alternative, which uses 'has been' is that of physical presence in British India for a period of more than two years in all during the seven preceding years.

The proposition A is not B if he is either not- X or not- Y is best diagrammatically represented as follows. It is clearly not the same as that A is B if he is neither not X nor not- Y .



To put it differently, nothing can be inferred definitely as to when *A* must be *B*, all that can be stated is that either not—*X* or not—*Y* (not necessarily both) carries the inevitable consequence of being not—*B* (with its attendant leniency) and that *A*, in order to be *B*, must be both *X* and *Y*. That is, the area of *B* cannot be wider than this common area of *X* and *Y*, but it *can* be smaller, i.e., some more conditions may have to be fulfilled to declare *A* to be *B*. It can therefore be argued that while 'not ordinarily resident' is to be interpreted in accordance with the definition, "ordinarily resident" should be interpreted at the discretion of the Income tax authorities as a question of fact and in accordance with the trend of rulings in the United Kingdom. Clause (b) referring to Hindu families, however, makes it necessary to determine positively whether its manager is ordinarily resident and on the whole it would appear that the more probable intention of this section is that *B* should be coterminous with the common part of *X* and *Y*, i.e., *A* is *B* if it is both *X* and *Y*, though the words of the section do not necessarily convey that meaning. This is also borne out by Sir James Grigg's statement in the Legislative Assembly that the two conditions in clause (a) are cumulative.

The official view is contained in the following instruction in the form of Return of Income (Rule 19) 'An individual is ordinarily resident in British India if he has been resident as defined above in nine out of ten years preceding the year and has been in British India for previous amounting in all to more than two years during the seven years preceding that year.

Another way of looking at the matter is that if the assessee fails to discharge the onus of proving that he is not ordinarily resident, i.e., he will be assumed to be ordinarily resident and *ex hypothesi* he cannot question such an assumption which is merely founded on the equivalence or "ordinarily resident" with "not not ordinarily resident", which may be assumed for the purpose in the absence of anything to the contrary.

Data for determination—It will be seen that in some cases the residence in the ten years preceding the previous year will have to be examined. Under section 4-A (a) (iii), it may be necessary to refer also to another four years earlier, thus making it necessary in all to cover a period of 15 years including the previous year. The questions to be considered however, will all be questions of fact.

There is nothing in the section however to prevent the periods of residence and stay in British India of the successive managers of a

family (Hindu joint) during its continued existence being added together for the purpose of the section, *Marimuthu Pillai v Commissioner of Income tax Madras*, 1945 ITR 186 'Seven years' refers to seven periods of twelve calendar months each preceding the appropriate 'previous year' and not to the period of seven years ending on 31st December, before the previous year, *Commissioner of Income tax, Madras v V E K R Saumiamurthy*, 1946 ITR 185 This, however, may result in some cases, where different previous years are adopted for different sources of income, in the assessee's being considered resident in respect of some sources but not in respect of others

Hindu undivided family—It will be observed that the status of the family will vary from time to time entirely with reference to the status of its manager and irrespective of any other condition The status of the Manager will be determined with reference to (a) of this section

It is not clear why the words 'deemed to be' have been used in condition (b) alone but not in (a) or (c)

Companies, etc—This part of the definition presents no fresh difficulty, *etc*, apart from the determination of the company's residence under section 4-A

In a way, this definition merely codifies Lord Sumner's dictum in *Todd v Egyptian Delta, etc, Co*, 14 Tax Cases 119, that the words "ordinarily resident" are singularly inappropriate in the case of a company

United Kingdom Law—There is no definition in this law, either of residence or of ordinary residence The word "ordinarily" in this connection has however been interpreted by the House of Lords to mean as part of the regular order of a man's life or habitually and normally and in the customary course of events, rather than continuously or mainly, the converse to 'ordinarily', is 'extraordinarily', and that part of the regular order of a man's life adopted voluntarily, and for settled purposes, is not 'extraordinary,' see per Lord Sumner in *Lysaght v Commissioners of Inland Revenue*, 13 Tax Cases 511 A 'voluntary' beginning is however, not essential for 'ordinary' residence An inmate of a mental hospital was therefore held to be ordinarily resident *Mackenzie v Attorney General*, 1941 What about a foreigner who comes temporarily, commits a crime and is imprisoned for a long period, or a prisoner of war in a lengthy war?

INCOME-TAX AUTHORITIES.

5 (1) There shall be the following

Income tax authorities classes of Income tax authorities for the purposes of this Act, namely —

(a) the Central Board of Revenue,

(b) Commissioners of Income tax,

(c) Assistant Commissioners of Income tax who may be either Appellate Assistant Commissioners of Income tax or Inspecting Assistant Commissioners of Income-tax,

(d) Income tax Officers,

(2) The Central Government may appoint a Commissioner of Income-tax for any area specified in the order of appointment, and may appoint Commissioners of Income-tax, not more than three in all, each to discharge, without reference to area, and to the exclusion of any Commissioner appointed for any area, the functions of a Commissioner in respect of any cases or classes of cases assigned to him by the Central Board of Revenue.

(3) The Central Government may appoint as many Appellate or Inspecting Assistant Commissioners of Income-tax and Income-tax Officers as it thinks fit.

(4) Appellate Assistant Commissioners of Income-tax shall be under the direct control of the Central Board of Revenue and shall perform their functions in respect of such persons or classes of persons or of such incomes or classes of income or in respect of such areas as the Central Board of Revenue may direct, and, where such directions have assigned to two or more Appellate Assistant Commissioners of Income-tax the same persons or classes of persons or the same income and classes of income or the same area, in accordance with any orders which the Central Board of Revenue may make for the distribution and allocation of the work to be performed.

(5) Inspecting Assistant Commissioners of Income-tax and Income-tax Officers shall perform their functions in respect of such persons or classes of persons or of such incomes or classes of income or in respect of such areas as the Commissioner of Income-tax may direct, and, where such directions have assigned to two or more Inspecting Assistant Commissioners of Income-tax or Income-tax officers the same persons or classes of persons or the same incomes and classes of incomes or the same area, in accordance with any orders which the Commissioner of Income-tax may make for the distribution and allocation of the work to be performed. The Commissioner may, with the previous approval of the Central Board of Revenue, by general or special order in writing, direct that the powers conferred on the Income-tax Officer and the Appellate Assistant Commissioner by or under this Act, shall, in respect of any specified case or class of cases, be exercised by the Inspecting Assistant Commissioner and the Commissioner, respectively, and, for the purposes of any case in respect of which such order applies, refer-

ences in this Act or in any rules made hereunder to the Income tax Officer and the Appellate Assistant Commissioner shall be deemed to be references to the Inspecting Assistant Commissioner and the Commissioner, respectively

(6) The Central Board of Revenue may, by notification in the official Gazette, empower Commissioners of Income tax, Appellate or Inspecting Assistant Commissioners of Income-tax and Income tax Officers to perform such functions in respect of such classes of persons or such classes of income or for such area as may be specified in the notification, and thereupon the functions so specified shall cease to be performed in respect of the specified classes of persons or classes of income or area by the authorities appointed under sub sections (2) and (3)

(7) Assistant Commissioners of Income tax and Income-tax Officers shall, for the purposes of this Act, be subordinate to the Commissioner of Income tax for the area in which they perform their functions or where they perform functions assigned to them by a Commissioner of Income-tax appointed without reference to area, to that Commissioner

(7 A) The Commissioner of Income tax may transfer any case from one Income tax Officer subordinate to him to another and the Central Board of Revenue may transfer any case from any one Income tax Officer to another. Such transfer may be made at any stage of the proceedings and shall not render necessary the re issue of any notice already issued by the Income tax Officer from whom the case is transferred

(8) All officers and persons employed in the execution of this Act shall observe and follow the orders, instructions and directions of the Central Board of Revenue

Provided that no such orders, instructions or directions shall be given so as to interfere with the discretion of the Appellate Assistant Commissioner in the exercise of his appellate functions

History—Sub-sections (3) and (6) were amended in 1933 in order to enable Government to appoint Commissioners for such areas as may be found administratively convenient instead of by provinces and sub-section (5) so as to enable Commissioners to distribute work according to administrative exigencies. The Calcutta ruling in *Basantlal Nathani's Case* 5 ITC 114 is obsolete. The whole section was recast in 1939 so as (1) to separate Appellate Assistant Commissioners from Inspecting Assistant Commissioners (2) to have not more than three Central Commissioners to deal with special classes of cases (superseding the territorial Commissioners) (3) to place Appellate Assistant Commissioners under the direct con-

trol of the Central Board of Revenue and (4) to give the Central Board of Revenue formal powers of administrative control without interfering with the Appellate Assistant Commissioner's discretion. The section was again revised along with section 64 in 1940, with retrospective effect from 1st April, 1939, assessments by Income tax Officers under the non area Commissioners having been successfully challenged before the Courts on the following grounds: (a) section 64 had not been amended, (b) completed assessments (*i.e.* right of appeal or revision) could not be transferred. The power to transfer a case from one Income tax Officer to another was also provided.

Income tax Authorities—(1) The Central Board of Revenue is appointed by the Central Government. Apart from its rule making powers under section 59 its specific powers are mentioned in the various sections *e.g.*, sections 2 (6) 2 (11) (b) 5 (6) 18 (6), chapters IX A and IX B and section 64. The Board also issues executive instructions for the guidance of subordinate authorities regarding the interpretation of the provisions of the Act and the rules and is entrusted with the general administration of the Act. Sub section (8) of section 5 regularises the administrative control of the Central Board of Revenue which it has all along exercised. Certain rules in regard to recognised provident funds however are made by the Central Government.

(2) The head of the Income tax Department of a province or other area or group of cases entrusted to him is the Commissioner of Income tax who is appointed by the Central Government.

The specific powers conferred upon the Commissioner in regard to income tax proceedings are specified in sections 5 28, 32 33, 33 A, 35, 37, 54 (5) 58 B 58-D, 58-G, 58-J, 64 (3) and 66 of the Act. In particular he is vested with power under section 33-A in certain stated circumstances to revise orders passed by an income-tax authority subordinate to him, and he alone may, under section 66 of the Act ask on behalf of the Crown for a case to be stated for the opinion of the High Court.

(3) The functions of Appellate Assistant Commissioners of Income-tax are set out in sections 28 (1) 30 (2), 31, 35 and 37. They are appointed by the Central Government without reference to jurisdiction which is determined by the Central Board of Revenue. The jurisdiction may be by persons or classes of persons or incomes or classes of income or areas as may be found convenient.

(4) The functions of an Inspecting Assistant Commissioner are mainly extra statutory. His statutory powers are set out in section 5 (5) (the last part), 23 A 28 38, 39 and 53. The powers under sections 38, 39 and the last proviso of section 50 can evidently be exercised by both classes of Assistant Commissioners.

Inspecting Assistant Commissioners are also appointed by the Central Government and without reference to jurisdiction which is determined by the Commissioner of Income tax. As in respect of Appellate Assistant Commissioner jurisdiction may be by persons or classes of persons or incomes or classes of income or area as the Commissioner may find convenient. Where there is an overlap of jurisdiction as between more than one Assistant Commissioner, the Central Board of Revenue in the case of Appellate Assistant Commissioners and the Commissioner in the case of Inspecting Assistant Commissioners will give directions about the allocation of work.

The Assistant Commissioner when exercising the powers of the Income tax Officer need not actually go to the area of the Income tax Officer to exercise the functions *Maharajadhiraj of Darbhanga v Commissioner of Income tax, Bihar and Orissa* 4 ITC 283 9 Pat 240 AIR. 1930 Pat 81

(5) Income tax Officers are the actual assessors. Section 64 of the Act specifies the particular Income tax Officers by whom assessments shall be made. Sub-section (4) of the same section provides that every income tax Officer shall have all the powers conferred by or under the Act on an Income tax Officer in respect of any income, profits or gains accruing or arising or received within the area for which he is appointed. This particular provision was inserted mainly in order to permit of enquiries being made into the profits of a branch business by the Income tax Officer of the place in which the branch is situated and in order to enable every Income tax Officer to make enquiries regarding all income profits and gains arising or accruing within the area to which he is posted even though the assessment in respect of the particular income profits or gains may not be made by him. Income tax Commissioners have therefore been directed to secure by issuing instructions or otherwise that there is no overlapping in this matter and that the same person is not assessed to income tax by more than one Income tax Officer but that all Income tax Officers should at the same time give the utmost assistance to the assessing Income tax Officer in regard to any property income profits or gains within their respective areas which are liable to assessment elsewhere.

(6) While the income tax staff are normally appointed in provincial cadres there are certain classes of cases for which it may be advisable that assessment should be made by an all India staff or by specially trained staff. Examples of the following are the cases of military officers and of officers of other departments serving directly under the Government of India who are liable to transfer from one province to another, and there may be other cases such as the assessment of railway or insurance companies or banks which may be dealt with by special officers for the whole of India. Sub-sections (3) and (6) make provision for the appointment of special officers and Special Commissioners in such cases. Examples of the other kind are the special staff in big cities like Bombay or Calcutta who deal under the supervision of a Special Commissioner and Assistant Commissioners with intricate cases specially made over to them. For a list of special officers under sub-section (6) See notifications.

Sub-section (2) — 'Any cases or class of cases. These words permit individual cases—not necessarily classes of cases—being dealt with by one of the Special Central Commissioners.

Sub-section (4) — While it is stated in this sub-section that the Appellate Assistant Commissioners will be under the 'direct control' of the Central Board of Revenue, it is stated in sub-section (7) that Assistant Commissioners, i.e. Appellate and Inspecting will be subord^{be} Commissioner concerned. The subordination contemplated is one merely of jurisdiction as will be seen from section

Transfer of cases.—Till 1940, there was no provision for the transfer of a case from one Income-tax Officer to another. Sub-section (7-A) now provides for such transfer. It will be noted that notices issued by the previous Income-tax Officer (of course if they are otherwise valid) are automatically kept alive in relation to the proceedings before the new Income-tax Officer; otherwise there would be avoidable delay, and assessments have to be completed within a particular time under section 34.

It will be noted that there is no provision for transferring an appeal from one Appellate Assistant Commissioner to another or a revision petition from one Commissioner to another.

Proviso under sub-section (8).—The "Appellate Assistant Commissioner" referred to in the proviso clearly includes the Commissioner functioning as Appellate Assistant Commissioner under sub-section (5).

Income-tax Officer promoted as Assistant Commissioner.—When an Income-tax Officer is promoted as Assistant Commissioner, he must not, in fairness, hear appeals against his own orders as Income-tax officer which should be dealt with by another Assistant Commissioner appointed under sub-section (4). This, it is believed, has been laid down in executive orders.

CHAPTER II-A.

APPELLATE TRIBUNAL.

5-A. (1) The Central Government shall appoint an Appellate Tribunal consisting of not more than ten persons to exercise the functions conferred on the Appellate Tribunal by this Act.

(2) The Appellate Tribunal shall consist of an equal number of judicial members and accountant members as hereinafter defined.

Provided that the Tribunal shall not be deemed to be invalidly constituted merely by reason of a temporary inequality caused by the death, retirement or removal of any member.

(3) A judicial member shall be a person who has exercised the powers of a District Judge or who possesses such qualifications as are normally required for appointment to the post of District Judge; and an accountant member shall be a person who has, for a period of not less than six years, practised professionally as a Registered Accountant enrolled on the Regis-

ter of Accountants maintained by the Central Government under the Auditors' Certificate Rules, 1932: .

Provided that the Central Government may appoint as an accountant member of the Tribunal any person not possessing the qualifications required by this sub-section, if it is satisfied that he has qualifications and has had adequate experience of a character which render him suitable for appointment to the Tribunal.

(4) The Central Government shall appoint a judicial member of the Tribunal to be president thereof.

(5) The powers and functions of the Appellate Tribunal may be exercised and discharged by Benches constituted from members of the Tribunal by the president of the Tribunal.

(6) A Bench shall consist of not less than two members of the Tribunal, and shall be constituted so as contain an equal number of judicial members and accountant members, or so that the number of members of one class does not exceed the number of members of the other class by more than one.

(7) If the members of a Bench differ in opinion on any point, the point shall be decided according to the opinion of the majority, if there is a majority; but if the members are equally divided, they shall state the point or points on which they differ, and the case shall be referred by the president of the Tribunal for hearing on such point or points by one or more of the other members of the Tribunal, and such point or points shall be decided according to the opinion of the majority of the members of the Tribunal who have heard the case, including those who first heard it.

(8) Subject to the provisions of this Act, the Appellate Tribunal shall have power to regulate its own procedure, and the procedure of Benches of the Tribunal in all matters arising out of the discharge of its functions, including the places at which the Benches shall hold their sittings.

Powers.—As regards the powers and duties of the Tribunal, see sections 28, 33, 35, 37, 48 and 66.

Rules of procedure.—The rules made under sub-section (8), which, however, must be "subject to the provisions of this Act" have been set out along with other Rules.

CHAPTER III.

TAXABLE INCOME

6. Save as otherwise provided by this Act, the following heads of income, profits and gains, shall be chargeable to income-tax in the manner hereinafter appearing namely,—

Heads of income chargeable to income tax

- (i) Salaries
- (ii) Interest on securities
- (iii) Income from property.
- (iv) Profits and gains of business, profession or vocation.
- (v) Income from other sources

History—In the Act of 1886, Income was taxed under four separate schedules—Salaries, etc., Interest on Government securities, Profits of Joint Stock Companies, and other Income. In the 1918 Act, a sixfold classification was introduced the wording being as below—

- (i) and (ii) Same as now,
- (iii) Income derived from house property,
- (iv) Income derived from business,
- (v) Professional earnings,
- (vi) Income derived from other sources,

and a decision in *Rowe & Co v Secretary of State*, 1 I T C. 161, A.I.R. 1921 L B 30, confined (iii) only to residential house property. In 1922 the words "Income derived from" in items (iii), (iv) and (vi) were omitted, and the word "heads" was substituted for "classes". Simultaneously section 9 was altered so as to make "property" include all buildings and appurtenant lands not used for business. The word "property" is used in sections 6 and 9 in this restricted sense. Real property not falling under section 9 therefore comes under "other sources" which is a true residuary head, *Probhat Chandra Barua v Commissioner of Income tax, Assam*, 57 I A 228, 59 M L J 814 (P C). Income from mining leases, for example, is not income from "property" but from "other sources". *Commissioner of Income tax, B and O v Kamakshya Naram Singh*, 1940 I T R 563. So long as something is income and does not fall under one of the other heads, it will fall under this head, unless it is excluded from 'total income' altogether by one of the exemptions in section 4 (or section 60).

Items (iv) and (v) were amalgamated, and the words 'Income from' inserted both in items (iii) and (v), in 1939.

Scope of section—Though Chapter I is headed "Charge of Income-tax" this section is according to the Privy Council really the charging section inasmuch as it sets out the different categories of taxable income—see the ruling of the Privy Council in the case of *Raja Probhat Chandra Barua v. Commissioner of Income tax, Assam*, 57 I A 228, 59 M L J 814 (P C). This remark, according to *Kania, J* in *In re Kamdar*, 1946 I T R 10, was merely due to the express reference in section 4 (1) (as it stood before 1939) to section 6, and this remark has no significance now. In *Raja Raghunandan Prasad v Commissioner of Income tax, B and O*.

1933 I T R. 113, however, the Privy Council though not referring to section 3 in terms as a charging section assume that it is such. See also *Commissioner of Income tax, U P v Shrimati Singari Bai*, 1945 I T R. 224 (All.)

Section 6 contains a list of sources only in the sense of attributing income to property as distinct from employment and to business as distinct from employment and so forth and not in the sense of attributing income to one property rather than another or one business rather than another, *Commissioner of Income tax, Bombay v C B Mehta*, 1938 I T R. 521 (P C.)

Section 6 however, merely sets out the different sources of income liable to tax if the conditions laid down in section 4 are satisfied, i.e., if the income is chargeable with reference to that section, the manner of taxing each head, or rather the method of computing income under each head is explained in the following sections. As to the computation of the income falling under each of the categories set out in this section see the notes under sections 7 to 12 and 13.

Income, profits and gains—While this section uses the words 'profits and gains' in reference to a business, profession or vocation and income with reference to 'property' and 'other sources', a study of the different sections of the Act will show that the words are used more or less promiscuously. See, however notes under section 2 (6 C) 'Income' and under section 3 as to the difference between 'capital' and 'income'.

The tax is not on gross receipts but on "income, profits and gains," i.e., after deductions have been made as provided under sections 7 to 12, *Probbhat Chandra Barua v Commissioner of Income tax, Assam* 57 I A. 228, 59 M L J 814 (P C.)

United Kingdom Law—The corresponding provisions in the United Kingdom Law are in the several elaborate and complicated Schedules, the scope of which is roughly summarised below.

Schedule A—In respect of the property in all lands, tenements hereditaments, and heritages in the United Kingdom. This is known as the 'property' or the owners' tax, and covers not only lands and buildings but also mines, gas works, water works, salt-springs, docks, railways, fisheries, roads, markets, fairs, tolls, bridges, ferries, etc. Needless to say, it also includes agricultural lands. It will be seen that this Schedule partly covers the following heads under the Indian law, viz., Property, Business and Other sources. There are elaborate rules as to how a property shall be valued, what deductions may be allowed which persons may be charged, and so forth. These rules, however, are not of much interest in India.

Schedule B—In respect of the occupation of all lands, tenements, hereditaments, and heritages in the United Kingdom. This is known as the occupiers' tax. There is no corresponding tax in India.

Schedule C—In respect of all profits arising from interest, annuities, dividends, and shares of annuities payable out of any public revenue. This corresponds to a part of the tax on Securities in India under section 8.

Schedule D—In respect of—

(a) The annual profits or gains arising or accruing—

But 'Money' passes through the hands of a great number of people you have received your money and have paid Income-tax upon it and then you pay it out again to other people and they make a profit out of it and they pay Income tax upon it again' Per *Grantham J*, in *Leeds Building Society v Mallandame* 3 Tax Cases 577 (1897) 2 Q B 402

There could be double taxation if the Legislature distinctly enacted it but upon general words of taxation and when you have to interpret a Taxing Act you cannot so interpret it as to tax the subject twice over to the same tax But it all depends on its being the same tax and there is nothing to prevent either one Legislature or two Legislatures, if they have jurisdiction over the subject matter, imposing different taxes on the same subject matter' per *Channel, J*, in *Stevens v The Durban etc Mining Company*, 5 Tax Cases 402 25 TLR. 316

" the assessee is only a reversioner of the estate and not the owner thereof during the lifetime of the present incumbent, and the allowance having been paid out of the agricultural and taxed income of the estate may be taxed again when it passes from the owner of the estate to the assessee, for in his hands the character of the income has been changed *Kedar Naran Singh v Commissioner of Income Tax UP*, 1938 1 TR 157 (All)

Tennant v Smith, 3 Tax Cases 158 (H L), which exempted the value of a rent free residence on the ground that it could not be converted into money was decided solely on that ground and not on the ground that the employer had paid tax on the building under Schedule A, see *Robinson v Corry*, 18 Tax Cases 411 (C A), (1934) 1 KB 240

Per *Mukerjee, J*, in *Manindra Chandra Nandi v Secretary of State*, 34 Cal 257 Courts always look with disfavour upon double taxation, and Statutes will be construed, if possible, to avoid double taxes see the observations in *Carr v Fowle*, (1893) 1 Q B 251 To the same effect are the observations of Chief Justice Waite in *Tennessee v Whitworth*, (1886) 117 US 139 in which that learned Judge in delivering the unanimous opinion of the Supreme Court of the United States remarked as follows —

It is no doubt within the power of a State to subject a corporation to double taxation Double taxation, however is never to be presumed If property is taxed once in one way, it would ordinarily be wrong to tax it again in another way when the burden of both taxes falls on the same person Sometimes tax laws have that effect but if they do it is because the Legislature has unmistakably so enacted All presumptions are again such an imposition

But when the Legislative intent is clear and unmistakable effect must be given to the statutory provisions on the subject The question of double taxation is one of expediency for the consideration of the Legislature, it cannot be affirmed, as a matter of law, that double taxation is forbidden see the decision of the Supreme Court of the United States in *Davidson v New Orleans*, (1877) 96 US 97, *New Orleans v Houston*, (1886) 119 US 265 see also *Reclamation v Hagar*, (1880) 6 Sawyer 567, 4 Fed Rep 366 and *United States v Benson*, (1865)

2 Cliff 512, 24 Fed Rep 1112. It must be held consequently that the royalty received by the plaintiff is liable to be assessed with cesses, as it is part of the net annual profits from the mine and it is also liable to be assessed with income tax inasmuch as it is taxable income' within the meaning of the Income tax Act.

Again in *Raja Probhat Chandra Barna's Case* 1 ITC 414 per Rankin J. —

'In *Manindra Chandra Nandi v Secretary of State*, 34 Cal 257, reference was made to certain dicta of American Courts and to the English case of *Carr v Fowle*, (1893) 1 Q B 251. But the only observation in this case was to the effect that the statute presumably did not intend that a vicar should in effect pay the same tax (land tax) twice on the same hereditament. This is plain enough. Thus the income tax is one tax, and income assessed under one Schedule cannot be assessed all over again under another. That there is any legal presumption of a general character against 'double taxation' in any wider sense is a proposition to which I respectfully demur as a principle for the construction of a modern statute. In *Manindra Chandra Nandi v Secretary of State*, 34 Cal. 257, it did not avail to cut down clear though absolutely general language.

In an Allahabad case *In re Mukund Sarup* 2 ITC 495, 50 All 495, A.I.R. 1928 All 81, there are suggestions that the Legislature should be presumed not to have intended to tax the same source of income under different Acts. But these suggestions were questioned by the Patna High Court, *Rajni Prasad Singh v Commissioner of Income-tax* 4 ITC 264, who were disposed to agree with the views of Rankin, J. quoted above. The Madras High Court in *Commissioner of Income-tax v S V K L Somasundaram Chettiar* 6 ITC 88, saw no indication of any general idea in the Act against double taxation. All that the Act did was to exempt certain kinds of income from being taxed twice. Cf section 14.

Holding Companies—Taxation of—The super tax paid by companies in India is not paid on behalf of the shareholder—see sections 16, 18 and 49 B, it is really of the nature of a corporation tax on profits. Double taxation can arise only if the same person is taxed twice in respect of the same income. See, however exemption under section 60 in respect of income of Investment Trust Companies.

Can the Crown choose the head under which to tax?—The problem often arises in the United Kingdom in respect of investments in the course of business, chiefly that of Insurance Companies, whether to tax the investments (less expenses) or the net profits. Several decisions—*Norwich Union Fire Insurance Co v Magee* 3 Tax Cases 457, *Retall v Edinburgh Life Insurance Co*, 5 Tax Cases 221, *Liverpool and London and Globe v Bennett* 6 Tax Cases 327 had assumed that the Crown had the right to choose the source under which the income may be taxed.

The question whether income from lands and buildings can be assessed alternatively under Schedules A and B and under Schedule D was examined by the House of Lords in *Fry v Salisbury House Estates Ltd* (1930) A.C. 432, and it was decided that the assessment must be made under Schedules A and B the assessment being exhaustive and there being no option to the Crown to tax under Schedule D the excess of the profits over the assessments under Schedule A or B. The option of the Crown in respect of

other schedules and in respect of the different cases of Schedule D was left undecided.

As regards income from house property, a similar view to that in *Fry's case*, *supra*, has been taken by Indian Courts, In *re Commercial Properties Ltd*, 3 ITC 23; *Commissioner of Income-tax, Madras v A.S.P.L.V.R. Ramasami Chettiar*, 1933 ITR 389 *see also* query by the Privy Council in *Commissioner of Income tax, U.P. v. Basantraj Takht Singh*, 60 I.A. 307. Where, however, income is of a composite nature and arises partly from the ownership of property and partly from business, *e.g.*, the income to an owner of a 'tied' house which partly arises from the ownership of the house and partly from the owner's trade of supplying liquor to the public, an assessment can be made partly under Schedule A and partly under Schedule D. *Alfred Leney Co v Whelan*, 13 ATC. 100. *Fry's case* prohibits an assessment under Schedule D only in respect of income arising from sources which are taxable under Schedule A or B, it does not prohibit additional taxation if the land is put to specific uses, and profits arise from activities other than the ownership or occupation of land. Section 21 of the United Kingdom Finance Act of 1934 has however largely altered the effects of the ruling in *Fry's case* (1930) A.C. 432.

In India, the words "Credit shall be given to him therefor in assessment, if any, made for the following year under the Act" in section 18 (5) would seem to imply no option to the income tax authorities to tax interest on securities as a separate source finally. The assessment is made with reference to 'total income' (sections 3, 22 and 23), and 'total income' is defined in section 16. Under section 24, set-off is allowed as between the different sources of income. It is clear from these provisions and section 48 that if the interest on investments made by an assessee, is in excess of his 'total income' (after set-off), the tax deducted at source on the interest on investments is partly or wholly refundable.

7 (1) The tax shall be payable by an assessee under the head "Salaries" in respect of any salary or wages, any annuity, pension or gratuity, and any fees, commissions, perquisites or profits in lieu of, or in addition to any salary or wages, which are due to him from, whether paid or not, or are paid by or on behalf of, the Crown, a local authority, a company, or any other public body or association, or any private employer, and for the purposes of this sub-section advances by way of loan or otherwise of income chargeable under this head shall be deemed to be salary due on the date when the advance is received.

Provided that the tax shall not be payable in respect of any sum which the assessee by the conditions of his employment is required to spend out of his remuneration wholly necessarily and exclusively in the performance of his duties.

Provided further that the tax shall not be payable in respect of any sum deducted from the salary payable by or on behalf of the Crown to any individual, being a sum deducted in accord-

ance with the conditions of his service for the purpose of securing to him a deferred annuity or of making provision for his wife or children, provided that the sum so deducted shall not exceed one sixth of the salary

Provided further that where tax is deductible at the source under section 18, the assessee shall not be called upon to pay the tax himself unless he has received the salary without such deduction

Explanation 1 —The right of a person to occupy free of rent as a place of residence any premises provided by his employer is a perquisite for the purposes of this sub-section

Explanation 2 —A payment due to or received by an assessee from an employer or former employer or from a provident or other fund is to the extent to which it does not consist of contributions by the assessee or interest on such contributions a profit received in lieu of salary for the purposes of this sub-section unless the payment is made solely as compensation for loss of employment and not by way of remuneration for past services

Provided that nothing herein contained shall render liable to income-tax any payment from a provident fund to which the Provident Funds Act 1925 applies or any payment from a recognised provident fund within the meaning of Chapter IX A if such payment is exempted from payment of income-tax under the provisions of Chapter IX A or any payment from an approved superannuation fund within the meaning of Chapter IX B made on the death of a beneficiary or in lieu of or in commutation of an annuity, or by way of refund of contributions on the death of a beneficiary or on his leaving the employment in connection with which the fund is established

(2) Any income which would be chargeable under this head if paid in British India shall be deemed to be so chargeable if paid to a British subject or any servant of His Majesty in any part of India by or on behalf of the Crown or by a local authority established in the exercise of the powers of the Crown Representative or the Central Government in that behalf

History—For corresponding provisions in the 1886 Act see sections 3 (4) 3 (5) 7 8 and 9 of that Act. In the 1918 Act there was no explanation clause and the section did not extend to salaries paid by all private employers, but only to those paid by employers who had entered into an agreement with the Income-tax Officer to recover the tax on behalf of

Government. The words "or any servant of His Majesty" in sub section (2) were inserted in the Act of 1918 so as to bring all servants of the Crown, whether British subjects or not, within the purview of this sub-section.

The following changes were made by the Amending Act of 1939 —

In sub section (1),—

(a) the words 'received by him' were omitted,

(b) for the words which are paid by or on behalf of the Crown" the words "which are due to him from, whether paid or not, or are paid by or on behalf of, the Crown" were substituted,

(c) for the words 'by or on behalf of any private employer' the words "any private employer and for the purposes of this sub-section advances by way of loan or otherwise of income chargeable under this head shall be deemed to be salary due on the date when the advance is received", were substituted

(d) the first and third provisos of sub section (1) and Explanation 2 with its proviso were all added

In 1944, the words 'at or in connection with the termination of his employment, whether or not the employment is then terminated or to be terminated, occurring after other fund' in Explanation 2 were omitted

Explanation (1)—Under the Act of 1918 [section 3 (2) (1x)] 'a perquisite or benefit which is neither money nor reasonably capable of being converted into money' was exempt from taxation. This merely set out the English law as expounded by the House of Lords in *Tennant v Smith*, (1892) A.C. 150, 3 Tax Cases 158. In 1922 it was decided to abandon this position, as it led to inequalities and to tax perquisites and benefits that possessed a money value whether or not they were in fact capable of conversion into money. But the wording of section 7 did not fully carry out this intention, for in no sense could it be said that a rent-free residence was 'paid' to a person, hence the 'explanation' clause in 1923.

Perquisites—Other than residences—The position regarding benefits other than free residences, e.g., free medical advice, free conveyance for other than official duties, free board, etc., should be evidently governed by the principle of *Tennant v Smith*, (1892) A.C. 150, 3 Tax Cases 158. Such benefits are not ordinarily capable of conversion into money, and are no more 'paid' than free residences. These benefits are therefore not taxable.

Where however a company paid its managing director the taxes and cost of his repairs of his house (which he was asked to occupy partly in order to maintain the dignity of the business), and also his lighting, heating, telephone and other domestic expenditure, it was held that the taxes, etc., were money's worth' and therefore taxable as the income of the managing director, *Nicoll v Austin*, 19 Tax Cases 531 (K.B.D.). Per *Finlay, J.*, 'it seems to me to be impossible to say that Mr Austin when he was enjoying the amenities and pleasures of his house and his garden was engaged wholly and exclusively on the business of his company'. See also notes under section 4 (3) (vi) and *Abbot v Commissioner of Income tax, B and O*, 9 I.T.C. 9, referred to there. *Nicoll v Austin* was distinguished in *Reed v Cattermole*, 1937—in which case the rates on his house paid to a Methodist minister were held to be exempt—on the ground that he occupied the house in a representative capacity while Mr Austin occupied his house in an individual capacity.

Where a company allotted shares to its officers (as bonus) at par on condition that the shares were not to be sold except with the permission of the Directors, it was held that the officers received an advantage that could be converted into money and that therefore the difference between the true value of the shares (which was the market value less a deduction on account of the restriction on sale) and the par value was taxable as salary *Ed. v Wilson and Cornwall*, (1945) 1 All E R 367 (K B)

Salaries—Tax on—Collection of—As to how taxes are collected on 'salaries', see section 18, as regards annual returns to be furnished by employers see section 21 and as regards refunds, see section 48

Meaning of words Salary—Signifies a recompense or consideration given unto any man for his pains bestowed upon another man's business" (*Terms de la ley*) (Stroud)

Wages—Though this word might be said to include payment for any service yet in general the word 'salary' is used for payment of services of a higher class, and 'wages' is confined to the earnings of labourers and artisans 'per *Groze J*, in *Gordon v Jennings*, 51 L.J Q B 417

Wages then are the *personal* earnings of labourers and artisans. (Stroud)

This distinction between salary and wages is of no importance in India, as the law does not prescribe different arrangements for the taxation of salaried persons and wage-earners as the United Kingdom law does

Annuity—A yearly payment of a certain sum of money granted to another in fee for life or years charging the person of the grantor only" (*Co Litt 144-b*) (Stroud)

But in this context it simply represents a recurring annual payment

Pension—Is really deferred pay or a compensation for past services, etc., and is sometimes distinguished, in India at any rate from gratuity, the latter refers to lump sum payments while the former denotes periodical recurring payments

But according to the Concise Oxford Dictionary gratuity means a money present of amount fixed by giver in recognition of an inferior's good offices"

Fees—Here evidently refer to fluctuating payments depending on the work done as distinguished from salaries, etc., which are fixed with reference to a period of time

Commissions—Payments being percentages on amounts involved

Perquisites—See notes under section 4 (2) (vi)

Date of receipt—The head of a Government Office who draws the salary of a subordinate from the Treasury and disburses it to him is not drawing the money from the Treasury as a trustee or bailee for the subordinate and it is not therefore open to the Income tax Officer to tax the subordinate with reference to the date of drawal of the salary from the Treasury by the head of the office *Banke Behari Lal v Commissioner of Income tax, Punjab*, 1937 I T R 345 This ruling was given with reference to the law as it stood before 1st April, 1959

Which are due to him—Whether paid or not, or are paid—The section as it now stands has adopted in respect of salaries both the 'accrual' and 'receipt' bases instead of, as formerly, the 'receipt' basis only, though

with the adoption of the slab system of taxation the incentive to postpone receipt of salary mostly disappears. The words whether paid or not are superfluous and merely repeat and emphasise the sense of the word due.

While the section adopts both the accrual and receipt basis it does not say with whom the option rests of choosing either basis. Section 13 cannot be applied because it does not refer to section 7. Is the option then to be that of the Income tax Officer?

Though it is not stated in terms it may be assumed that salary taxed in an earlier year on an accrual basis cannot be taxed a second time on a receipt basis when received in a later year. Further, where accrual basis has been adopted and the collection of tax on salary is postponed till it is actually received it would evidently not be open to the Income tax Officer to change the basis afterwards and tax the salary on a receipt basis (i.e., including it in the total income of the year of receipt) instead of on an accrual basis (i.e. as part of total income of year of accrual).

Similarly if salary has been taxed as a loan or advance in an earlier year it cannot be taxed again when adjusted by the employer against salary earned in a later year. Adjustments made after 1st April 1939, in respect of advances of salary made before the date can presumably be taxed on the accrued basis at the time of adjustment since the amendment in 1939 will not have retrospective effect.

Salary due but not received—The last proviso to this sub section ensures that the employee cannot be taxed direct unless he has received the salary without deduction of tax. It has been evidently put in out of abundant caution for even in its absence it would be held on the strength of *St Lucia Usries and Estates Co v St Lucia* (1924) A.C. 508 and similar rulings that income of the nature of salary could not be actually taxed before receipt. An assurance was given to the Select Committee and repeated in the Legislative Assembly that administrative action would be taken to obviate the hardship that might arise when salary due had not been received or might not be received at all. Action in this respect cannot be taken under section 60 as will be seen from a perusal thereof but only through executive orders and it was stated by Government that instructions would be issued for the postponement of collection of tax on salary not actually received. The tax so held over would evidently be worked out at the average rates laid down in section 18 (2) see also notes under that section.

The basis of taxation being salary due, whether received or not, an employee cannot escape tax merely by not drawing it. Such surrender may merely be an application of income on the other hand if *ab initio* there is no idea of drawing any salary there will be no liability. See *Reade v Brearley*, 17 Tax Cases 687 and *Daly v Inland Revenue*, 18 Tax Cases 641. On which side of the line a case falls can only be determined by the facts of the case and having regard to the original object of the amendment of section 7 in 1939, viz to prevent avoidance of tax by salaries being drawn late and the comparative absence of a similar motive under the slab system of tax, it is believed that in practice the Revenue do not carry the implications of section 7 to the utmost limit.

For the purposes of this section—These qualifying words the significance of which is not clear might create the anomaly that while an employee was taxed on the ground that something was his salary his

employer might be refused the corresponding deduction from his taxable profits. In any case the explanation clause has to be read in conjunction with section 2 (6-C), section 18 and other connected sections.

Due date—The time at which a person becomes entitled to a remuneration must be determined with reference to the relevant circumstances, e.g., the contract of service or the rules and conditions of employment, and in the case of a director of a company, the articles of association of the company, the date of declaration of bonus or extra dividends if any and so forth cf *Grey v Tiley*, 16 Tax Cases 414. The law presumes nothing as to the intervals at which salaries are payable for they are to be governed by the facts of each case.

It was suggested in passing in *In re Usharani*, 1942 ITR 199, that the taxable salary need not be due in respect of the year under assessment but might cover salary due in respect of earlier years also.

Employment and Profession—As to the distinction between the two words see notes under section 4 (3) (vii). If the earnings of a person's livelihood depend not on obtaining a single post and sticking to it more or less but on obtaining a series of separate engagements and moving so to speak from one to another the person exercises a profession not an employment, *Davies v Braithwaite*, 10 A.T.C. 286 (1931) 2 K.B. 628. There should be a relationship of employer and employee or of principal and agent if a payment from the one to the other is to be considered salary. A restrictive covenant undertaking to refrain from doing something is entirely different in its nature from a contract of service and a payment in consideration of such a covenant cannot be salary. *Commissioner of Income tax, Sind v Mills Store Co* 1941 ITR. 642.

An official liquidator under the Companies Act holds an 'office', and his remuneration is 'salary' (under section 7) and neither professional earnings (section 10) nor income from 'other sources' (section 12). *In re Bhagawati Shankar*, 1944 ITR. 193.

Honoraria—Honoraria or fees paid to Government servants by local bodies or private persons, companies, etc., for professional work, the whole of which is in the first instance credited to Government, after which the whole or part is drawn under proper sanction by the Government servant concerned on a bill, should be taxed as salary by deduction at source. They are obviously fees, commissions, or perquisites received in addition to salary and paid by or on behalf of Government [section 7 (1)].

Child allowance—An allowance paid to an employee to meet "the increased cost of children" is not a payment belonging to the children but a part of the salary of the parent and if both the father and mother are employees of the same employer, the allowance should be treated as part of the salary of the father and not of the mother since the father is the natural guardian. *Commissioner of Income-tax UP v Ret. Manry*, 1942 ITR. 205 (All).

Place of payment—Immaterial—The tax is chargeable irrespective of the place of payment, even though such place be not merely outside British India but outside India. It will be sufficient if the income clearly accrues or arises in British India.

Under Explanation 2 to section 4 (1), income which would be chargeable under the head 'salaries' if payable in British India and not being pension payable without India should be deemed to accrue or arise in British

India wherever paid if it is earned in British India. The second sub-section of section 7 applies to income which is neither paid in British India nor accrues or arises in British India. *See also* the amendment to section 18, sub-section 2 (A) introduced in 1925, which goes further and applies to sterling overseas pay which is payable outside India but earned by service in British India.

Advances by way of loan or otherwise of income chargeable under this head—The words 'or otherwise' are merely put in out of abundant caution. The advance must be of the income, *i.e.*, it cannot cover a *bona fide* debt even if such debt was secured on pay or measured in terms of pay. Advances for specific purposes, *e.g.*, purchase of houses, motor cars, typewriters etc. will not ordinarily be advances of salary. The nature of the advance—whether it is of salary or not—must obviously be a question of fact. The advance if caught by this section will be deemed to be salary due on the date of receipt of the advance.

The nature of income as 'salary' cannot be changed merely by assigning it to a creditor in payment of a debt. *Cf Parking v Warwick*, 25 Tax Cases 419 (K B D).

Out of-pocket expenses—The first proviso merely reiterates the principle of section 4 (3) (vi) and makes it clear that expenditure incurred out of salary for the purpose of the employer's work should be deducted from taxable income *see also* notes under section 4 (3) (vi).

It should be noted that the use of the word 'necessarily' makes the provision more stringent than similar provisions in sections 10 (2) (xii) and 12. The words 'conditions of his employment' mean, evidently, circumstances of his employment and not contractual conditions.

A parson was bound by law to live in the parsonage and make it over to his successor. The Government proposed to extend an aerodrome for which purpose they had to acquire the parsonage and its grounds. The parson opposed the Bill which Government brought for this purpose, and as a result when the Bill became law, there was provision in it for acquiring another site and building a new parsonage. The expenditure incurred by the parson in opposing the Bill was allowed as a necessary expenditure in computing his income under Schedule C. *Mitchell v Child* 1942 Taxation Reports 243. On the other hand costs payable to an employer by an employee in respect of unsuccessful litigation about the latter's pension have been disallowed as a deduction from pension. *Magraw v Lewis*, 18 Tax Cas 222. Similarly fees paid to an employment agency to secure a job were not allowed to be deducted from salary, as the expenditure was not incurred in the performance of the duties of office. *Short v McIlgorm*, (1945) 1 All E R 391 (K B). Medical expenses incurred by an employee, even if his illness be due to the conditions of his employment are not incurred in the performance of office. *Norman v Golder*, 1945 I T R 21 (Sup) (C A).

The travelling expenses to and from a college incurred by a student assistant in the research laboratory of a business, it being a condition of his employment that he should attend evening classes in the college and take a degree in science were held not to have been incurred in the performance of his duties as an assistant in his employer's laboratory, *Blackwell v. Mills*, 1946 K.B.D.

Bonuses, gratuities and accumulations of provident funds—Explanation 2 read with the definition of 'income' in section 2 (6-C) is in-

tended to nullify the Privy Council decision in *Commissioner of Income-tax v Fletcher*, 1937 ITR 428 (P.C.), by declaring that the payments in question which are inherently of the nature of capital will be deemed to be income.

It should be noted that in this explanation also the accrual basis is adopted.

The reference to other fund is only out of abundant caution and in any case other should evidently be construed *ejusdem generis*.

In *In re S R Mittra* 1942 ITR 259, which arose after the amendment in 1939 the Patna High Court held that a lump sum received in the course of an employee's service (not at or in connection with the termination of his service) representing the employer's contribution to a provident fund was not taxable. The *ratio decidendi* is not clear but the effect of the decision has been nullified by the omission of the words "at or in connection, etc." in the explanation clause in 1944.

Solely as compensation for loss of employment and not by way of remuneration for past services.—The word 'solely' shows that a payment cannot be dissected into separate parts if it is of a mixed nature and that if it is only partially of the nature of compensation the whole of it will be presumed to be remuneration. The reference to "past services" shows that a premium in respect of future services may be capital and not covered by this explanation. A payment to an ex-employee for refraining from competition would be neither compensation for loss of employment nor remuneration for past services. A gift pure and simple, to an ex-employee would presumably be neither remuneration nor compensation. As to what constitutes compensation for loss of office see notes under sections 3 and 4 (3) (ii).

So long as the payment in truth represents compensation for loss of employment it is immaterial in what manner the service terminates whether by formal resignation by the employee or by his dismissal and also by what name the compensation is described. In *re Ahosla* 1945 ITR 436 (L.H.).

Exceptions.—The proviso covers (1) payments from Government and Railways etc. Provident Funds unconditionally, (2) payments from recognised Provident Funds under Chapter IXA if the payments are exempt under that chapter and (3) certain payments from Superannuation Funds under Chapter IXB.

Gratuities.—See notes under section 4 (3) (iii). The Madras High Court ruled that a gratuity paid to a Bank employee on his retirement was taxable. *Balaji Rao v Commissioner of Income-tax* 155 ITR 101, 8 ITC 8 but this is not in accordance with the Privy Council ruling in *Shaw v Mallac's est.*, 59 IA 206 52 Cal 1343 6 ITC 173.

In *Mun v Freeman* 22 Tax Cas. 15, an employee was entitled to a lump sum payment to be paid to him or his representatives on the termination of his service from any cause other than wilful negligence on his part. He died and the lump sum paid to his representatives was taxed as profit from office on the ground that the death was the occasion for and not the cause of, the payment.

Where, however, an agent, on termination of his agency and in consideration of his past services and also of his refraining from competing with the principal who opened his own office, received a monthly payment for a period of years (the payment being continued after his death) the

son), it was held that the payments were salary, being gratuities for services rendered *Commissioner of Income tax, Bombay v Katrak*, 1937 ITR 527

Salaries—Pensions paid by Foreign Governments—The salary paid by a Foreign Government or an Indian State cannot fall under this section. Such a State is not Government (*see* General Clauses Act), nor a local authority (*ibid*), nor a company [*see* section 2 (6)] nor a public body or association, nor a private employer. A foreign State can hardly be considered a public body or a private employer. Such 'salaries' are therefore income under 'other sources' under section 12 though with some training they may be considered to be income from profession under section 10. In either case deduction of tax cannot be made at source, and the Income tax Officer can only recover the tax after assessing the income at the end of the year.

Annuities—Not paid by employer—This section does not apply to annuities other than those paid by Government, etc., or a private employer. Such annuities (*e.g.*, under a will or paid by an Insurance Company) fall under 'income from other sources'—section 12, and the tax on such annuities cannot be deducted at source under section 18.

Real nature of salary to be seen—A school was owned by a religious body and staffed by priests who under the rules of the order were forbidden to receive any remuneration. In response however to the requirements of the Board of Education that only teachers on formal agreements should be employed agreements were made between the school and the teachers, and the transactions on account of salaries were shown as payments to teachers and simultaneous *per contra* donations by them to the school, nothing was paid to the teachers. *Held*, that the so-called salaries were not taxable, *Reade v Brearley*, 12 ATC 96 17 Tax Cases 687. Similarly where in order to meet the household expenses of priests living in community payments were made from the mission to which the priests belonged the payments were not held to be emoluments of office. *Daly v Inland Revenue*, 18 Tax Cases 64.

In *Secretary of State v Mohiuddin Ahmad*, 27 Cal 674, 1 ITC 4 the facts of which were peculiar, it was held that the superior of a *khanqah* (a kind of monastery) was the owner of the income from the endowment and not the recipient of a salary therefrom. The income in question was wholly agricultural, and therefore exempt in the hands of the superior but if he had been a salaried employee, he would have been taxable.

Whether a salary paid out of agricultural income is paid out as such income or not depends on the facts of each case. Broadly speaking if the salary is given directly as a share of such income, it will be exempt, otherwise not. So, where the joint owners of certain agricultural lands arranged that one of them should reside on the estate and manage it under the directions of another and the resident owner received remuneration over and above his share in the income from the lands it was held that the remuneration was 'salary' and not a share of the income and therefore taxable. *Major Conville v Commissioner of Income tax Punjab*, 1935 ITR 404. So also in a partnership having agricultural income where a partner received remuneration in excess of his share *Danby v Commissioner of Income tax, B & O*, 1944 ITR 381. *See also note* under section 2 (1) regarding payments out of agricultural income.

Where bonuses were allowed from year to year entirely at the discretion of the employer, and not on the basis of contractual rights, to certain selected employees satisfying certain conditions laid down in the rules of the fund made by the employer and the bonuses were accumulated till the employees retired or died when alone he or his estate could draw the money, it was held notwithstanding the trust created in favour of the employees which each of them could enforce on the fulfilment of the conditions by which his interests were bound that the bonuses were not of the nature of deferred salary but were merely the measure of a sum which the employer volunteered to pay at the time of termination of the employee's service and that the accumulations in the fund were capital. *Commissioner of Income-tax Madras v Fletcher*, 1937 ITR 428 (P.C.), 11 L.R. (1938) Mad 1, AIR 1937 PC 261. This was followed in *In re Hattiangadi* 1940 ITR 85 (Bom).

All these rulings are now obsolete in the light of the new definition in section 2 (6-C).

Salaries—Exemption—For classes or portions of 'salaries' which are entirely exempt from tax see exemptions under section 4 (3) (x) and (xi) and by notification under section 60.

Salaries paid in India but outside British India—Section 7 (2)
With regard to salaries paid in India but outside British India the following instructions have been issued for the guidance of the Department—

Under sub section (2) of section 7 all servants of Government including those whose services have been lent to a local authority established in exercise of the powers of the Crown Representative or the Central Government are liable to pay tax on their salaries if they are employed in any part of India irrespective of their nationality.

The pay of officers whose services have been lent to, and whose salaries are paid by Indian States is not chargeable to income-tax under this section unless it is drawn or received in British India. The portion of salaries of Government Officers serving in Indian States which is paid in the first instance by the Central Government but is subsequently recovered from the State concerned is not liable to income tax. Leave allowance not drawn or received in British India for leave earned during the period of service in an Indian State is also not taxable as it does not fall within the purview of Explanation 2 to section 4 (1).

Object of sub section (2)—This sub section is necessary because otherwise the salaries would not be taxable, as they neither accrue nor arise in British India nor are received therein—see notes under section 4 (1) regarding the meaning of the word 'accrue' or 'arise'. This sub section suggests that the cancelled exemption under section 60 exempting salaries of officers on deputation abroad who also received their salaries abroad, was superfluous.

Endowed income—Whether salary—In *Secretary of State v Mohiuddin Ahmed* 27 Cal 674, 1 ITC 4, the facts of which were peculiar, it was held that the Superior of a *Khankha* (a kind of monastery) was the owner of the income from the endowment, and not the recipient of a salary therefrom. The income in question was wholly agricultural and therefore exempt in the hands of the recipient but if the Superior had been treated as a salaried employee he would have been taxable.

Salaries—Paid free of tax.—A Railway Company had been assessed to income tax under Schedule E in respect of all offices or employments of profit held under the company. In pursuance of a contract with its officers the company did not exercise its statutory right to deduct on payment of the salaries the tax in respect thereof payable by the company and the Schedule E assessment had accordingly been made upon the company in a sum representing the amount of salaries actually paid *plus* the amount of income tax thereon borne by the company on behalf of its officers. *Held*, that the contract to pay the salaries free of income-tax constituted in effect an agreement to pay the salaries *plus* the tax thereon and that the Schedule E assessment upon the company had been correctly computed by reference to the amount of salaries actually paid *plus* the tax thereon borne by the company. *The North British Railway Company v Scott* 8 Tax Cas 332 (1923) A C 37

In a later case it was held that the income tax paid by the employer on an employee's salary—even though under no legal obligation to do so—is an part of the employee's emoluments for purposes of income tax. *Harland v Duggins*, 5 A T C 117 10 Tax Cas 247 (1926) A C 289

Salary received in arrears or advance.—See section 60 regarding the powers of the Central Government to grant relief in cases in which as a consequence of salary being received in advance or in arrear income is assessed at an unduly high rate

United Kingdom law.—The provision corresponding to section 7 in India is contained in Schedule E the detailed rules in which are materially different and give rise to numerous questions e.g. what is a public office within the United Kingdom which have led to considerable litigation. See for instance *Macmillan v Guest*, (H.L.) 1943 I T R (Sup) 35

8 The tax shall be payable by an assessee under the head 'Interest on securities' in respect of the interest receivable by him on any security of the Central Government or of a Provincial Government, or on debentures or other securities for money issued by or on behalf of a local authority or a company

Provided that no income tax shall be payable under this section by the assessee in respect of any sum deducted from such interest by way of commission by a banker realising such interest on behalf of the assessee or in respect of any interest payable on money borrowed for the purpose of investment in the securities by the assessee except interest chargeable under this Act which is payable without British India, not being interest on a loan issued for public subscription before the 1st day of April, 1938, unless in respect of interest which is so chargeable tax has been paid or deducted under section 18, or unless there is a person in British India who may be appointed an agent under section 43 in respect of such interest

Provided, further, that no income-tax shall be payable on the interest receivable on any security of the Central Government issued or declared to be income-tax free.

Provided, further, that the income-tax payable on the interest receivable on any security of a Provincial Government issued income-tax free, shall be payable by that Provincial Government.

History—*See* sections 13 and Second Schedule, Part III in the Act of 1886 and section 7 of the 1918 Act. The reference to the securities of a Local Government including the relative proviso, dates from 1922, formerly, Local Governments did not issue securities. The first part of the first proviso was added in 1933 and the second part, *ie*, the words after 'assessee' in the first proviso was also added in 1939 thus regularising a concession formerly given by executive orders. As regards the non deductibility of interest payable outside British India and chargeable under this Act, except under certain conditions compare proviso to section 9 (1) (*iv*), proviso to section 10 (2) (*iii*) and section 12 (2) (*b*).

Scope of Section—The interest chargeable under this section is the interest only on securities of the Central Government or of a Provincial Government or on debentures or other securities for money issued by or on behalf of a local authority or company. It does not include the interest on debentures issued by firms associations, clubs or individuals the interest on which is chargeable under section 10 or 12.

Exemptions—For interest on other securities which are entirely exempt from tax *see* Notification of exemptions under section 60.

For interest on securities held by Provident Funds *see* notes under section 4 (3) (*iv*) and (*ix*).

For interest on securities held by Charities, *see* notes under section 4 (3) (*i*) and (*ii*).

For interest on securities held by a Co operative Society, *see* exemption under section 60.

Taxation at Source—As in respect of salaries, so in respect of interest on securities, income tax is chargeable at source, *ie*, at the time the interest is paid. The person paying the interest is personally responsible to the Crown for collecting the tax and making it over (section 18). Super tax is not deductible at source' except in the special cases indicated in section 18 even though the interest disbursed by the same person to a single individual may exceed the appropriate limit.

The special provisions in section 18 apply only to dividends of companies, interest not being interest on securities or any other sum chargeable.

As regards refunds, *see* section 48.

Tax-free securities—These are not tax-compounded securities in the sense that the receiver of interest is credited with a notional payment of income tax. The owner therefore is not entitled to any refund under section 48 (small incomes relief) or 49 *et seq* (double-tax relief) in respect

of such tax constructively paid by him not even in respect of tax free securities issued by a Provincial Government though the tax in such cases is paid to the Central Government by the Provincial Government

Debenture—The following extract is from Stroud

No one seems to know exactly what Debenture means (Buckl 192 citing *British India Steam Navigation Co v Inland Revenue* 50 L.J.Q.B. 517 7 Q.B.D. 165 in which *Grave, J.*, said This is a word which has no definite signification in the present state of the English language. Re *Florence Land Co* Ex parte *Moore* 48 L.J.Ch. 137 10 Ch.D. 530. It should rather be said that no one has yet laid down an exhaustive definition of a Debenture. The *British India Steam Navigation Co*'s case show that it is not true to say that a Debenture is necessarily an obligation under seal or a charge on any property. *Faut de mieux* it is suggested that a Debenture is a written Obligation or Acknowledgment in an impersonal form and with conditions more elaborate than those of a Promissory Note given by or for a Corporation or a Company to secure a sum of money. Thus in the *British India Steam Navigation Co*'s case Lindley J. said Now what the exact meaning of Debenture is I do not know. I do not find any particular definition of it and we know that there are various classes of instruments called Debentures. You may have Mortgage Debentures which are charges of some kind on property you may have Debentures which are Bonds you may have a Debenture which is nothing more than an Acknowledgment of debt you may have an instrument like this which is something more—It is a statement by two Directors that a Company will pay. I think any Instruments of that sort may be Debentures. So in *Brown v Inland Revenue* 64 L.J.M.C. 211 Charles J. said A Debenture, though never I believe legally defined is included under one or other of the three descriptions laid down by *Bowen L.J.* in *English and Scottish Trust v Brunton* (1892) 2 Q.B. 700 62 L.J.Q.B. 136 as—(1) a simple Acknowledgment under seal of the debt (2) an Instrument acknowledging the debt and charging the property of the Company with repayment (3) an Instrument acknowledging the debt charging the property of the Company with repayment and further restricting the Company from giving any prior charge

Other Securities for money—There is no definition of this expression. Generally speaking a security is anything that makes money more assured in its payment or more readily receivable as distinguished from a mere I.O.U. which is only evidence of a debt. In its most general sense the expression would include Bank notes Bills of Exchange Promissory notes and cheques

Mortgages are securities for money *Dicks v Lambert* 4 Ves. 725 *Ogle v Knipe* L.R. 8 Eg. 434. It does not include Bank stock (*Ogle v Knipe*) nor shares in a company *Huddleston v Gouldsbury* 10 Bea. 547. Re *Mainland* 74 L.T. 274 *McDonnell v Morrow* 23 L.R. Ir. 591. It would include a Life policy *Laurence v Galsworthy* 3 Juv. N.S. 1049 Bonds *Dicks v Lambert* supra *Mainland v Upjohn* 41 Ch.D. 142 Bills of Exchange, Cheques and Promissory notes if complete *Barry v Harding* 1 Jo. and Lat. 475 *R v Hart* 6 C. & P. 106 *Goldsmid v Hapton* 5 C.B.N.S. 94 (Stroud)

In this section of the Indian Income-tax Act the expression 'securities for money' should evidently be construed *ejusdem generis* with debentures, *i.e.*, as referring to securities in the nature of debentures. It would not therefore include a life policy or cheque on neither of which, by the way, would interest ordinarily be payable—nor bills of exchange nor promissory notes (on neither of which would interest be paid at fixed recurring periods, which is evidently the generic feature contemplated by the section). The expression evidently refers to bonds in the nature of debentures, and would clearly not include Bank deposits. See however dicta cited below.

United Kingdom Law—It is a matter of importance in the United Kingdom—especially when the income arises abroad to a resident—whether the income is from 'securities' or not, also whether the securities are brought in "cum coupon" and sold "ex coupon"

'Shares in a company are not 'securities' but portions of its capital," per *Wright J.*, in *Bartholomay Brewing Company v. Wyat*, 3 Tax Cases 213, (1893) 2 K.B. 499

"The holding of shares in a foreign corporation entirely situated and carrying on business in a foreign country comes unquestionably under Rule 5 (Case V)"—Per *Fletcher Moulton, L.J.*, in *Gramophone and Typewriter Company v. Stanley*, 5 Tax Cases 358, [1908] 2 K.B. 89. The point in this case was that if it was "securities" it fell under Case IV whereas otherwise it fell under Case V.

"The word 'Securities' has no legal signification which necessarily attaches to it on all occasions of the use of the term. It is an ordinary English word used in a variety of collocations, and it is to be interpreted without the embarrassment of a legal definition and simply according to the best conclusion one can make as to the real meaning of the term as it is employed in, say, a testament, an agreement or a taxing or other statute as the case may be," per *Lord Shaw* in *Singer v. Williams*, 7 Tax Cases 419, (1921) 1 A.C. 41.

"A 'security', I take it, is a possession such that the grantee or holder of the security holds as against the grantor a right to resort to some property or some fund for the satisfaction of some demand, after whose satisfaction the balance of the property or fund belongs to the grantor. There are two owners and the right of the one has precedence of the right of the other. A share in a Corporation does not answer the above description. There are not two owners, the one entitled to a security upon something and the other entitled to the balance after satisfying the demand. A share confers upon the holder a right to a proportionate part of the assets of the Corporation, it may be a proportionate part of its profits by way of dividend or it may be a proportionate part of its distributive assets in liquidation. There is no owner other than himself," per *Lord Wrenbury* in *Singer v. Williams*, *supra*.

"The normal meaning of the word 'securities' is not open to doubt. The word denotes a debt or claim the payment of which is in some way secured. The security would generally consist of a right to resort to some fund or property for payment, but I am not prepared to say that other forms of security (such as a personal guarantee) are excluded. In each case however where the word is used in its normal sense some form of secured liability is postulated. No doubt the meaning of the word may be enlarged by an interpretation clause contained in a statute . . . but in the absence of any such aid to interpretation I think it

clear that the word 'securities' must be construed in the sense above defined and accordingly does not include shares or stock in a company,' per *Viscount Cuz*, in *Singer v Williams*, *supra*.

Receivable and payable—It will be noted that the words used are not 'received and paid' and that as a consequence the 'accrual basis' is to be adopted under this section. It is doubtful however whether in the face of rulings like the one in *St Lucia Unions and Estates* (1924) A.C. 508, interest can be taxed before it is received unless it is part of profits of a business, profession or vocation and is taxed on an accrual basis under section 13.

In any case under section 18 tax can be collected at source only when interest is actually paid and under section 19 the tax cannot be collected by the Income tax Officer until there has been failure to collect under section 18. Therefore, even if tax is levied on an accrual basis the interest being included in 'total income' is for regulating tax on other blocks of income the tax on the interest itself cannot be collected till the interest has been actually received.

Interest on securities does not come under section 18 A for the purpose of provisional advance payments of tax.

Receivable—Whether in British India.—The interest need not necessarily be receivable in British India. It is sufficient if it accrues or arises there, see *Raja Bahadur Bansilal Motilal v Commissioner of Income tax, Bombay*, 54 Bom 460. The question by whom the income is receivable is of some importance when it has to be decided whether a trustee or beneficiary should be assessed. *Trustees of Currumbhor Ebrahim Baronetcy v Commissioner of Income tax Bombay*, 1934 I.T.R. 148 (P.C.). These decisions however were given before the amendment of section 4 and section 41 in 1939.

Interest chargeable under the Act, etc.—See section 42 as to the nature of such interest.

Conditions to be satisfied to secure allowance—(a) The interest should be payable in British India, or (b) if payable outside British India but chargeable under section 42 (i) must be interest on a public loan issued before 1st April, 1938, (ii) or tax on it has been paid under section 18 or (iii) there is an agent under section 43 (who need not have been already assessed). As to (iii), the Income tax Officer's judgment is evidently to be the determining factor. For similar provisions, see sections (9) (1) (iv) proviso, 10 (2) (iii) and 12 (2) (b).

Income from securities—Deductions—The following executive instructions have been issued.

Where a Bank or other concern engaged in business similar to that of a Bank receives deposit or loans in the course of its business and invests the money so borrowed as occasion arises the entire interest on such borrowings will be allowed as a deduction against its entire income liable to tax without attempting at allocation of the borrowed money to investments in tax free and other securities.

Where, however, there is a definite proof (not a mere inference) that a certain sum was specifically borrowed by a Bank or similar concern for the purpose of investment in tax free securities and has been so invested, the interest on money so borrowed will be set-off against the interest on the tax free securities only.

In the case of Co operative Societies whose business income has been exempted from tax under section 60 of the Act a proportionate amount of interest will be allowed against the income from interest on taxed and tax free securities. This interest will bear the same proportion to the total interest paid as the capital invested in securities bears to the total working capital.

Under each category of income—sections 7 to 12—the law sets out what deductions may be made in arriving at the taxable income and no deductions were contemplated in respect of interest on securities, till the first proviso was added in 1933 *Maharaja etc Sahi v Commissioner of Income tax*, 6 Pat 29 2 ITC 281 *Rajni v Prasad Singh v Commissioner of Income tax Patna* 4 ITC 264 *Raja Bijoy Singh Dudhuria v Commissioner of Income tax Bengal* 57 C 918 *Forbes v Commissioner of Income tax Bihar and Orissa* 4 ITC 1 all these rulings were given before the first proviso was inserted other deductions than those allowed by the proviso e.g., brokerage on sale or purchase are not admissible even now. The first proviso applies only to taxable securities while the second applies to tax free ones *Madras Provincial Co operative Bank v Commissioner of Income tax* 1942 ITR 490.

Accrued interest since the date of last payment paid to a vendor is not deductible *Rajni Prasad Singh v Commissioner of Income tax Bihar and Orissa*, 4 ITC 264 *Rm. 1r Ar Rm Arunachallam Chettiar v Commissioner of Income tax Madras* (unreported case) (see also *Wigmore v Thomas Summerson & Sons* 9 Tax Cases 577 and other cases under section 3) not even if such interest is specially quoted in the contract of sale, *Havelishah Sardari Lal v Commissioner of Income tax Punjab*, 1936 ITR 298 nor the depreciation in the value of securities held by a bank *In re Tata Industrial Bank* 1 ITC 152 *Punjab National Bank v Emperor*, 2 ITC 184.

Impartible Hindu Family—Interest received under section 8 or under section 12 (but not income under section 9) by the holder of an impartible Hindu family is taxable on the basis of his being an individual even though he may have sons from whom he has not divided. In its simplest form the question is whether the interest comes to him as the person beneficially interested or as a manager on behalf of himself and others *Commissioner of Income tax Punjab v Dwan Kishan Kisore* 1941 ITR 695 (PC).

Indian Tax free Securities in Burma—Under clause 10 of the Burma Adaptation of Laws Order and section 148 of the Government of Burma Act income tax free securities of the Government of India issued before the Government of Burma Act came into force could not be made liable to income tax in Burma during their currency *Commissioner of Income tax Burma v Central Bank of India* 1940 ITR 264.

Set off—The net income under section 8 after deducting the interest paid out can be negative and in that case the loss can be set-off under section 24 against other heads of income.

United Kingdom Law—In the United Kingdom the Crown has in certain cases the right to choose under which head of income it shall tax an assessee (see notes under section 6) and the law and practice in that country do not therefore form a guide for interpreting the Indian law in this respect.

See however *Hughes v Bank of New Zealand* 17 A.T.C. 139 (H of L.) referred to under section 10 (2) (iii)

9 (1) The tax shall be payable by an assessee under the head "Income from Property" in respect of the *bona fide* annual value of property consisting of any buildings or lands appurtenant thereto of which he is the owner, other than such portions of such property as he may occupy for the purposes of any business, profession or vocation carried on by him the profits of which are assessable to tax, subject to the following allowances, namely —

(i) where the property is in the occupation of the owner, or where it is let to a tenant and the owner has undertaken to bear the cost of repairs, a sum equal to one sixth of such value,

(ii) where the property is in the occupation of a tenant who has undertaken to bear the cost of repairs, the difference between such value and the rent paid by the tenant up to but not exceeding one sixth of such value

(iii) the amount of any annual premium paid to insure the property against risk of damage or destruction,

(iv) where the property is subject to a mortgage or other capital charge, the amount of any interest on such mortgage or charge, where the property is subject to an annual charge not being a capital charge, the amount of such charge, where the property is subject to a ground rent the amount of such ground rent, and where the property has been acquired, constructed, repaired, renewed or reconstructed with borrowed capital, the amount of any interest payable on such capital

Provided that no allowance shall be made in respect of any interest or annual charge payable without British India and chargeable under this Act, not being interest on a loan issued for public subscription before the 1st day of April, 1938, except interest or a charge on which tax has been paid or from which tax has been deducted under section 18 or in respect of which there is an agent for the payee in British India who may be assessed under section 43,

(v) any sums paid on account of land revenue in respect of the property,

(vi) in respect of collection charges, a sum not exceeding the prescribed maximum,

(vi) in respect of vacancies, the part of the annual value, which is proportional to the period during which the property is wholly unoccupied or, where the property is let out in parts that portion of the annual value, appropriate to any vacant part, which is proportional to the period during which such part is wholly unoccupied

(2) For the purposes of this section, the expression "annual value" shall be deemed to mean the sum for which the property might reasonably be expected to let from year to year

Provided that where the property is in the occupation of the owner for the purposes of his own residence, such sum shall, for the purposes of this section, be deemed not to exceed ten per cent of the total income of the owner

(3) Where property is owned by two or more persons and their respective shares are definite and ascertainable, such persons shall not in respect of such property be assessed as an association of persons, but the share of each such person in the income from the property as computed in accordance with this section shall be included in his total income

Rule 7—Under section 9 (1) (vi) of the Act the sum to be allowed in respect of collection charges shall not exceed 6 per cent. of the annual value of the property

History—Under the Act of 1886 income from house property was taxable under Other income and there was no provision in the Act as to what deductions could be made. There was also a special section (section 24) as regards occupying owners. These persons were assessed at five-sixths of the annual value of the house

In the 1918 Act the corresponding section covered only house property and did not cover other buildings or lands appurtenant to any buildings. Also all house property was taxed under this head and a corresponding deduction was made under business in respect of premises used for business

Clause (iv) of sub section (1) was amended in 1933 so as to permit the deduction of interest on borrowed capital even if not charged upon the property and was further expanded in 1939

The following are the more important among the changes made in 1939—(a) the exception now applies to property used not only for the assessee's business but for his profession or vocation (b) interest etc. paid to non residents are disallowed except under certain conditions (c) the allowance in respect of vacancies has been made less discretionary (d) the annual value can now be a negative figure and set-off against other income (e) sub section (3) was added in order to deal with cases of joint ownership of property. The words net and after deducting the foregoing allowances qualifying annual value and occurring twice in clause (vi) were omitted in 1940

Provincial property tax—A property tax, levied by a province, on buildings and lands, even if based on annual value, is not necessarily a tax on income and may be merely a tax on lands and buildings within item 42 of the Provincial legislative list in the Government of India Act. In section 9 of the Income tax Act, the income from property is one of the elements making up the total income of the tax payer, which is what is taxed, and the fact that this element is measured by the 'annual value' of the property does not necessitate the conclusion that every tax based on the 'annual value' is a tax on income. It is not the measure, but the substance that has to be seen, *Sir Byramji Jeejeebhoy v Province of Bombay*, 1939 ITR 670.

Property outside British India.—On the analogy of Schedule A of the English Act, the Madras High Court held under the pre 1939 law that this section applies only to property in British India property outside falling under "Other Sources" (section 12), *A S P L V R Rameswami Chettiar v Commissioner of Income tax*, 1933 ITR 389, AIR 1933 Mad 59. Under the present law however where a resident in British India owns property abroad, his income therefrom is to be worked out with reference to section 9 even if the property is acquired in the course of business, *S N A S A Annamalai Chettiar v Commissioner of Income-tax, Madras*, 1944 ITR 254, *Arunachalam Chettiar v Commissioner of Income-tax, Madras*, 1945 ITR 183.

Business premises—Buildings or lands appurtenant thereto, occupied by the owner for his business, profession or vocation, the profits of which are assessable to tax cannot be taxed under section 9, and no allowance will be given under section 10 for any notional rent of such premises the profits being taxable without deduction of rent for such premises. If for any reason, the business profession or vocation is not assessable, then the income from property will be taxable.

Property and business—See *In re Kaladan Suratee Bazar*, 1 ITC 50 [under section 2 (4)] and *Mangalagiri Factory case*, 97 IC 850, 2 ITC 251 [under section 10 (2) (vi)]. The computation of income from property should be calculated under section 9, and not under section 10. Income derived from 'property' is a specific category, and the mere fact that the owner of a property is a company will not make the income one derived from business'. *In re Commercial Properties, Ltd*, 3 ITC 23. On the other hand, in the *Mangalagiri case*, 2 ITC 252 and *Commissioner of Income-tax v Bosotto Brothers*, the Madras High Court ruled that depreciation allowance was admissible on mills (in the first case) and a hotel building (in the second case) when let out as part of a business. It was held by the Allahabad High Court that income from leasing land and erecting stables thereon is income from 'other sources' and not from 'property', but the correctness of this view was doubted by the Privy Council in *re Basantrao Takhat Singh*, 60 IA 307, 55 All 452, 6 ITC 459.

The erection of buildings for rent is ordinarily of the nature of investment and not of that of trade or business, but even if the ownership and letting of buildings should be so conducted as to make the transactions a business, the assessment should be still made under section 9.

Under section 12 (3) however, which was introduced in 1941 it would seem that income from buildings let out along with machinery or plant

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Provided that, where the property is in the occupation of the owner for the purposes of his own residence, such sum shall, for the purposes of this section, be deemed not to exceed ten per cent of the total income of the owner

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Under section 12 (3) however, which was introduced in 1941, it would seem that income from buildings let out along with machinery or plant

should be treated as income from 'other sources' and not as income from property under section 9

Where the actual profits exceed what is taxable under section 9 and the ownership and letting are of the nature of business it is not open to the Crown to make an assessment under section 9 on a notional income in accordance with that section and a supplementary assessment under section 10 or 12 of the difference between the actual profits and the notional income. Cf *Sahsbury House Estate Ltd v Fry*, 15 Tax Cases 266, (1930) A.C. 432 (H.L.) If however the income is of a composite nature arising partly from the ownership of property and partly from other trade, e.g., the profits of a brewer from a 'tied house' which arise partly from the ownership of the public house and partly from the sale of liquor to the publican assessments can be made separately for each part of the income, *Alfred Leney & Co v Whelan* 13 ATC 100 (K.B.D.)

In *Shop Investments v Sweet* 19 ATC 35 (K.B.), it was held on the facts, that the difference between the Schedule A assessment and the actual rent was a profit arising out of the business of letting of the premises. In *Croft v Seywell Aerodrome*, 1942 I.T.R. 96 (Sup.) the facts in which were peculiar, the Court of Appeal reached a somewhat contrary conclusion. See, however, the United Kingdom Finance Act of 1940 which allows an additional assessment in such cases and for this purpose, it was held in *Mellors v Buxton Palace Hotel*, 1944 (C.A.), that compensation paid by Government to an owner of a commandeered building is of the nature of rent the Crown being the tenant.

The various rulings of the United Kingdom referred to above rest on provisions not to be found in the Indian law. Under the latter, if a property (or part thereof) is not used for business and therefore falls under section 9 the income therefore is merely the 'annual value' (less the allowances) as defined therein and if it is used for the business the compensation received (say) for commandeering will ordinarily be a receipt of the business of a revenue nature and therefore taxable as a business receipt. So also rent received for a part of the business premises. The tax under section 9 is on the owner's rights in the property and his ability to exploit such rights: if he exploits the property itself, apart from his rights in it and if such exploitation is not for his business, profession or vocation and at the same time produces income, such income, it would seem would fall to be taxed under section 12 as income from other sources.

Property—What it includes—The tax is payable under this head in respect of property consisting of any building or lands appurtenant to a building by the owner of such property. Lands not attached to a building are not chargeable under this section. The income derived from vacant lands let out in urban areas for the purpose, e.g., of storing material is chargeable to the tax under section 12. (*Income tax Manual*)

Land—Would evidently include ponds, etc., if they are 'appurtenant' to the buildings. 'Appurtenant' means usually enjoyed with or occupied with see *Baylev v G W Railway*, 26 C.L.D. 434, *Ongley v Chambers* (1824) 8 Moore C.P. 66 (*Stroud*). 'Appurtenance' is obviously a question of fact and income if any from surplus land would fall to be taxed under section 12.

'Building'—What is a building is a question of degree and circumstances, its ordinary and usual meaning is a block of brick or stone work covered by a roof', per *Lord Fisher, M.R.* in *Moir v Williams*, (1892) 1 Q.B. 261.

In restrictive covenants, various questions may arise as to what constitutes a 'building', but for the purpose of income-tax the word must obviously be construed in the sense of a structure possessing "annual value". It would therefore include docks, wharves, bridges and the like.

Annual value—Property occupied by owner—In reckoning total income of the owner, the annual value of the house which the owner himself occupies should not exceed 10 per cent. of the total income. By annual value here is clearly meant *gross* annual value before making the various deductions permitted under section 9 (1), and not the *net* annual value after these deductions have been made. "Total income" [see section 2 (15)] excludes income to which the Act does not apply, e.g. agricultural income [see section 4 (3) (viii)].

The insertion of the word 'own' between the word 'his' and "residence" indicates that the phrase applied only to a human being and not to a fictional person like a company. The benefit of the proviso to the second sub-section cannot therefore be claimed by a company in respect of its offices. *In re The Calcutta Stock Exchange Association, Ltd* 1935 I T R. 105, 62 Cal 547.

Definition of annual value—Tax is chargeable in respect, not of any actual rental or cash received but of the *bona fide* annual value. The *bona fide* annual value is the full annual rental at which the building could be let from year to year if the owner bears all owner's burdens including municipal rates or taxes chargeable on the owner and if the tenant bears all tenant's burdens including municipal rates and taxes chargeable on the tenant. It differs from the actual annual rent payable on a long term lease or the actual rent payable on a yearly lease under a privileged rental or with tenant's liability to pay owner's rates or taxes. (*Income tax Manual*)

The words '*bona fide*' are otiose, the expression 'annual value' having been defined by sub-section (2). '*Bona fide*' merely repeats the idea of the word 'reasonably' in that sub-section. A decision on '*bona fide*' or 'reasonable' value is necessarily a decision on a pure question of fact. see *Gour's case*, 3 I T C. 33. It seems obvious from the definition that the annual value includes the value of any easement rights that may go with the buildings or lands.

The liability to tax under section 9 arises out of ownership of the property and irrespective of whether the owner can receive the annual value or not. Trustees, therefore, who own a building occupied by beneficiaries free of rent are liable to tax. *D M Vakil v Commissioner of Income tax*, 1946 I T R. 298 (Bom.).

Annual value—How to be worked out—The annual value is a question of fact to be determined on the evidence. It is only when the actual rent is not ascertainable or does not represent the true rent that the question of a hypothetical tenant and the rent that he would pay arises. In shops, for example, the annual value would not necessarily be the same as 365 times the daily rent. In ascertaining the annual value, no allowance should be given for cost of repairs, interest on capital, fair profits and the like, for, the assessee would then get double deductions in respect of certain items, e.g., repairs, and escape altogether in respect of others, e.g., interest and profits. There is no analogy between Municipal Acts which allow such deductions for the purpose of local taxation and the Income tax Act which specifically provides for certain deductions only from the gross annual value, *Sooratee*

Bazaar, Ltd v Commissioner of Income tax, Burma, A.I.R. 1931 Rang 99 [reviewing *Sooratee Bazaar v Municipal Corporation of Rangoon*, 5 R. 715] *William v Sanders*, (1927) 2 K.B. 498 and *Attorney-General v Mutual Tontine, etc., Association*, (1876) 1 L.R.Ex.D. 469. Even the actual rent paid is only *prima facie* evidence of annual value and a consideration of the rents paid for similar and similarly situated properties in the locality may show the annual value in any particular case to be less or more than the rent actually paid, *Lallamal Sunghamlal v Commissioner of Income tax, Punjab*, 1936 ITR 250, A.I.R. 1936 Lah 762.

Owner's taxes—A Division Bench of the Lahore High Court held in *Nawab Muhammad Akbar Khan v Commissioner of Income tax*, 3 ITC 344 that the expression annual value in section 9 (2) includes House tax payable to a local authority realised by the landlord from the tenant. Another Division Bench of the same High Court came to a different conclusion in *Chuna Mal Sahg Ram v Commissioner of Income tax*, 3 ITC 465. The matter again came up before a Full Bench of five Judges of the Lahore High Court in *Chuna Mal Sahg Ram v Commissioner of Income tax*, 5 ITC 316. The Full Bench held, approving, 3 ITC 465, and overruling 3 ITC 344 that the 'annual value' of property under section 9 does not include sums paid by tenants to owner on account of Municipal House tax payable by owner. The Calcutta High Court dissented from the above Full Bench ruling, *In re Krishn Lal Seal*, 60 Cal 357. The annual value is a hypothetical sum, and the question who pays tax can come in only to the extent that the actual rent is evidence of annual value. If the tenant pays the tax, it is obviously part of the consideration paid by him to the landlord. A bench of seven Judges of the Lahore High Court overruled the decision of the previous Full Bench in *Chuna Mal Sahg Ram's case* and adopted the view of the Calcutta High Court *Lallamal Sunghamlal v Commissioner of Income tax, Punjab*, 1936 ITR 250. See also *Gappumal Kanhaiyalal v Commissioner of Income tax, U.P.*, 1945 ITR 210 (All). The term 'annual value', it should be noted, does not necessarily mean the annual money benefit derivable from the property by the landlord.

The present executive instructions in the Income-tax Manual referred to later follow the above decisions and explain how owner's and occupiers' taxes should be dealt with. The form of the Return of income (Rule 19) makes the position clear.

Under the English Acts, there are elaborate rules regarding the ascertainment of 'annual value', but these are of no assistance in interpreting the Indian law. Reference however may be made to cases of rating, the general principles of which (in so far as they are not in conflict with provisions in Income tax laws) can be applied to valuations for income tax purposes also. That is the Income tax Officer should value the property with due regard to the environment, the nature of the building, its amenities both internal and external, and so forth, and not merely with reference to its bare ground and its four walls and the roof, see *L.C.C. v Erith Churchwardens*, (1893) A.C. 562, *Mersey Docks and Harbour Board v Birkenhead Assessment Committee*, (1901) A.C. 175, *Kirby v Hunslet Union Assessment Committee*, (1906) A.C. 43, all rating cases.

'Whatever is fixed to the realty so as to pass landlord's fixtures in a demise of the premises must be taken to be part of the premises for the purpose of ascertaining its rateable value,' per *Blackburn, J.*, in *Childley v West House*, (1874) 32 L.T. 486.

Things which are on the premises to be rated, and which are there for the purpose of making, and which make the premises fit as premises for the particular purpose for which they are used, are to be taken into account in ascertaining the rateable value of such premises.

It seems to me that when things are brought into that category they would pass by a demise or premises as such between landlord and tenant.—Per Lord Esher, M R, in *Tyne Boiler Works v Tynemouth* (1886) 18 Q B D 81

See also the following cases—*Stocks v Sulley*, 4 Tax Cases 89 *infra* and *Gundry v Dunham*, 7 Tax Cases 12, referred to under section 2.

Annual value is but an hypothetical sum arrived at in a certain manner.—Per Buckley, L J

It is 'not an actual but an hypothetical sum'—Per Kennedy L J, in *R v Special Commissioners Ex parte Essex Hall*, 5 Tax Case 636 (1911) 2 K B 434

In the words of the English Poor Law statutes, it is the rent at which hereditament might reasonably be expected to be let from year to year free of all usual tenant's rates and taxes and to the commutations tenth charge if any."

Under the United Kingdom law, insurance premia paid on property cannot be deducted in full in all cases, and an attempt was made in *Turner v Carlton*, 5 Tax Cases 395, (1909) 1 K B 932, in which the lessor agreed to pay the insurance premium, to deduct this premium from the rent before ascertaining the annual value. The case was thrown out on other grounds, but Channell, J, incidentally expressed the opinion that the deduction was not admissible. It was held in a later case *House and Property Investment Co v Kneen*, 17 A.T.C 113 (K B), that in such circumstances the gross rent, i.e., including the insurance premium and not the net rent is the annual value. In India, under section 9 (1) (iii), the annual premium paid for insurance against damage or destruction can be deducted.

Under the United Kingdom law (section 138 of the 1918 Act), if a dispute arises as to 'annual value' under Schedule A or B, the General Commissioners may if they consider necessary, and shall, if required by the appellant, direct him to cause a valuation to be made by a person of skill named by them, and may require the same to be verified on the oath of such person. The annual value shall thereupon be determined in accordance with such valuation, and with reference to this provision, it has been held that the function of the Commissioners is finally and formally to adopt the valuation of the person appointed, except in cases of dishonesty, fraud or other apparent invalidity, *Lions v Collins*, 15 A.T.C 510 (C A)

Evidence of municipal valuations.—Though the annual value is a question of fact, the value adopted by local bodies for rating purposes would have a high evidential value. See *Gundry v Dunham*, 7 Tax Cases 12, referred to under section 23, but the municipal valuation would not bind the Income tax Officer.

Reasonably.—It would be unreasonable to expect an exact definition of the word. Reason varies in its conclusions according to the idiosyncrasy of the individual and times and circumstances in which he thinks. The reasoning which built up the old scholastic logic, sounds now like the juggling of a child's toy. But mankind must be satisfied with the reasonableness within reach, and in cases not covered by authority, the verdict of a jury.

(or the decision of Judge sitting as a jury) usually determines what is reasonable in each particular case, but frequently reasonableness 'belongeth to the knowledge of the law', and therefore to be decided by the justice.
" (Co Lete 56 B)—

Cost of building—It would be open to the Income tax Officer in arriving at the annual value to take into account the cost of erection of the building though, ordinarily it would only be a remote consideration, *De-wanchand v Commissioner of Income tax, Punjab*, 1933 ITR 218, 7 ITC 358.

Annual value—Evidence—Lease—Not conclusive—A mother granted to her son a lease of a public house at a rent of £19 10s, such lease, dated 2nd May, 1898, being in continuation of one dated July, 1889. The Commissioners considered that they were not bound to accept either lease in the circumstances as conclusive evidence of the annual value of the premises, and fixed such value at £40. The Court affirmed the determination of the Commissioners, *Stock v Sulley*, 4 Tax Cases 98, In re *Babulal Raj Garhia* 1936 ITR 148 (Cal).

Of which he is the owner—Should evidently be constituted as 'of which he was the owner during the previous year, the previous year being understood of course with reference to section 2 (11). The present tense in 'is' has no specific reference to the point of time at which the tax is assessed. Section 9 is primarily a section of computation, the liability to tax being determined by sections 3 and 4. The liability to tax will therefore not cease merely because since the close of the 'previous year' the assessee has ceased to own the property, In re *Beharilal Mullick*, 2 ITC 328 (Cal), 54 Cal 630 AIR 1927 Cal 553.

According to one view, since abandoned of which' means 'of which annual value' if the section is to be in conformity with the general scheme of the Act, *Commissioner of Income tax, Bombay v Abubaker Abdul Rehman*, 1939 ITR 139, consequently where beneficiaries receive the income the trustees having no discretion as to its disposal, the beneficiaries are the owners. *Commissioner v Income tax, Bombay v Ibrahimji Hakimji*, 1940 ITR 501.

'It must be presumed that the Legislature was aware that the expressions 'owner', 'ownership' and the verb 'to own' in its various tenses have been frequently used in Acts of a similar nature and further that they can be and are used in various meanings in different Acts in some of which they have been specially defined for the purposes of particular sections. Nevertheless, the expression has not been defined for the purposes of this Act. It may have the narrow and technical meaning of the full ultimate and legal owner but if this was intended it could easily have been expressed and the failure to do so points to it not having been so intended." *The Burma Railways Company v The Secretary of State for India*, 1 ITC 140 AIR 1921 LB 9, 64 IC 801—in which it was accordingly decided to tax a Railway company managing a State owned Railway.

In *Commissioner of Income tax, Punjab v Drwan Kisan Kisor*, 1939 ITR 427, the Lahore High Court dissented from the above rulings of the Bombay and Rangoon Courts, and the Privy Council also in the same case on appeal 1941 ITR 695, agreed with the Lahore High Court that whatever the difficulty in applying to particular cases the simple and ordi-

nary phrase 'of which he is the owner', it is not permissible to substitute a phrase of dubious and noticeably different meaning. In that case it was held that the owner of buildings of an impartible Hindu family is the family even though the holder thereof may be the owner of the income.

The Privy Council felt that the question of ownership is of some difficulty when it has to be settled whether a trustee or a beneficiary should be taxed, *Trustees of Sir Currimbhoy Ibrahim Baronetcy Trust v Commissioner of Income tax*, 1934 I T R. 148, 61 I.A. 209.

See also *D M Vakil v Commissioner of Income tax, Bombay* 1946 I T R. 208 already referred to under "Annual value".

See also notes under sections 40 and 42 as to the taxation of trustees and agents.

The word 'owner' may even include a person with a right of occupancy only and without full right of property, cf *Lady Miller v Commissioners of Inland Revenue*, 15 Tax Cases 25, (1930) A.C. 222.

There may be cases, as, for instance, the case of a person who receives an allowance from his father, where the sum is certainly not assessable under any clause of the Income tax Act and yet it represents income which the man is free to expend as he pleases. And, conversely, there are such cases as that of a person who has a life rent of a house under a trust or settlement, which he is by the terms of the deed, precluded from letting. There again his right is not value in money, because he cannot let it, and yet he could undoubtedly be subject to assessment under Schedule A and without relief from any other party," per Lord McLaren in *Corke v Fry*, 3 Tax Cases 335, 32 Sc.L.R. 341.

'Owner' evidently means beneficial owner, cf *Joly v Pinhoe Nurseries, Ltd*, 20 Tax Cases 271 (K.B.D.), (1936) 1 All E.R. 841, in which under Schedule B of the United Kingdom Act (occupier's tax) it was unsuccessfully contended that the trustee in bankruptcy was retrospectively occupier from the time of the act of bankruptcy. *Lawrence, J.*, held that 'occupation' meant beneficial occupation. The radical right of a bankrupt however, in his sequestrated estate is nothing but a right of reversion to the balance remaining after the creditors are satisfied, for which balance he is entitled to call the trustee to account. It is not a specific right to particular assets or a right which applies specifically to that part of the reversion which originated from revenue on the one hand and that part which originated from capital on the other. Therefore, the income of the estate is the income of the trustee who alone has the right to put it into his pocket as income, and cannot become the income of the bankrupt on his re-investiture, *Commissioners of Inland Revenue v Fleming*, 14 Tax Cases 78 (C.A.). Following this ruling, the Calcutta High Court have held, in *re Official Assignee (Estate of Jnanendranath Pramanik)* 1937 I T R. 233, that the Official Assignee is the owner of property under his administration for the purpose of this section.

In *Eglinton v Norman*, 46 L.J.Q.B. 559 the expression was defined as

"The person in whom (with his or her assent) it (the property) is for the time being beneficially vested and who has the occupation or control or usufruct of it, e.g., a lessee is during the term the owner of the property demised."

In the context in section 9 a distinction is implied between an 'owner' and a 'tenant', and it would appear from the general structure of the

section—which merely contemplates the taxation of the annual value (subject to certain deductions)—that it is intended to tax only one person, that is, the ultimate owner. The intermediate tenants if any, are chargeable on their income as income from 'other sources' under section 12—if the circumstances are such that the intermediate persons cannot be taxed under section 10 (Business). See dicta in *In re Gooptu Estates, Ltd* (Calcutta), 57 C 910.

The Allahabad High Court took the view, *In re Basantrai Takhat Singh*, 4 ITC 324 and 5 ITC 442 that if a house is built on leased land and would eventually revert to the lessor, the lessee should be taxed in respect of rents received from the houses and shops and from squatters to whom portions of leased land had been let out, under section 12 'income from other sources' and not under section 9. This view however was incidentally questioned by the Privy Council in *Commissioner of Income tax UP v Basantrai Takhat Singh*, 1933 ITR 197, 60 IA 307, 6 ITC 459 before whom this particular point was not taken on appeal. If the house will not revert to the lessor (e.g., perpetual lease) the lessee should be taxed under section 9. *Rochiram Khattar v Commissioner of Income-tax, Punjab*, 6 ITC 127. A person constructing a building on leased land is liable to be taxed as owner in so far as he has the right to remove the superstructure. *Madras Cricket Club v Commissioner of Income tax* 1934 ITR 209. If the superstructure cannot be removed and if the house will revert to the lessor, it has still to be definitely decided whether or not the case falls under section 9 and if so who is the owner.

Before an assessee can be taxed as 'owner', it must be decided that he is in fact the owner of the property in question, and this decision rests with the Income tax Officer subject to the usual rights of appeal and reference. The mere existence of a dispute as to title, even when a suit has been filed cannot, of itself, hold up an assessment, otherwise, it would be open to an assessee to delay an assessment indefinitely by arranging for the institution of collusive proceedings, *In re Keshardco Channria*, 1937 ITR 246 (Cal). In this case in a suit for partition in a Mitakshara Hindu family, a consent decree was passed declaring two persons (of whom the assessee was one) to be equally entitled to the residue of an estate and a Commissioner was appointed to partition the estate. Meanwhile the two persons were allowed to collect the income of the estate and incur the necessary expenditure. The Income tax Officer assessed each of the two on one half of the annual value of the property as owners thereof, and it was held that the assessments were in order, and that the assessee (and the other person) were not managers on behalf of another under section 41.

Repairs [Section 9 (1) (i)]—The allowance to be made on account of repairs, has nothing to do with the period for which the house has been occupied. The allowance is also a fixed sum, namely, one-sixth of the annual value and it can neither be reduced nor increased by the Income-tax Officer. Similarly, under clause (ii) of section 9 (1) where the tenant has undertaken to bear the cost of repairs, the allowance is also a fixed amount, being the difference between the annual value of the house and the rent paid by the tenant, subject to a maximum of one sixth of the annual value.

The allowance will be given in full even when an allowance is given for vacancies under clause (iii).

In the United Kingdom, only the actual cost of the repairs is allowed.

Proof of expenditure—The allowance for repairs being a fixed figure can be claimed without any proof, on the other hand, the allowances under clauses (iii) to (vi) are related to actual expenditure and the Income-tax Officer is entitled to demand proof of such expenditure.

Property—Insurance deductions [Section 9 (1) (iii)]—The only insurance deduction permissible is the amount of the annual premium paid to insure the property against risk of damage or destruction. According to the old departmental instructions, which do not, however, find a place in the latest edition of the Income tax Manual, where an owner insures against loss of rent and asks for an allowance on account of the annual premium for such insurance it should be allowed if such owner agrees to pay tax on any amount recovered from the insurance company. Where no such allowance is claimed or allowed, tax is not to be charged on the amount recovered from the insurance company.

Annual premium—It is not usual to enter into contracts for fire etc insurance for long periods, but if a person entered into such a contract and paid a lump sum premium for a longer period than one year only the premium for one year could be deducted from the income. See however the meaning of the word 'annual' in annual profits discussed by *Ro Jait, J.*, in *Ryall v Hoare*, 8 Tax Cases 521, also see section 10 (2) (iv) and 15 in which the word 'annual' does not appear. The omission of the word "annual" in section 10 (2) (iv) is probably accidental.

Damage or destruction—From any cause whatever, e.g. fire, earthquake, lightning or civil commotion. 'Damage' means a partial injury to the property whereas 'destruction' is complete damage.

Mortgage, ground rent, etc.—[Section 9 (1) (iv)]—The question arises, under this clause of the sub-section, whether, when the property is subject to a mortgage or charge, the amount of interest to be allowed as a deduction should be the interest that has accrued or the interest that has been actually paid during the year. In respect of premiums paid for insurance or on account of land revenue, the word 'paid' has been used in clauses (ii) and (v), and it would seem from the absence of the word 'paid' in clause (iv), that a charge or interest on mortgage may be deducted when it has accrued—even if it has not been paid, *Beharilal Mullick v. Commissioner of Income tax*, 54 Cal 636, 2 ITC 328.

Outside the Presidency towns, a mere deposit of title deeds will not result in a charge. In *re Basantlal Taklat Singh*, 4 ITC 324, see also section 59 of the Transfer of Property Act.

So long as there is a mortgage or charge, the purpose for which the mortgage or charge was created is irrelevant and interest can be deducted from the annual value. On the other hand where income from land is assessed under section 12, no such deduction can be made unless the mortgage is for the purpose of earning the income under assessment, In *re Amulyadhan Addy and others*, 1936 ITR. 164 (Cal).

Where the property belongs to a Hindu undivided family and what is mortgaged is only the share of an individual member the interest on the mortgage cannot be deducted either from the income of the family or from that of the individual member. Both the property and the mortgage should relate to the same assessee if the interest is to be deducted. In *re Amulyadhan Addy and others*, supra.

Before 1933, no allowance was given for interest unless there was a mortgage or charge. From that year allowance is given for interest on capital borrowed for acquiring the property, even if there is no mortgage or charge, and since 1939, the concession is extended to money borrowed for constructing, reconstructing, repairing or renewing the property.

The word 'annual' in 'annual charge' simply means 'recurring' and does not exclude interest or charge for shorter periods. See *Ryall v Hoare*, referred to under section 4 (3) (iii). All the items referred to in this clause can be claimed on an 'accrued' basis, and there is nothing requiring that they should have been actually paid in the accounting year concerned. In respect of the concluding item as already pointed out no charge is necessary on the property.

It was claimed in *Commissioner of Income-tax, Bombay v Mahomedbhoj Rowji*, 1943 ITR 320 that the Bombay City Municipal tax was an 'annual charge' because, if the tax fell into arrear, it became a charge on the property. The claim was disallowed. Per *Beaumont CJ*: 'I do not find it very easy to say what is the meaning of an 'annual charge'. The words would mean a charge arising annually. But charges, as a rule do not arise annually. The words, I think, would cover a charge to secure an annual liability. I find it impossible to suppose that the Legislature (having regard to the scheme of the Act, which allows only payments to preserve the property or earn income), whatever they may have intended the words to cover, can have intended to include Municipal taxes in such an expression as an annual charge, not being a capital charge.' A similar view was taken by the Madras High Court in *Muhammad Keyi, v Commissioner of Income tax*, 1943 ITR 484 in respect of the urban tax on immovable property in Bombay City. That tax is neither an 'annual charge' nor land revenue. The relevant Act clearly distinguishes between the tax and land revenue. On the other hand it was held in *Gappunal Kanhaiyalal v Commissioner of Income-tax, UP*, 1945 ITR 210 (All) that house tax and water tax were deductible under section 9 (1) (iv) on the ground that under the relevant Municipal Act these taxes were first charges on the buildings or lands.

In *re Chourunghee Properties, Ltd*, 1944 ITR 434 (Cal) a company purchased its debentures with an overdraft from a bank with whom the debentures were pledged as security. Interest was paid on the overdraft but no interest was paid on the debentures. It was held that interest on debentures was allowable (following *In re Beharilal Mullick*) even though it was not paid, because the debentures had not been cancelled and were alive and the Bank could have proceeded against the accumulated interest on the debentures if there had been a default in the overdraft account. The result however, is at variance with the general scheme of the Act which allows only for actual or accrued expenditure and not for remotely contingent and possible expenditure, and even then it should be noted that in this particular case the Bank could not have claimed more than the interest on the overdraft, though it could have proceeded against the interest on the debentures.

A house inherited or received as a gift with an attached debt will not receive exemption in respect of interest unless there is a mortgage or charge, for it is not 'acquired' with borrowed capital.

The proviso prohibits the allowance of interest or charge payable to a non resident except under certain conditions, *c f* first proviso to section 8, proviso to section 10 (2) (iii) and section 12 (2) (b).

As to what is chargeable under the Act, see sections 4 and 42
Property—Collection charges—[Section 9 (1) (vi)]

As regards collection charges, Rule 7 fixes 6 per cent of the annual value as the maximum amount permissible. The burden lies on the assessee to prove that he has incurred the expenditure claimed by him as allowance. Legal expenses incurred in recovering rents from tenants are allowed subject to the following conditions—(a) Only net expenses that is, expenses deducting any costs recovered from the opposite party are allowed (b) The total allowance for collection charges including legal expenses allowed does not exceed the statutory 6 per cent

No collection charges can arise in respect of property occupied by the owner. Under this clause notional expenditure cannot be claimed. *Maharajadhiraj of Darbhanga v Commissioner of Income tax, Bihar and Orissa* 10 Pat 261. This allowance is in the discretion of the Income tax Officer i.e., with reference to the evidence before him subject to the maximum prescribed by the rules. In *re Basantrai Takhat Singh* 5 ITC 441

Legal expenses in collecting interest on arrears of rent as distinguished from the rent itself will not be deductible *cf Ramaranga Prasad v Bihar*, 1942 ITR 446

The amendment to clause (vi) in 1939 has removed most of the discretion which the Income-tax Officer had before and made the allowance more or less automatic in respect of the length of time. But it still leaves two problems uncertain viz., (a) what is meant by 'wholly unoccupied'? Would the occupation by a watchman or by a few servants be covered by these words? If not if the question is to be one of degree it is obvious that the Income-tax Officer must exercise some discretion (b) What is 'appropriate' to the vacant part? This can only mean what in the judgment of the Income-tax Officer can be attributed to the vacant part in relation to the occupied part, having regard to all the relevant circumstances

While the Income tax Officer would seem to have discretion about these two points he has none in regard to the period for which the allowance is to be given

The word 'net before annual value' and the words 'after deducting the foregoing allowances' after 'annual value' were omitted in 1940, in order to remove a legitimate grievance of property owners' (to quote the *Statement of Objects and Reasons*)

Under Rule 4, No VII Schedule A of the English Act a vacant house is automatically exempt for the period of vacancy

The expression used in the English Act is 'unoccupied and not vacant' and its variants. In *Queen v The Assessment Committee of St Pancras*, (1877) 2 QBD 581, which was a rating case, it was held that the test of occupancy was not actual habitation of residence but the state of the house which permits of its being inhabited or resided in at any time.

Per *Lush, J*—'If, however, he (the owner) furnishes it (the house) and keeps it ready for habitation whenever he pleases to go out, he is an occupier though he may not reside in it one day in a year'

In *Smith v Dauncy*, 5 Tax Cases 25, a case under the Inhabited House Duty Act, the assessee paid Income-tax on property under Schedule A but disputed the liability to Inhabited House Duty. It was held that the words 'habited' and 'occupied' meant the same thing, and that the house is

question which was furnished ready for use, was assessable to the Inhabited House Duty, even though it was not dwelt in or slept in by any person during the year in question

In *Commissioner of Income tax, Madras v Sri Krishna Chandra Gajapati Narayana Deo* 2 ITC 104, 49 Mad 22, AIR. 1925 Mad 287, the Madras High Court held, following *R v St Pancras Committee*, (1877) 2 QBD 581

"If a man owns a house ready for his own occupation, ready for him to live in when he chooses to do so, he is assessable."

A house occupied by the owner, i.e., kept in such a manner that he can enter into residence at any time, and not let is not vacant unless dismantled and shut up. The contrasting terms are more appropriately 'user' and 'non-user', rather than 'occupation' and 'vacancy'. The provision in section 9 (1) (vi) is meant for let houses. It was held therefore in *Maharajadhiraj of Darbhanga v Commissioner of Income-tax, Bihar and Orissa*, 5 ITC 35, 10 Pat 261, AIR 1931 Pat. 223, that the owner of a house who occupies it himself and keeps it as a guest-house cannot claim an allowance for vacancies on the ground that no one resided in the house, see however 2 ITC 104 (*Sri Krishna Chandra Gajapati Narayana Deo's Case*)

Unrealised rent—A Notification under section 60 exempts from tax and also excludes from total income "such part of income under the head 'property' as is equal to the amount of rent payable for a year but not paid by the tenant and proved to be lost and unrealisable, if (a) the tenancy is *bona fide*, (b) the defaulting tenant has vacated, or steps have been taken to compel him to vacate the property, (c) the defaulting tenant is not in occupation of other property of the assessee, (d) the assessee has taken all reasonable steps to institute legal proceedings for the recovery of the unpaid rent, or satisfied the Income-tax Officer that legal proceedings will be useless, and (e) the assessee has for the year in which the unpaid rent was due, paid income-tax in respect of the annual value of the property to which the rent relates."

The ruling in *Muhammad Naqui v Commissioner of Income tax Punjab*, 132 I.C. 1, AIR. 1931 Lah 656 which permitted the deduction of unrealised rent on the strength of *Commissioner of Income tax, Madras v Arunachallam Chettiar*, 47 Mad 660, may now be taken as obsolete.

Deductions allowed in respect of property—It is to be particularly noted that no deductions are permissible on account of any municipal or local rates or taxes in respect of property. Where however, under the tenancy agreement the owner pays the occupier's share of municipal tax, then the amount included in the rent on account of such tax is deductible from the gross rent for the purpose of arriving at the *bona fide* annual value. On the other hand if there is a stipulation that the tenant will in addition to the regular rent payable to the owner, pay to the municipality the owner's share of tax, such tax must be deemed to be a part of the rental value and must be added to the rent to arrive at the *bona fide* annual value. (Income tax Manual)

No allowance can be claimed beyond what is provided for in the section. Brokerage or Legal Charges in raising a loan would not be admissible being of the nature of capital expenditure and not provided for.

Similarly expenditure on structural alterations, depreciation whether on the building or on its furniture or fittings cannot be allowed as

as a dwelling-house, a proportional part only of such amount shall be allowed;

(iii) in respect of capital borrowed for the purposes of the business, profession or vocation, the amount of the interest paid:

Provided that no allowance shall be made under this clause in any case for any interest chargeable under this Act which is payable without British India, not being interest on a loan issued for public subscription before the 1st day of April, 1938, except interest on which tax has been paid or from which tax has been deducted under section 18 or in respect of which there is an agent in British India who may be assessed under section 43 or, in the case of a firm, for any interest paid to a partner of the firm;

Explanation.—Recurring subscriptions paid periodically by shareholders or subscribers in such Mutual Benefit Societies as may be prescribed, shall be deemed to be capital borrowed within the meaning of this clause;

(iv) in respect of insurance against risk of damage or destruction of buildings, machinery, plant, furniture, stocks or stores, used for the purposes of the business, profession or vocation, the amount of any premium paid;

(v) in respect of current repairs to such buildings, machinery, plant, or furniture, the amount paid on account thereof;

(vi) in respect of depreciation of such buildings, machinery, plant, or furniture being the property of the assessee, a sum equivalent where the assets are ships other than ships ordinarily plying in inland waters to such percentage on the original cost thereof to the assessee as may in any case or class of cases be prescribed and in any other case to such percentage on the written down value thereof as may in any case or class of cases be prescribed;

and where the buildings have been newly erected, or the machinery or plant being new has been installed after the 31st day of March, 1945, a further sum (which shall however not be deductible in determining the written down value for the purposes of this clause) in respect of the year of erection or installation equivalent—

(a) in the case of buildings the erection of which is begun and completed between the 1st day of April, 1946 and the 31st

day of March 1948 (both dates inclusive, to fifteen per cent. of the cost thereof to the assessee;

(b) in the case of other buildings to ten per cent. of the cost thereof to the assessee;

(c) in the case of machinery or plant, to twenty per cent. of the cost thereof to the assessee;

Provided that—

(a) the prescribed particulars have been duly furnished;

(b) where full effect cannot be given to any such allowance in any year not being a year which ended prior to the 1st day of April, 1939, owing to there being no profits or gains chargeable for that year, or owing to the profits or gains chargeable being less than the allowance, then subject to the provisions of clause (a) of the proviso to sub-section (2) of section 24, the allowance or part of the allowance to which effect has not been given, as the case may be, shall be added to the amount of the allowance for depreciation for the following year and deemed to be part of that allowance, or if there is no such allowance for that year, be deemed to be the allowance for that year, and so on for succeeding years; and

(c) the aggregate of all such allowances made under this Act or any Act repealed hereby, or under the Indian Income-tax Act, 1886, shall, in no case, exceed the original cost to the assessee of the buildings, machinery, plant, or furniture as the case may be;

(vii) in respect of any such building, machinery or plant which has been sold or discarded or demolished or destroyed, the amount by which the written down value thereof exceeds the amount for which the building, machinery or plant, as the case may be, is actually sold or its scrap value:

Provided that such amount is actually written off in the books of the assessee:

Provided further that where the amount for which any such building, machinery or plant is sold exceeds the written down value, so much of the excess as does not exceed the difference between the original cost and the written down value shall be deemed to be profits of the previous year in which the sale took place;

Provided further that where any insurance, salvage or compensation moneys are received in respect of any such building, machinery or plant which has been discarded or demolished or

destroyed, and the amount of such moneys does not exceed the written down value, the amount allowable under this class shall be the amount, if any, by which the difference between the written down value and the scrap value exceeds the amount of such moneys:

Provided further that where any insurance, salvage or compensation moneys are received in respect of any such building, machinery or plant as aforesaid, and the amount of such moneys exceeds the difference between the written down value and the scrap value, no amount shall be allowable under this clause and so much of the excess as does not exceed the difference between the original cost and the written down value less the scrap value shall be deemed to be profits of the previous year in which such moneys were received:

Provided further that for the purposes of this clause, the original cost of a building the written down value of which is determined in accordance with the first proviso to sub-section (5) shall be deemed to be the written down value so determined as at the date of its being brought into use for the purposes of the business, profession or vocation

(viii) in respect of animals which have been used for the purposes of the business, profession or vocation otherwise than as stock in trade and have died or become permanently useless for such purposes, the difference between the original cost to the assessee of the animals and the amount, if any, realised in respect of the carcasses or animals;

(ix) any sums paid on account of land-revenue, local rates or municipal taxes in respect of such part of the premises as is used for the purposes of the business, profession or vocation:

(x) any sum paid to an employee as bonus or commission for services rendered, where such sum would not have been payable to him as profits or dividend if it had not been paid as bonus or commission:

Provided that the amount of the bonus or commission is of a reasonable amount with reference to—

(a) the pay of the employee and the conditions of his service;

(b) the profits of the business, profession or vocation for the year in question; and

(c) the general practice in similar businesses, professions or vocations,

(xi) when the assessee's accounts in respect of any part of his business profession or vocation are not kept on the cash basis, such sum, in respect of bad and doubtful debts, due to the assessee in respect of that part of his business, profession or vocation, and in the case of an assessee carrying on a banking or money lending business, such sum in respect of loans made in the ordinary course of such business as the Income tax Officer may estimate to be irrecoverable but not exceeding the amount actually written off as irrecoverable in the books of the assessee

Provided that if the amount ultimately recovered on any such debt or loan is greater than the difference between the whole debt or loan and the amount so allowed the excess shall be deemed to be a profit of the year in which it is recovered and if less, the deficiency shall be deemed to be a business expense of that year,

(xii) any expenditure (not being in the nature of capital expenditure) laid out or expended on scientific research related to the business,

(xiii) any sum paid to a scientific research association having as its objects the undertaking of scientific research related to the class of business carried on and any sum paid to a university college or other institution to be used for such scientific research

Provided that such association university, college or institution is for the time being approved for the purposes of this clause by the prescribed authority,

(xiv) in respect of any expenditure of a capital nature on scientific research related to the business, an allowance for each of the five consecutive previous years beginning with the year in which the expenditure was incurred or where the expenditure was incurred prior to the commencement of the business, for each of the five consecutive previous years beginning with the year in which the business was commenced one fifth of such expenditure

Provided that no allowance shall be made for any expenditure incurred more than three years before the commencement of the business

Provided further that—

(a) where an asset representing scientific research expenditure of a capital nature ceases to be used for scientific research related to such business—

(i) no allowance shall be made in respect of any previous year after the previous year in which the cessation takes place; and

(ii) if the aggregate of the amounts allowed under this clause added to the value of the asset immediately before the cessation is less than the said expenditure, there shall also be allowed in respect of the previous year in which the cessation takes place an additional deduction equal to the difference;

(b) where such asset is sold without having been used for other purposes, the sale proceeds shall be taken to be the value of the asset immediately before the cessation, and if an additional allowance or a greater additional allowance would have been made in respect of the previous year in which the cessation occurred on the basis of that value, an amount equal to the additional allowance which would have been made or as the case may be, to the difference between the additional allowance which would have been made and the additional allowance which was made for that year shall be made in respect of the previous year in which the sale occurs.

(c) where the proceeds of the sale *plus* the total amount of allowances made under this clause exceed the amount of the expenditure, the excess or the amount of the allowances so made whichever is the less, shall be treated as a receipt of the business accruing at the time of the sale;

(d) where a deduction is allowed for any previous year under this clause in respect of expenditure represented wholly, or partly by any asset, no deduction shall be allowed under clause (vi) or clause (vii) for the same previous year in respect of that asset;

(e) where an asset is used in the business after it ceases to be used for scientific research related to the business, and a claim for an allowance under clause (vi) or clause (vii) is made in respect of that asset, the actual cost to the assessee of the asset shall be treated as reduced by the amount of any deductions allowed under this clause;

(f) clause (b) of the proviso to clause (vi) shall apply in relation to deductions allowable under this clause as it applies in relation to deductions allowable in respect of depreciation;

(g) if any question arises under clause (xii), clause (xiii) or this clause as to whether, and if so to what extent, any activity constitutes or constituted, or any asset is or was being used for, scientific research, the Central Board of Revenue shall refer the question to the prescribed authority, whose decision shall be final;

Explanation—In clause (xii), clause (xiii) and this clause,—

(i) 'Scientific research' means any activities in the fields of natural or applied science for the extension of knowledge;

(ii) references to expenditure incurred on scientific research do not include any expenditure incurred in the acquisition of rights in, or arising out of scientific research but, save as afore-said, include all expenditure incurred for the prosecution of or the provision of facilities for the prosecution of scientific research;

(iii) references to scientific research related to a business or class of business include—

(a) any scientific research which may lead to or facilitate an extension of that business, or as the case may be, all businesses of that class;

(b) any scientific research of a medical nature which has a special relation to the welfare of workers employed in that business, or as the case may be, businesses of that class;

(xv) any expenditure (not being in the nature of capital expenditure or personal expenses of the assessee) laid out or expended wholly and exclusively for the purpose of such business, profession or vocation.

(3) Where any building, machinery, plant or furniture in respect of which any allowance is due under clause (iv), clause (v), clause (vi) or clause (vii) of sub-section (2) is not wholly used for the purposes of the business, profession or vocation, the allowance shall be restricted to the fair proportional part of the amount, which would be allowable if such building, machinery, plant or furniture was wholly so used.

(4) Nothing in clause (ix) or clause (xii) (xv?) of sub-section (2) shall be deemed to authorise the allowance of any sum paid on account of any cess, rate or tax levied on the profits or gains of any business, profession or vocation or assessed at

a proportion of or otherwise on the basis of any such profits or gains; and nothing in clause (xii) (xv?) of sub-section (2) shall be deemed to authorise—

(a) any allowance in respect of a payment which is chargeable under the head 'Salaries' if it is payable without British India and tax has not been paid thereon nor deducted therefrom under section 18; or

(b) any allowance in respect of any payment by way of interest, salary, commission or remuneration made by a firm to any partner of the firm; or

(c) any allowance in respect of a payment to a provident or other fund established for the benefit of employees unless the employer has made effective arrangements to secure that tax shall be deducted at source from any payments made from the fund which are taxable under the head 'Salaries'.

(5) In sub-section (2), 'paid' means actually paid or incurred according to the method of accounting upon the basis of which the profits or gains are computed under this section; 'plant' includes vehicles, books, scientific apparatus and surgical equipment purchased for the purposes of the business, profession or vocation, and 'written down value' means—

(a) in the case of assets acquired in the previous year the actual cost to the assessee;

(b) in the case of assets acquired before the previous year the actual cost to the assessee less all depreciation actually allowed to him under this Act, or any Act repealed thereby, or under executive orders issued when the Indian Income-tax Act, 1886, was in force;

Provided that in the case of a building previously the property of the assessee and brought into use for the purposes of the business, profession or vocation after the 28th day of February, 1946, 'written down value' means the actual cost to the assessee reduced by an amount equal to the depreciation calculated at the rate in force on that date that would have been allowable had the building been used for the aforesaid purposes since the date of its acquisition by the assessee and had the provisions of this Act relating to the allowance for depreciation been in force on and from the date of acquisition.

Provided further that where the provisions of the proviso to sub-section (2) of section 26 are applicable, the actual

cost to the assessee referred to in clauses (a) and (b) shall be the actual cost to the person succeeded in the business, profession or vocation.

(6) A trade, professional or similar association performing specific services for its members for remuneration definitely related to those services shall be deemed for the purposes of this section to carry on business in respect of those services, and the profits and gains therefrom shall be liable to tax accordingly.

(7) Notwithstanding anything to the contrary contained in section 8, 9, 10, 12 or 18, the profits and gains of any business of insurance and the tax payable thereon shall be computed in accordance with the rules contained in the Schedule to this Act.

General—As a matter of convenience the section as a whole has been set out here, and the sub-sections and clauses have been repeated before the relevant notes and decisions relating to each sub-section and clause.

Previous law.—Before 1918 there were no provisions in this Act as to the method of computing income from business, the subject being governed by rules and executive instructions. The provisions introduced in 1918 did not undergo any radical changes till 1939 when very considerable changes were made, and further amendments were made after 1939 in respect of depreciation allowance. The details of all these changes are referred to in the notes relating to each sub-section and clause.

Section 11 which dealt with professional earnings was deleted (as from 1st April, 1939) and section 10 now deals with professional earnings also, the various sub-sections and clauses having been amended for this purpose.

United Kingdom Law.—This section roughly correspond to a part of Schedule D and the Rules thereunder, and some of the General Rules.

Sub section (1)—Assessee—See notes under section 24 as regards the position of a partner in a firm carrying on business.

Where an assessee appointed certain managers to run his business for five years (without any right of interference on his part in regard to the executive control) and their remuneration was the net profits of the business after paying the proprietor a percentage of the gross takings and a fixed sum, and the agreement referred to the business as that of the assessee and permitted him to supervise and check bills and outstandings and the accounts it was held that the business was that of the assessee and not that of the managers, *In re Nrisingha Chandra Nandy*, 1936 I T R. 428 (Cal).

Business—As to what is meant by this word see notes under sections 2 (4) (*Business*), 3 (*Capital and Income and Mutual Concerns and Destination of Profits*), 4 (3) (i) and (ii) (*Charities*), and 4 (3) (iii) (*Casual Profits*). There is no necessary inconsistency between 'agriculture' and 'business', there can be a business in agriculture though income from such business is exempted by section 4 (3) (vii).

Profession and Vocation—As to the meaning of the words 'profession' and 'vocation', see notes under section 4 (3) (vi)—Casual Profits and under section 7—Salaries

As to what constitutes a profession as distinguished from business, see also the following Excess Profits Duty cases in which the assesses were held to exercise a profession or to carry on a business —

Commissioners of Inland Revenue v North (private school master), (1918) 2 K.B. 705 12 Tax Cases 41, *Commissioners of Inland Revenue v Maxse* (a magazine editor) (1919) 1 K.B. 647 *Barber & Sons v Commissioners of Inland Revenue* (a stock broker), (1919) 2 K.B. 222, *Burt and Reid v Commissioners of Inland Revenue* (a commission agent) (1919) 2 K.B. 650 *Smeeton v A.G.* (Engineer), 12 Tax Cases 166 (1920) 1 Ch. 85, *Robbins v Commissioners of Inland Revenue* (general sales manager) (1920) 2 K.B. 877 *Currie v Commissioners of Inland Revenue* (income-tax repayment agent) 12 Tax Cases 245 (1921) 2 K.B. 332 see also *Commissioners of Inland Revenue v Marx*, 4 A.T.C. 467 (C.A.) under section 2 (4)

Voluntary payments—It is immaterial, for the purposes of taxation whether a payment is received on a voluntary basis or as of right so long as it is the receipt of a business profession or vocation it is taxable. See notes under section 4 (3) (vii)

Illegal business or vocation—The fact that a business or vocation is illegal or unlawful does not affect liability to tax. See *Partridge v Mallandaine*, 2 Tax Cases 179 18 Q.B.D. 276 and other cases set out under sections 3 and 4 (3) (viii)

Company—Profession of—A company cannot exercise a profession. It obviously can have no personal qualifications or activities which are necessary for the exercise of a profession. See *Esplen (William) Son and Swainston Ltd v Commissioners of Inland Revenue*, (1919) 2 K.B. 731 in which it was held that even though all the members of the company were professional men (naval architects) and the nature of the work was precisely the same as that done by individual professional men the company could not exercise a profession. Also *Commissioners of Inland Revenue v Hamilton & Co* 6 A.T.C. 342 (C of A) (commercial travellers) and *Commissioners of Inland Revenue v Peter McIntyre, Ltd* 12 Tax Cases 1006 (auctioneers)

Carried on—Implies a repetition of acts but as to whether any such repetition is necessary see the rulings set out under sections 2 (4) 3 and 4 (3) (vii) referred to above. Carry on implies a repetition or series of acts per *Brett, L.J.*, in *Smith v Anderson*, 15 Ch.D. 247. To carry on a business means primarily to carry on one's own business therefore a salaried clerk does not carry on business at the office of his employer. *Levine v Graham*, 20 Q.B.D. 784. A clerk in the Admiralty, for example does not 'carry on business at his office' *Buckley v Harrow* 19 L.J. Ex. 151

As to the difference between trade exercised in the country or business carried on in the country on the one hand and business connection on the other, see notes under sections 4 (1) and 42 (1)

(2) Such profits or gains shall be computed after making the following allowances, namely —

Profits—There is no definition of Profits or gains. All that is stated in this section is that certain deductions alone are permitted in computing

profits, and that the deductions would depend on the method of accounting adopted by the assessee. The section assumes that gross profit has been arrived at somehow. The gross profit will depend on the method of accounting in regard to Receipts, the exclusion of Receipts on Fixed Capital Accounts, the valuation of stocks, etc. In regard to these matters it would appear that, in the absence of any statutory provisions, the accepted principles and practice of commercial usage and accountancy should be followed, and that the accounts should represent facts with truth and accuracy. See notes under section 13.

Though the word income has been dropped in this section as being less appropriate to a business than 'profits or gains' the section in no way curtails or modifies the scope of sections 3 and 4 or alters the charge of income tax, which is imposed by section 3. *Commissioner of Income tax, U P v Shrimati Singari Bai*, 1945 ITR 224 (All)

Whether section exhaustive.—Dicta particularly those in earlier decisions, like *In re Tata Industrial Bank*, 1 ITC 152 (Bom.) *Howrah Amrita Railway Co v Commissioner of Income tax, Bengal*, 2 ITC 509, *In re Raja Joti Prasad Singh*, 1 ITC 103 (Pat.) to the effect that the deductions referred to in the section are exhaustive are not of much significance, especially in view of the wide and comprehensive nature of clause (xv) [formerly clause (x) of sub-section (2)]

In *S P S Ramaswami Chettiar v Commissioner of Income tax, Madras*, 53 M 904, 59 M L J 403 (S B) the Court observed that the deductions detailed in sub-section (2) are not exhaustive, and that all deductions permitted in commercial usage e.g., Bad Debts should be allowed. The Privy Council also ruled that Bad debts should be allowed even though not (then) mentioned in the section. *Commissioner of Income tax C P v Sir S M Chitnavis*, 59 IA 290

Incurred.—The word 'incur' according to the Oxford Dictionary means 'to become through one's action liable or subject to'. The word is used here in contrast with 'paid'.

Several businesses.—The question whether particular businesses are entirely different from each other or merely branches of the same business is of importance in carrying forward losses under section 24 and if there is no right to such carry forward in setting off losses in one business against the profits in another. The gain in a continuing business cannot be set-off against the loss in a closed business. See notes under section 24.

Whether a business is a single one with branches or is really made up of different businesses is a question of fact. *Hiralal Kalyanmal v Commissioner of Income tax, Bombay*, 1943 ITR 128, *Commissioner of Income tax, C.P. v Ram Krishna Ramnath*, 1944 ITR 21

'Any' business means 'each and every' business. Therefore, if the assessee carries on several businesses the profits of each business should be calculated under this section and added together before any set-off is given under section 24. That section allows set-off between different heads of income as described in section 6. *Mr Ar Ar Arunachalam Chettiar's case*, 1 ITC 278, *Karam Ilahi Muhammad Shafi v Commissioner of Income-tax*, 3 ITC 456, 11 Lah. 38. In later cases however *Siddha Gounder and Sons v Commissioner of Income tax*, 55 M 818 *South Indian Industries, Ltd v Commissioner of Income tax, Madras*, 1935 ITR 11

the same High Court thought that the above construction of 'any' as equivalent to 'each and every' was needlessly strained, and that under section 24, an assessee could set off loss (not capital loss) in one business against gain in another. See also notes under section 10 (2) (iii) as to the inadmissibility of set-off of losses of businesses not in existence during the year to which the income under assessment relates against profits of businesses then in existence.

Profits from foreign business—See notes under section 4 regarding the circumstances in which foreign profits may be taxed and the method of computing such profits.

United Kingdom Law—The following dicta relate to the United Kingdom law which, is practically the same in this respect as in India, though in form, it differs prohibiting all deductions except the specified ones. See also the dicta set out under section 3, as to what is 'income, profits or gains'.

'What a trader receives is a trading receipt, not a profit. The latter involves deductions on account of expenditure, adjustment on account of stocks, etc', see per *Rowlatt, J.*, and *Lawrence, L.J.*, in *Short Bros v Commissioners of Inland Revenue*, 12 Tax Cases 955.

"The words 'profits and gains' are, where the context does not otherwise require, to be construed in their ordinary signification. I can see no reason for suggesting that this last-mentioned principle should not apply to the word 'Capital' when used in these statutes, that it too, where the context does not otherwise require, should be construed in its ordinary sense and meaning"—Per *Lord Atkinson* in *Scottish North American Trust v Farmer*, 5 Tax Cases 693 at p 705, (1912) A C 118.

'It cannot of course be denied that, as a matter of business, profits are ascertained by setting against the income earned the cost of earning it, nor that as a general rule for the purpose of assessment to the income-tax, profits are to be ascertained in the same way. Unless the context requires a different meaning, or the words appear to be used throughout the Act in another sense, I think that they (the words 'profits or gains') must be construed according to their ordinary signification. When we speak of the profits and gains of a trade we mean that which he has made by his trading. Whether there be such a thing as profit or gain can only be ascertained by setting against the receipts the expenditure or obligations to which they have given rise"—Per *Lord Herschell* in *Gresham Life Assurance Society v Styles*, 3 Tax Cases 185, (1892) A C. 309, 321.

"The word 'profits,' I think, is to be understood in its natural and proper sense—in a sense which no commercial man would misunderstand"—Per *Lord Halsbury* (*ibid*).

The Privy Council applied the above principle in the *Pondicherry Railway Company's case*, 5 ITC 362, observing that the principle was of general application and not dependent on the peculiarities of the English tax system.

"In determining the amount assessable to the tax, deductions are to be made from the gross profits of all the expenses incurred by the owner for the time being for the purpose of earning the profits. This

indeed is involved in the very idea of profits —Per *Lord Finlay* in *John Smith and Son v Moore* (1921) 2 A C 13 12 Tax Cases 266

You must find new money in order to pay the expenses year by year but then you do find money to pay the expenses year by year and you get the receipts year by year and the difference between the expenses necessary to earn the receipts of the year and the receipts of the year are the profits of the business for the purposes of the income-tax —Per *M R Esher* in *City of London Contract Corporation v Styles* 2 Tax Cases 239

There can be no doubt that in the natural and ordinary meaning of language the income of a bank or trade for any given year would be understood to be the gain if any resulting from the balance of the profits and losses of the business in that year. That alone is the income which a commercial business produces and the proprietor can receive from it. *Lawless v Sullivan* (1881) 6 A C 373 379 (P C)

On the other hand while following commercial practice

We must go by the word of the Act of Parliament and we must not allow any item in favour of the person who is taxed merely because it is an item which would properly find its way into a loss and profits account between a man and his partners or kept for himself. There are a great many things that a prudent trader might treat as deductions because he wished to make a fund to provide against future accidents and things of that kind which are not dealt with at all by the Income tax Acts —Per *Baron Pollock* in *Rhymer Iron Co v Fowler*, 3 Tax Cases 476 (1896) 2 Q B 79

In making out the balance sheet to show what profit a trader has made under Schedule D it is not to be worked out in the same way that the trader would make out his balance sheet for his own information showing what profit or loss he has made —Per *Smith J*, in *Gillatt and Watts v Colquhoun* 2 Tax Cases 76

As little are they bound as the Income tax Commissioners are bound to take the balance sheet of the company as the true measure of the income —Per *the Lord President* in *Edinburgh Southern Cemetery v Kinnmont* 2 Tax Cases 516 27 S.C.L.R. 71

But it is a very different question that is raised here as to whether though that may be a very proper operation in a trader's balance sheet the sums which are received and which are proposed to be applied to redemption of capital can be properly regarded as profits under the Income tax Acts. The profits in a proper trader's balance are a very different thing from profits as they have been defined under the provisions of the statute —Per *Lord Shand* (*ibid*)

But the statute refuses to take an ordinary balance sheet or the net profits thereby ascertained as the measure of the assessment, and requires the full balance of profits without allowing any deduction except for working expenses and without regard to the state of the capital account or to the amount of capital employed in the concern or sunk and exhausted or withdrawn —Per *the Lord President* in *Coltess Iron Co v Black* 1 Tax Cases 287 6 App Cas 315

The law does not permit all deductions which a prudent trader would make in ascertaining his own profits

—Per *Stirling L J* in *The Ahanza Co v Bell*, 5 Tax Cases 60 (1905) 1 K B 184

The phrase capital exhausted does not occur anywhere in the Income tax Acts. It is taken from a passage in Mr McCulloch on Political Economy where he says profits must not be confounded with the produce of industry primarily received by the capitalist. They really consist of the produce or its value remaining to those who employ their capital in an industrial undertaking after all their necessary payments have been deducted and after the capital wasted and used in the undertaking has been replaced. If the produce derived from an undertaking after defraying the necessary outlay be insufficient to replace the capital exhausted a loss has been incurred. If the capital is merely sufficient to replace the capital exhausted there is no surplus there is no loss but there is no annual profit and the greater the surplus is the greater the profit. I do not feel at all inclined to dispute the sufficiency of this definition. But that is certainly not the scheme of the income tax. —Per *Lord Blackburn* in *Coltress Iron Co v Black* 1 Tax Cases 287 6 App Cas 315 329

Taking the two groups of dicta together

It is plain that the question of what is or is not profit or gain must primarily be one of fact and to be ascertained by the tests applied in ordinary business. Questions of law can only arise when some express statutory direction applies and excludes ordinary commercial practice or where by reason of its being impracticable to ascertain the facts sufficiently some presumption has to be invoked to fill up the gap. —Per *Lord Haldane* in *Sun Insurance v Clarke* 6 Tax Cases 59 (1912) A C 443. Accounts however, need not be on a cash basis.

Of course the learned Master of the Rolls (Esher) does not mean there (in *City of London Corporation v Styles*, 2 Tax Cases 239) by receipts money which is actually received. He means debts which you will receive and which therefore on their face value require an allowance for bad debts. —Per *Sterndale M R* in *Hall & Co v Commissioners of Inland Revenue* 12 Tax Cases 382 (1921) 3 K B 152.

The question was considered at length in the leading case referred to below

Now in the case of a trade it is well established that this balance (of profits and gains) is *prima facie* to be ascertained by deducting from the receipts of the trade the expenditure necessary to earn them. Until this has been done it is impossible to determine whether there has been any balance of profits at all. *Gresham Life Assurance Co's Case* (1892) A C 309 323 and *Ashton Gas Co v Attorney General* (1906) A C 10 12. However deductions which on ordinary practice and principles might be deducted are restricted (by Rules). —Per *Lord Atkinson* in *Usher's Wiltshire Brewery, Ltd v Bruce* (1915) A C 433 452 6 Tax Cases 399.

The expression balance of profits and gains implies as has often been pointed out something in the nature of a credit and debit account in which the receipts appear on one side and the costs and expenditure necessary for earning these receipts on the other side. Indeed without such account it would be impossible to ascertain whether there were really any profits on which the tax could be assessed. But the Rule proceeds

to provide that 'the duty shall be assessed, charged and paid without other deduction than is hereinafter allowed'. The difficulty is that nowhere in the Act is there any express allowance or enumeration of deductions, the scheme of the Act being to prohibit certain deductions with certain exceptions. It has been suggested that the difficulty can be overcome by treating the exceptions from the prohibition as implicitly allowed deductions. The better view however appears to be that where a deduction is proper and necessary to be made in order to ascertain the balance of profits and gains, it ought to be allowed, provided there is no prohibition against such an allowance in any of the Rules applicable to the case, and the decision of your Lordships' House in *Russell v The Town and County Bank*, 2 Tax Cases 321 and the speech of Lord Halsbury in *Gresham Life Assurance Society v Styles*, 3 Tax Cases 185, clearly proceeded on this footing'—Per Lord Parker (*ibid*, p 458).

If a subject engaged in trade were taxed simply upon the full amount of the balance of profits or gains of such trade there can be no doubt that upon the facts found in this special case he would be entitled to deduct all the items which are now in debate before arriving at the sum to be charged. To do otherwise would neither be to arrive at the balance, between two sets of figures—a credit and a debit set, which balance is the profit of the trade nor to ascertain the profits of the trade for trade incomings are not profits of the trade till trade outgoings have been paid or allowed for and deducted. The effect of this structure, is, that the direction to compute the full amount of the balance of profits must be read as subject to certain allowances and to certain prohibitions of deductions but that a deduction, if there be such which is neither within the terms of the prohibition nor such that the expressed allowance must be taken as the exclusive definition of its area is to be made or not to be made according as it is or is not on the facts of the case a proper debit item to be charged against incomings of the trade when computing the balance of profits of it.—Per Lord Sumner (*ibid* p 467-468).

The Indian Act does not use the expression balance of profits but this makes no difference in substance for obviously 'profits' can only mean balance of profits. The provisions of the United Kingdom law are in some cases otiose. For example, notwithstanding the fact that the United Kingdom law prohibits deductions on account of expenditure not wholly or exclusively laid out for the business it again explicitly prohibits the deduction of personal expenses losses not connected with the trade, etc. As regards losses recoverable under an insurance or indemnity, see notes on section 10 (2) (*iv*) *infra*.

Onus on assessee—The onus of proving that a deduction from taxable income is admissible under the Act falls on the subject. See *Roantrree & Co v Curtis*, 8 Tax Cases 678, *Nopechand Magniram v Commissioner of Income tax, Bengal*, 2 ITC 146, *Baldeodas Rameswar v Commissioner of Income tax, Bengal*, 5 ITC 476, *Brijraj Hukumchand v Commissioner of Income tax, Bengal*, 5 ITC 303 and *R N Singha v Commissioner of Income tax, Burma*, 5 ITC 188. On the other hand, payments to known persons for admittedly trading purposes cannot be disallowed on mere suspicion e.g., payment of royalty to a wife who holds the landlord right

over her husband's colliery *Ram Kinkar Banerjee v Commissioner of Income tax B & O*, 1936 ITR 108 Deductions in order to be admissible should fall under one of the clauses mentioned in sub section (2)

Assessments made under section 23 (4)—It must be assumed that in assessments made under section 23 (4) to the best of the judgment of the Income tax Officer (i.e. not based on the accounts of the assessee) that all admissible allowances under sections 10 and 12 have been given by the Income tax Officer *Government Mail Motor Service v Commissioner of Income tax Punjab* AIR 1932 Lah 396 136 IC 706

Allowances not mutually exclusive—The different sub clauses in sub section (2) are to be read disjunctively and cumulatively and if an allowance falls within one of the sub-clauses the Revenue is not at liberty to argue that the allowance is really covered by some other clause *Rathan Singh v Commissioner of Income tax* 50 MLJ 157 2 ITC 107 See, however, *Commissioner of Income tax Bombay v Haji Jamal Nurmuhomed & Co* 1 ITC 396 49 Bom 362 AIR. 1925 Bom 251 for a different view, see also note under clause (xi) [now (xv)] of this sub section

(1) any rent paid for the premises in which such business, profession or vocation is carried on, provided that, when any substantial part of the premises is used as a dwelling house by the assessee, the allowance under this clause shall be such sum as the Income tax Officer may determine having regard to the proportional annual value of the part so used,

History—The words profession or vocation and annual value of the were added in 1939

The allowance referred to in this clause is only in respect of that portion of the premises in which the business is carried on and the same limitation applies to all allowances relating to premises or buildings in clauses (ii) (iv) (v) (vi) and (viii) Where premises are owned by the owner of the business no allowance on account of rent is permissible since the owner is not liable to pay tax on the annual value of such premises under section 9 Where the trader resides in a part of the business premises the full rental cannot be set against the profits and the Income tax Officer must in each case determine the portion of the rent that may so be set off

Meaning of words—Premises have been nowhere defined but see notes under section 10 (2) (iv) *infra*

Substantial is a vague relative word its meaning can involve questions only of fact

Dwelling house—not necessarily a house actually dwelt in—ordinarily comprises a building adapted for and capable of being dwelt in and which is dwelt in whether by a care taker or others although the larger part of it is used for trade or business *Lewin v George Newnes* 90 LT 160

Even Inhabited dwelling house has been construed as equivalent to inhabitable dwelling house i.e. Ready to be slept in although on no single occasion during the year of assessment was it let or actually resided in *Smith v Dauncey* (1904) 2 KB 186 5 Tax Cases 25

Premises not in use.—While the redemption of an unexpired lease would be a capital payment [see rulings referred to under sub clause (xi) now (xv) and in particular, *Mallett v Staveley Coal and Iron Co*, 13 Tax Cas 772 (C.A.), 1928 (2) K B 405, and *Cowcher v Richard Mills Co*, 13 Tax Cas 216], rent actually paid for premises once required for the business and used by it but no longer in use would be deductible. Expenditure need not be correlated to the profits of the year (see notes under clause (xv)), nor can items leading to loss be ignored items leading to a profit alone being taken into account *Commissioners of Inland Revenue v Falkirk Iron Co Ltd*, 17 Tax Cases 625. The annual recurring loss in subletting premises acquired for the business and subsequently found unnecessary is a legitimate deduction from the profits of the business, *Hyett v Leonard* 1940 ITR 133, 19 ATC 180.

Rent of railway track—In return for the grant of free land, a guaranteed income per mile and exemption from local cesses a Railway Company agreed to share with a District Board in equal moieties the excess of profits over 4 per cent of the capital. It was contended on behalf of the Railway that the payment of surplus profits to the Board was deductible from the taxable profits of the Railway either as the rent of the premise, i.e., the track, which was laid on the free land or as a local rate on the 'premises or as expenditure necessary to earn that profits. Held, that payment to the Board was an appropriation of profits and not deductible from the Railway's taxable profits *Howrah Amta Light Railway Co v Commissioner of Income tax* AIR 1928 Cal 579 2 ITC 509.

United Kingdom law—In the United Kingdom, certain kinds of rents for easements in respect of mining leases are taxed like patent royalties (under Schedule D, over and above the assessment of the land under Schedule A), and the payer of the rent must not deduct it from his taxable profits (though he can deduct tax when paying). There has been much litigation as to what kinds of rents fall in this class but it is of no interest under the Indian law.

Rent paid to a partner—In *Heastie v Vench & Co*, 12 ATC 471 (1934) 1 K B 535 18 Tax Cases 305, the Court of Appeal decided (over ruling *Finlay, J*) that rent paid by a firm to a partner for the use of business premises is deductible from the profits of the firm. The test always is whether the service for which payment is made is made to the partner as such or in some other capacity. Under the Indian Act the payment of rent to a partner is not prohibited by sub section (4), clause (b) which disallows only interest, salary, commission or remuneration made by a firm to a partner.

Rent fluctuating with profits—See *Union Cold Storage Co Ltd v Adamson*, 16 Tax Cases 293 under clause (xi) [now (x)] of this sub section.

A landlord made extensive alterations to a building to suit a particular tenant and enable the latter to run a hotel and the latter had to pay the cost in 50 equated half yearly payments. It was held that the payments could not be deducted from the tenant's hotel keeping profits and that merely calling the payments rent could not make it such *Ainley v Edens* 19 Tax Cases 303. The expenditure was of the nature of capital. On the other hand even if the lease says that the rent is not only in respect of the right of user but also in respect of reimbursing the cost of the building the

rent will not necessarily be of the nature of capital expenditure, for the reference to the cost of the building may be only a step in the method of fixing the rent. It has to be seen what in truth the payment represents *Race Course Betting Board v Wild* 1944 KBD (?).

Sub letting—If a person takes a lease of premises for his business and subsequently lets out a part of the premises which he finds to be surplus that fact in itself will not convert the letting out into a separate trade and there is no reason why he should not be allowed to deduct the net rent paid by him from his taxable profits *Allied Newspapers Ltd v Hindsley* 16 A.T.C. 410 (1937) 4 All E.R. 677 (C.A.). This ruling however does not mean that if a tenant develops the property for other purposes the expense of the development even if a revenue item can be debited to the profits of the main business for which he rented the property.

Where an Iron Company rented certain premises which it was unable to use and let them out as far as possible to sub tenants till the lease term, the difference between the rent paid by the company and the rent received from the sub tenants was allowed as a deduction from the company's profits since the premises were rented for the business of the company and were available for it *Commissioner of Inland Revenue v Falkirk Iron Co* 17 Tax Cases 625.

Taxes—Even express words making a lessee liable for all public demands imposed on the owners in respect of a mine would not bring Income tax within such a liability since the tax is not imposed on the mine as such but on the owner in respect of his income *Bengal Coal Company Ltd v Janardan Kishorilal Singh Deo and another* 1938 I.T.R. 632 (P.C.). The tax therefore cannot be included in the rent.

Annual value—The reference to proportional annual value of the part makes it clear that the Income tax Officer must go by the share of annual value of the part in question and not by other considerations e.g. share of floor area.

(ii) in respect of repairs where the assessee is the tenant only of the premises and has undertaken to bear the cost of such repairs the amount paid on account thereof, provided that, if any substantial part of the premises is used by the assessee as a dwelling house, a proportional part only of such amount shall be allowed.

Proportion—The proportion need not be identical with that applied to (i) it will be a question of fact for determination by the Income-tax authorities how much of the expenditure should be attributed to each part.

It should be noted however that it is only if a substantial portion is used as a dwelling house by the assessee the Income tax Officer can modify the allowance on account of rent.

(iii) in respect of capital borrowed for the purposes of the business profession or vocation the amount of the interest paid.

Provided that no allowance shall be made under this clause in any case for any interest chargeable under this Act which is

payable without British India not being interest on a loan issued for public subscription before the 1st day of April 1938, except interest on which tax has been paid or from which tax has been deducted under section 18 or in respect of which there is an agent in British India who may be assessed under section 43 or, in the case of a firm, for any interest paid to a partner of the firm

Explanation —Recurring subscriptions paid periodically by shareholders or subscribers in such Mutual Benefit Societies as may be prescribed shall be deemed to be capital borrowed with in the meaning of this clause

History —The proviso was added and the words where the payment of interest thereon is not in any way dependent on the earning of profits omitted in 1939

Conditions to be satisfied —While the condition about interest not being dependent on profits has been removed stringent conditions have been imposed in other directions. These latter conditions are (a) interest which is liable to tax but payable abroad is disallowed unless (i) it relate to a public loan issued before 1st April 1938 or (ii) tax has been deducted at source or (iii) there is an agent who can be assessed under section 43 (he need not have been actually assessed) and (b) interest paid to a partner in a firm is disallowed in all cases however *bona fide* the nature of the interest. As to when interest payable abroad is taxable see section 42

Compare also sections 9 (1) (iv) and 12 (2) (b) It should be noted that the restriction in (b) applies only to interest paid to partners and not to interest paid to members of other associations

Explanation —This was inserted in 1922 primarily with reference to certain societies in Madras but no rule has been made since the explanation if applied would give more trouble to the societies than the present procedure. The rulings of the Madras High Court in regard to the mutual nature of some of these fund have also partly made a rule unnecessary (see notes under section 3). Where profits of such societies are taxable interest paid by them will be allowed as a deduction and the recipients of interest will be taxed.

Periodically excludes uncertain intervals *Jones v Ogle* 8 Ch 192— (a case under the English Appropriation Act) see also *Commissioner of Income tax Madras v Madhava Siddhanta Onnabhi Nidhi* 1934 ITR 427. Payments should be at fixed times and under antecedent obligation and not at variable periods and at the discretion of the payer

The so-called share capital subscribed by members of Mutual Funds in Madras (a rupee or so per month for a fixed term re-payable thereupon with a guaranteed interest) is not share capital as contemplated by the Indian Companies Act though these funds are registered under that Act. It is really capital borrowed for the purpose of the business and interest paid on it can be deducted from the profits of the fund if it is really mutual. *Commissioner of Income tax Madras v Madura Permanent Fund* 1933 ITR 46 56 Mad 415. *Commissioner of Income tax Madras v Trichy Tennore etc Fund* 1937 ITR 702

Interest etc., paid to partners—Prior to the amendment in 1939 disallowing unconditionally all interest paid to partners, there had been considerable litigation as to the circumstances in which interest paid to partners could be allowed as a deduction from the firm's profits, and the general trend of the decisions (which however have all become obsolete) was that interest on *bona fide* advances made over and above the capital for the purpose of the firm's business all of which were primarily questions of fact, was a legitimate deduction see *A L S P P L Subramanian Chett v Commissioner of Income tax Madras*, 3 ITC 187, *Bhola Singh Narsingh Das v Commissioner of Income tax Punjab*, 4 ITC 401, *Commissioner of Income tax Burma v A K C T Chettyar Firm* 4 ITC 388, *Abdur Rahman & Co v Commissioner of Income tax, Madras* 1939 ITR 602, *Seth Kanhayalal Goenka v Commissioner of Income tax, U P and C P*, 1941 ITR 70.

Where one or more partners leave the firm in the year of assessment receiving their capital with interest up to the date of their leaving, the surviving partners are not entitled to deduct from the profits of the firm the interest so paid *Commissioner of Income tax Madras v Karuppasami Moopattar*, 1954 ITR 284 *Siddha Gowdar & Sons v Commissioner of Income tax, Madras* 6 ITC 78. Apart from the fact that the amendment made to this clause in 1939 makes no difference between outgoing and remaining partners the interest in question would not be in respect of capital borrowed for continuing the business.

Where the successor to the business of a dissolved firm paid interest to a partner of the old firm in respect of capital invested in the old firm the interest was not allowed as a deduction *In re Kunjamal & Sons*, 1941 ITR 358.

United Kingdom Law—Under this law no deduction is permitted on account of any *annual* interest or other payment payable out of profits and gains but the assessee—payer—is entitled to deduct (and retain subject to certain conditions) tax at the time of payment. The question what is an *annual* payment has therefore been of importance and there are several rulings on the subject which are however of not much help in interpreting the Indian Statute.

Interest during construction—In the United Kingdom where there is no provision corresponding to this clause it has been held that if interest which is paid on debentures during construction is debited in the assessee's accounts to capital it cannot be claimed as a deduction from his profits *Central London Railway v Commissioners of Inland Revenue*, 20 Tax Cases 102 (1936) 2 All ER 375 (1937) A.C. 77.

Interest dependent on profits—Even though since 1939 the condition that the interest should not depend on the earning of profits has been removed it does not follow that all interest depending on the earning of profits will be allowed as a matter of course. A distinction can readily be drawn between *bona fide* interest which takes the form of a share of profits and real sharing of profits described formally as interest. Compare *the Pondicherry Railway Indian Radio and Cable, etc.* group of cases before the Privy Council referred to in the notes under clause (xi) [now (xv)]. The test will often be whether what is shown is the gross receipts or some *ad hoc* profits or the ultimate net profits. In a case in the United Kingdom in which a loan carried a fixed interest *plus* a share in the profits it was

held that the latter share was not deductible from taxable profits, *A W Walker & Co v Commissioners of Inland Revenue*, 12 Tax Cases 297, (1920) 3 K B 648

What is Interest—It is the price of the use of money and should be distinguished from payments of the nature of compensation. See *Simpson v Maurice's Executors*, 14 Tax Cases 591 and *Hudson's Bay Co v Thew*, 7 Tax Cases 206. There should be a capital sum and a contract to pay interest on it. A payment to a person as consideration for guaranteeing an overdraft will clearly not be interest. There is no element of interest when a guarantor of an overdraft pays up to the Bank. The liability to pay interest is that of the person guaranteed, and the liability of the guarantor is not to pay interest but to make good the loss on the whole if any, *Inland Revenue v Holder*, 16 Tax Cas 540 (H L)

What is at first sight a premium on re payment of capital may in truth be of the nature of interest, e.g., when the amount of premium varies with the time of re-payment and is so fixed as to form, together with a nominal low rate of interest, a reasonable aggregate rate of interest. The fact that the borrower need pay the premium only when he repays the capital makes the premium no more capital than the lender's waiving his right to receive interest every year would convert it into capital, *Thos Nelson and Sons v Commissioners of Inland Revenue*, 17 A.T.C 408 (C S)

Borrowing—The capital should be borrowed therefore a company cannot be allowed interest on its capital. Interest paid to a partner, even on a *bona fide* debt due to him by the firm, has been expressly disallowed by the concluding part of the proviso

The guaranteed interest or dividend paid by a company to its own shareholders is not deductible from the company's profits *Ahmadpur Katwa Railway v Commissioner of Income tax, Bengal*, 1935 ITR 277

For the purposes of the business—In the deed regulating the distribution of profits of an association of individuals it was laid down, *inter alia*, that each member would receive from the association interest on the capital which had to be invested by him for the purchase and sale of goods on behalf of the association, and it was held that this capital was not borrowed by the association for its business, *Mian Channu Fac'ories v Commissioner of Income-tax, Punjab*, 1936 ITR 203, 166 IC 150

Different businesses—"The business" referred to in this clause is the business the profits of which are under assessment, and the deductions claimable are restricted to what is necessary to earn the profits taxed. No deduction is therefore admissible from British Indian profits on account of capital borrowed—even in British India—for the purpose of business abroad, *Commissioner of Income tax, Madras v M T T K M M S M A R Somasundaram Chettiar*, AIR 1928 Mad. 487, 2 ITC 61 and 505 54 M L J 436 (F B). In the same case the Court suggested that "capital borrowed for the purposes of the business" meant capital borrowed and so used. This ruling was followed by the Bombay High Court in a case in which a finance company borrowed money in British India and invested it abroad retaining the income from the investments there. The company claimed that in the absence of equity in taxing statutes a literal construction of this clause permitted the deduction of the interest paid in British India from its taxable profits. The claim was disallowed on the ground that section 10 must be read with section 4. The fact that there were two separate busi-

nesses in the Madras case while in *Provident Investment Co v Commissioner of Income tax*, AIR. 1932 Bom 94, 56 Bom. 92, 6 ITC 21, the Bombay case the business was one, made no difference. An assessee, not a dealer in stocks and shares, borrowed money in British India and invested it abroad income from such investments not being taxable in British India. It was held that the interest paid on the borrowings could not be deducted from his taxable income in British India, *Macnabb v Commissioner of Income tax, Punjab* 1936 ITR 306. Similarly interest on money borrowed for the purpose of land revenue, etc., in respect of lands producing agricultural income which is not taxable cannot be deducted from other taxable income *Contelle v Commissioner of Income tax Punjab* 1936 ITR 137 AIR 1936 Lah 595.

The position relating to investments in tax free securities is more complicated. In *Hughes v Bank of New Zealand* (1938) AC 366, 17 ATC 139 (HL) it was held that (i) the exemption of interest on tax free securities (e.g., British War Loans) could not be nullified by taxing the interest as part of trading profits, and (ii) the whole cost of getting funds (including interest paid to depositors) should be deducted from taxable profits. The ratio decidendi in the Court of Appeal was (a) the Crown had no option as between different schedules (Schedule C applies to interest on securities and Schedule D to trading profits) and (b) the permissible deductions are in respect of expenditure for the purpose of the trade as a whole—and not necessarily for the purpose of the particular items of profit brought into charge. Before the House of Lords the Crown dropped its claim in respect of interest on War loans. As regards the other point, the House of Lords observed that since investments in securities were an integral part of a Bank's business the corresponding expense was incurred for the purpose of the trade and therefore admissible in full. Expenditure incurred in the course of a trade which is unremunerative is none the less a proper deduction and it does not require the presence of a corresponding receipt on the credit side to justify the deduction of a particular item of expense so long as the latter is laid out for the purpose of the trade. See also *Sinclair v Cadbury Bros*, (1933) 49 TLR 208 18 Tax Cases 156 (CA), in which land exempt from all taxes by a Statute of 1660 was used for business and it was held that the annual value of the land should be deducted from the profits of the trade in the usual course (under the United Kingdom Law) for otherwise the exemption would be nullified.

If the investments in securities are not an integral part of the assessee's business interest can be deducted only under section 8 and in accordance therewith.

In *Commissioner of Income tax Madras v A I A R Bros* 3 ITC 209 52 Mad 296 AIR 1928 Mad 1229 in which the assessee who were bankers and money lenders started a piece goods business for financing which they borrowed money and there were heavy losses in the piece goods business which was wound up and the question arose in a later year whether the interest on the money originally borrowed for the closed piece goods business could be deducted from the profits of the remaining banking and money lending business the Madras High Court held that on the facts the piece goods business was not a separate and distinct business from the other business of the assessee and the interest was therefore deductible. The case was more like that of branches in a multiple store and the fact that separate accounts were kept to show whether the departments were profitable or not did not make the departments separate busi-

nesses In a later case, *South Indian Industrials, Ltd v Commissioner of Income tax, Madras*, 1935 ITR 11. 58 Mad 433, AIR 1935 Mad 330, the same High Court considered that in the above ruling the Court ought to have accepted the finding of fact by the Commissioner that the businesses were separate and that the ruling was wrong.

The later Madras decision was followed by the Lahore High Court who made it clear that an assessee cannot set-off the losses of a business which had been discontinued before the year of account against the profits and gains of a current business. Set-off can only be allowable if both the businesses are alive during the current year, *British Cotton Growers' Association (Punjab) Ltd v Commissioner of Income tax, Punjab* 1937 ITR. 279 at 304.

It has been held that interest paid in British India on capital borrowed in British India for the purpose of a foreign business can be deducted when the foreign profits are brought into British India and that the deduction can be allowed even if all the profits of the year under assessment and the three preceding years are not brought in provided that the actual amount brought in and taxed is not less than the deduction claimed *Harkishen Lal v Commissioner of Income tax, Punjab* 12 Lah 297 1930 Lah 982 4 ITC 431.

The effect of some of these rulings has been altered as a consequence of the new basis of residence adopted in section 4, but the general principles underlying these rulings are still operative.

Fictitious payments—In *Nopechand Magniram v Secretary of State*, 2 ITC. 146 interest was paid to an unsecured creditor whom the Income tax Officer found as a fact to be a partner. Interest was also paid to relatives of partners mostly women, and the Income tax Officer found that these were all fictitious payments. Held, that the Income-tax Officer was justified in his findings of fact, as no evidence to the contrary was adduced even though the assessee was given an opportunity.

A will made by a *karta* of a Hindu joint family referred to the credit of two sums in the books of the family business in favour of two girls and provided that the amounts 'should under the control and supervision of (this son) be augmented and utilised for marriage, stridhanam, etc.' No assets or funds were set apart or allocated for the purpose and the funds remained in the business. A claim to deduct interest credited to these accounts of girls was disallowed on the ground that the will was only precatory and contemplated contingent and future gifts by the son, and that the father was not competent as a member of a joint family, to make a testamentary disposition of family property in favour of the ladies *E V Muthappa Chettiar v Commissioner of Income tax, Madras*, 1945 ITR. 311.

Two brothers sold a cotton ginning business of theirs to a private company belonging substantially to them. The written-down value of the assets was about Rs 5 lakhs, at which figure the assets stood in the books. The private company took over the assets for Rs 15 lakhs which was paid for by shares for Rs 5 lakhs and debentures for Rs 10 lakhs. The debentures were issued in favour of two private companies registered in Canada and controlled by the brothers through their wives. These Canadian companies issued equivalent debentures to these ladies. It was held that the Income-tax Officer was justified in disallowing the interest

on the debentures on the ground that they were colourable and illusory, *Commissioner of Income-tax, Madras v Harveys, Ltd*, 1940 ITR 307.

Guaranteed interest to Railway Companies—The Bengal-Nagpur Railway Company was called upon to pay tax on the following items (a) interest debitable to the undertaking of the Secretary of State's operative capital (b) The payment to the Secretary of State in rupee currency of the amount of the guaranteed interest payable by him on the share capital of the Company found by it and made over to the Secretary of State to be held by the latter absolutely as his property and repayable only in the event mentioned in the agreement between the Secretary of State and the Bengal Nagpur Railway Company

The contention of the Crown was that the Company should be taxed on its whole earnings save such sums as may be deducted under section 9 (2) of the Income tax Act [now section 10 (2)] *Held*, that the liability to tax must be determined with reference to the special agreement between the two parties and the nature of their relation to one another and that the tax should be levied on what was retained by the Company

Per *Woodroffe J*—'In my opinion the principle applicable is that the Company should pay tax on what they get

In my opinion they are not liable in respect of sum (A) This is interest due to the Secretary of State on 15½ Million capital found by him It is true that this capital has been the means whereby profits have been earned in which the Company share But this is not the Company's property This interest is deducted before the profits in which the Company are entitled to share can be ascertained It is this share of surplus profits which is income earned by the Company and so liable to tax Sum (B) represents interest which the Company get for their three Million capital money and which has to be deducted before surplus profits can be ascertained This is deducted in order that the Secretary of State may meet his obligations to the Company in respect of the three Million Pounds they have made over to him It is stated that that money was borrowed in England and the liability is to pay interest in England and that the sum of Rs 13,07,440 is payment to the Secretary of State in rupee currency of the amount of the guaranteed interest payable by him on the share capital of the Company The guaranteed interest on the Company's share capital is payable and paid in London as in the case of a debenture obligation by the Secretary of State and is independent of the earnings of the Railway

In effect the transaction is one in which the Secretary of State pays in London certain moneys to the Company which he recoups himself in this country out of the earnings of the Railway In that view of the case I am of opinion that the Company is not liable for tax in respect of this sum", *Bengal Nagpur Railway Co v Secretary of State*, (1922) 49 Cal 815, A.I.R. 1922 Cal 503. 1 ITC 178

On the other hand, in *M & S M Railway v Commissioners of Inland Revenue*, 5 ATC 739, 12 Tax Cases 1111, a case relating to English Corporation Profits Tax, *Roulatt, J*, held that the interest guaranteed by the Government of India is a distribution of the profits earned The Madras High Court followed *Roulatt, J*, and held in *M & S M Ry v Commissioner of Income-tax*, 1940 ITR 280, that the guaranteed interest is a part of the profits and therefore taxable in British

India The same view was also taken in *Commissioner of Income tax, Bombay v B B C I R*, 1943 I T R. 578. The so-called guaranteed interest was only a dividend, which was guaranteed. The recoupment of the Secretary of State's guarantee was not in respect of the undivided proceeds of the railway but fell on the company's share of the profits. If the company had been unsuccessful the Secretary of State could not have got the recoupment beyond the company's share, i.e., if the company had no profits the Secretary of State would have simply paid the guarantee. So, the case was one of distribution of profits in recoupment of a guarantee. If the profits were insufficient, the guarantor had to make good the balance. Subsequently, the contract between the railway company and the Secretary of State was amended, the payment of guaranteed interest *inter alia* being referred to as one of the prior charges before calculating the divisible surplus and the Railway Company claimed that the guaranteed interest was consequently deductible from the profits. The claim was disallowed. The change in the contract had made no change in the substantial position and related only to the method of account keeping. The payment of guaranteed interest still remained a provisional payment, which the Secretary of State recovered out of the 'profits' made in British India, and the case was still one of distribution of profits in recoupment of a guarantor who guaranteed the profits, *Commissioner of Income-tax v M & S M Ry*, 1943 I T R. 380. The question what would happen if the profits of the company fell below the guaranteed limit was left open.

(iv) in respect of insurance against risk of damage or destruction of buildings, machinery, plant, furniture, stocks or stores, used for the purposes of the business, profession or vocation, the amount of any premium paid,

History—The words "furniture stocks or stores" were added in 1922 and the words 'profession or vocation' in 1939.

Business—Allowances in respect of insurance premia. The following Executive instructions have been issued:

Allowances in respect of insurance premia are restricted to insurance policies taken out against the risk of damage or destruction of buildings, machinery, plant, furniture, stocks or stores, used for the purposes of the particular business, profession or vocation under assessment and no allowance can be made on account of premia for other insurances. Any sums not actually expended on premia but merely set aside as a reserve for insurance cannot be allowed as a deduction.

The Act does not provide specifically for the deduction of premia on account of insurance against a loss of profit consequent on damage by fire but such premia should be allowed under section 10 (2) (xi) [now (xv)] without requiring the assessee to make a declaration in writing undertaking to declare and pay tax on any amounts received from an Insurance Company under any such policy or policies. Moneys received from an Insurance Company in respect of loss of profits caused by destruction of plant and premises by fire was held by the Privy Council in the *Fir and Cedar Lumber Case*, (101 I-J P.C. 113, 1932 A.C. 441; 147 L.T. 1) to be income and liable to tax under the British

Columbia Taxation Act, 1924, and the same principle holds good under the Indian Income tax Act 1922

Meaning of words—As to what is meant by insurance, "there is no magic in the words 'insurance' or 'guarantee' whether the transaction is the one or the other depends on the character of the contract itself—per *Romer, J* in *Sca'on v Heath* (1899) 1 Q B 782 In the present context however, insurance would include a guarantee

As regards the meaning of 'damage and destruction' see notes under section 9 (1) (iii)

As to 'buildings' see notes under section 9 (1)

Machinery—Machinery implies the application of mechanical means to the attainment of some particular end by the help of natural forces (Stroud)

'The word 'machinery' must mean something more than a collection of ordinary tools. It must mean something more than a solid structure built upon the ground whose parts either do not move at all or, if they do move, do not move the one with or upon the other in interdependent action with the object of producing a specific and definite result

Their Lordships concur with Lord Davey in thinking that there is great danger in attempting to give a definition of the word 'machinery' which will be applicable in all cases. It may be impossible to succeed in such an attempt. If their Lordships were obliged to run the hazard of the attempt they would be inclined to say that the word 'machinery' when used in ordinary language *prima facie* means some mechanical contrivances which by themselves or in combination with one or more other mechanical contrivances by the combined movement and interdependent operation of their respective parts generate power or evoke, modify, apply or direct natural forces with the object in each case of effecting so definite and specific a result. But the determination in any given case of what is or is not 'machinery' must to a large extent depend upon the special facts of that case. *Corporation of Calcutta v Cossipur Municipality* 49 Cal 190 (PC)

"A bequest of 'Plant and Goodwill' passes the house of business held at rack rent, also trade fixtures, benches, presses and implements of trade but not stock in trade or household furniture and effects of the ordinary kind, *Blake v Shaw*, 8 WR. 410 Johns 732

The Employer's Liability Act, 1880 contains no definition of 'Plant', as therein used 'but in its ordinary sense it includes whatever apparatus is used by a businessman for carrying on his business—not his stock in trade which he buys or makes for sale but all goods and chattels fixed or moveable, live or dead which he keeps for permanent employment in his business per *Lindley LJ*, in *Yarmouth v France*, 57 LJQB 17 19 QBD 647 36 WR. 281 In that case *Esher, MR.* and *Lindley, LJ* held that a Wharfinger's horse was part of his 'Plant' as of a Coal Merchant's ship *Carter v Clarke* 78 LT 76 The carcass of a house is not part of a Builder's 'Plant' *Conway v Clemence*, 80 Law Times 44 58 (1885) 2 TLR. 80 but scaffolding and ladders are *Cripps v Judge* (1884) 13 QBD 583

But (whilst recognizing *Yarmouth v France*) a Cab Proprietor's horses were held not part of his 'Plant' within section (2) Bills of Sale Act 1882 because there the context—e.g. 'Trade Machinery'

and 'Fixtures',—indicates that "Plant", as there used refers to something connected with the premises, *London and Eastern Counties Loan Co v Creasy*, (1897) 1 Q B 768, 66 L J Q B 503, 76 L.T. 612, 45 W.R. 497 (Stroud)

Qua, and by, section 104, Factory and Workshop Act 1901, "Plant" includes any gangway or ladder used by any person employed to load or unload or coal a ship'

'Plant and Machinery are two quite different things per *Kekewich, J*, in *Re Brooke*, 64 L J Ch. 27 On a contract for the sale of a Freehold Brewery which provided that its 'Fixed Plant and Machinery' should be paid for by valuation, *Kekewich, J*, held that "speaking generally, Machinery' includes everything which by its action produces or assists in production and that 'Plant' might be regarded as that without which production could not go on and included such things as, brewer's pipes, vats and the like', and that therefore a Chimney Shaft which was built just outside the boiler house but formed no part of it a double boarded partition forming a malt and grain store, and Staging erected by placing joists on the stout bearers built into the wall, were not to be included in the valuation (*Stroud*), *Re Nutley and Finn*, W.N. (94) 64

Plant—It will be seen from sub-section (5) that for the purpose of sub-section (2) 'plant' includes vehicles, books scientific apparatus and surgical equipment purchased for the purpose of the business, profession or vocation The definition extends the ordinary meaning of the word which is as follows, *viz*, a set of machinery, tools etc, necessary to conduct a mechanical business often including the buildings and grounds or in the case of a railroad the rolling stock but not including material or produce hence the permanent appliances needed for any institution as a Post Office (*Standard Dictionary*) So, the allowances under clauses (iv), (v), (vi) and (vii) are admissible in respect also of vehicles, books etc used for the purpose of the business profession or vocation

The following have been held to be 'plant'—Ships *Burnley Steamship Co v Atkin*, 3 Tax Cases 275 31 Sc L.R. 803, a hulk which had formerly been a sailing ship and was used as a floating warehouse for coal *John Hall & Co v Rickman*, (1906) 1 K.B. 311, railway engines etc, and tools, *Caledonian Railway v Banks* 1 Tax Cases 487, 18 Sc L.R. 85, and tramway rails, *L C C v Edwards*, 5 Tax Cases 383, 100 L.T. 444, 25 T.L.R. 319, but a stallion is not 'plant', *Derby, Earl of v Ajlmer*, 6 Tax Cases 665, (1915) 3 K.B. 374, nor the bed of a harbour, *Dumbarton Harbour Board v Cor*, 7 Tax Cases 147, 56 Sc L.R. 122, nor a ferro-concrete water tower, *Margreth v Lowestoft Water and Gas Co*, 19 Tax Cases 481, 14 A.T.C. 237 (K.B.D.)

In construing the word 'plant' for income tax purposes especially under the Indian Act, regard must be paid to the grouping in which the word occurs In clause (ii) of this sub-section the grouping is 'buildings, machinery, plant, furniture, stocks or stores' in clauses (v) and (vi) it is 'buildings machinery, plant or furniture' Considering this grouping it would seem that the decisions under other Acts—e.g., *Employers Liability Act*—declaring horses etc., to be 'plant' will not apply to income-tax cases In *Derby v Ajlmer* cited *supra* though it was decided that a stallion is not plant, the question whether a traction horse was 'plant' was left open but it is doubtful whether it is 'plant' Similarly elephants buffaloes and other

animals used in a business are not 'plant' for income tax purposes See clause (viii) *infra* inserted by Act III of 1928

Furniture—'It has not yet been declared what is meant by furniture'—Per Brett, M R, in *In re Parker* Ex parte *Turquand*, 14 Q B D 636

"A bequest of furniture may pass pictures (*Cremarne v Anirobus*, 5 Ridd 312) or fixtures but not a library of books *Bridgman v Dove*, 3 A I K 202, nor stock in trade *Re Presby*, 92 Law Times 391" (Stroud)

But there is nothing under the Indian Income tax Act to prevent the cost of insurance of a library of books being claimed as a deduction under section 10 (2) (xi) [now (xv)] if the library is necessary for the business

Stocks or stores—In commercial practice it is usual to refer to 'stocks' of the principal raw materials and of the finished goods and to 'stores' of incidental articles which are consumed in the course of manufacture The cotton and the semi finished and finished yarn and cloth form the 'stocks' of a cotton mill the parts of machines lubricating oil coal etc, being referred to as 'stores'

'Stocks' exclude goodwill *Chapman v Haym*, 1 Times Rep 397

The phrase comprises all such chattels as are acquired for the purpose of being sold or let to hire in a person's trade and it probably includes utensils in trade (*Seymour v Rapier*, Bunb 28.)" (Stroud.) Utensils in trade : e, implements and tools would however, in commercial practice be more often classed as 'stores' than as 'stocks'

Used for the purpose of the business—These words qualify all the words from 'buildings' to "stores" 'The business' obviously is the business under assessment A building used by the assessee as his own residence would clearly not be covered by this clause

Under executive instructions, where the owner of a business who also owns buildings houses his employees in them they are treated as being used for the purpose of the business if he charges no rent, otherwise they are dealt with under section 9

When used.—Section 3 governs the whole Act, and in section 10, where an allowance has to be made covering a longer period than a year or ascertainable only at a later period a definite proviso is inserted to meet the case [see clauses (vi) and (vii)] It is therefore obvious that the buildings, etc, should have been used for the purpose of the business during the previous year, *Radhakishen & Sons v Commissioner of Income-tax*, 3 ITC 73, *Sree Gopaljee, etc, Co v Commissioner of Income-tax, Punjab*, 5 ITC 267 A I R. 1931 Lah 376, *C P Mangotes Ore Co v Commissioner of Income tax*, 1937 ITR 734, *Bhikaji Venkatesh v Commissioner of Income-tax, C P*, 1937 ITR 626, but the buildings, etc, need not have been actually so used throughout the year 'Used' in this clause may, however, embrace passive as well as active user, machinery, which is idle, may well depreciate, particularly during the monsoon, and the ultimate test is whether, without the particular user of the asset relied upon the profits could have been made Where, therefore, the asset has to be kept in reserve ready for use at a moment's notice (especially if so kept under covenant), it is 'used' within the meaning of this clause, *Commissioner of Income tax, Bombay v V B Sathe*, 1937 ITR 621.

The above rulings apply equally to clauses (iv), (v) and (vi) Some of these conditions of admissibility being common under clauses (v), (v),

(vi) and (vii), the notes should all be read together. Note however that in clause (vi), the word *such* and not *appear* till the recent amendment of that clause in 1946.

Partially used—See sub-section (3) which governs clauses (iv) to (vii) and allows deductions on a proportionate basis.

Plant, etc. leased or let—See section 12 (3) and also notes below.

Livestock—Insurance of livestock used in business might arguably, be admissible, either as insurance of plant (which is doubtful) or as stocks—which presumably includes not only stocks of goods but both live and dead stock. In view however of the express reference to furniture which is the same as dead stock, the cost of such insurance would be more appropriately admissible under clause (xii) [now (x)]

Sums recovered on insurance policies—There is no doubt that sums recovered on insurance policies on account of loss of circulating capital *e.g.* trading stocks should be treated as revenue items and taxed, but recoveries on account of loss of fixed capital would be capital receipts just as the loss of such capital would be capital loss. The point is that it is part of the course of business of a prudent trader to insure stocks and money received from insurance companies on account of loss of stocks stands on the same footing as the sale proceeds of such stocks. *Green v. Gilester & Sons* (1929) A.C. 381. Or to put it in another way, the business of a trader is to buy and sell stocks. When stocks are sold they are converted into money. It is immaterial whether the conversion results from sales or from insurance and it is irrelevant to argue that the business of an ordinary trader is not that of insurance.

Insurance of profits—As regards insurance against loss of profits consequent on fire there is no difference between the provisions in the United Kingdom law and those in the Indian law. In either country if the cost of such insurance can be allowed at all it is only as expenditure incurred for the purpose of the business. Under the Indian law the expenditure cannot be allowed under section 10 (2) (ii) but only under section 10 (2) (xi) [now (xv)]. In *Usher's Wiltshire Brewery v. Bruce*, 6 Tax Cases 399 [1915] A.C. 133 it was held in the United Kingdom that premia paid by a Brewery in order to provide against the loss of trade occasioned by the taking away of a licence from the defaulting tenant of a tied house was a permissible deduction from the profits of the Brewery. Similar considerations will apply to premia paid to insure against loss of profits. The test is whether the expenditure is incurred for the purpose of the business. The sum recovered under an insurance policy covering profits is not a capital sum but a profit and therefore taxable as such in the year of receipt, *R v. P. C. Fir and Cedar Lumber Co.*, (1932) A.C. 441 (P.C.). Such a receipt arises from the business: it cannot be said to be a windfall and is in fact provided for by the payment of premia every year. The fact that such a receipt will not recur every year will not make it any the less a Revenue receipt. See also *Rhymney Iron & Coal Co. v. Forder* 3 Tax Cases 476 (1896) 2 Q.B. 79; *Thomas v. Richard Evans & Co.* 11 Tax Cases 790 (1927) 1 K.B. 33; *Jones v. The South West Lancashire Coal-owners' Association* 141 11 Tax Cases 790 (1927) A.C. 827 and *Thomas Merfyll Colliery Co. v. Davies*, 17 Tax Cases 519 (1933) 1 K.B. 341 [altered under clause (xv) 'Trade associations'] In the last case it has been suggested that if the premium which is paid against loss of profits is not allowed the immunity when recovered could not be taxed as profits.

The executive instructions in the Income tax Manual already referred to follow *R v B C Fair Cedar & Lumber Co*

Insurance of Lives of Employees—On the same grounds as premia paid to insure against loss of profits a premium paid to insure the life of an employee who personally influences the business and whose death will cause a diminution of profits can be claimed as a deduction under section 10 (2) (xv) and the amount recovered under the insurance policy treated as profits in the year of receipt. A lump sum received by an employer from an insurance company in respect of an employee's liability policy with reference to the death of an employee is as much part of the employer's trading receipt as weekly receipts in respect of temporary disablement. *Murphy v Thomas Gray & Co*, 19 ATC K.B. see also in respect of insurance on the life of a director of a company *Inland Revenue v Williams Executors* 1943 ITR 84 (Sup) (CA) confirmed by the House of Lords. Per L. C. Simon the question whether a particular item is to be regarded for income tax and surtax as capital or income may involve questions both of law and of fact. But in the present case the Commissioner's determination does not disclose any conclusion of fact which would justify the view in law that the policy moneys were received by the company otherwise than as a receipt of income. Premia paid for the insurance of lives of employees for their benefit and not for that of the employer will stand on the same footing as a bonus or salary.

Insurance against accidents to employees—Premia paid for such insurances as well as insurances against compensation under the Workmen's Compensation Act will all fall under section 10 (2) (xi) and not under this clause.

Machinery etc.—Leased—An English company had some foreign cold storage business which it carried on either directly or through subsidiary companies. The foreign business was transferred to an American company for a term of years in consideration of certain annual payments to the subsidiary companies whose shares the parent English company continued to own receiving dividends therefrom. The American company also guaranteed sums necessary to meet the fixed charges of the English company and maintain its dividends. The premises, machinery and plant of the foreign business remained the property of the English company but they were placed under the sole control of and were used by, the American company for the purpose of carrying on the business as it thought fit. They were not demised or leased to the American company and no rent was payable for their use but the American company was to keep them in proper repair and working order save as regards all ordinary wear and tear and damage by fire. The English company claimed that in taxing its profits deductions should be allowed for the fire insurance premiums paid by it in respect of the premises and for wear and tear of the machinery and plant of the transferred business. *Held* that the fire insurance premiums did not represent money wholly and exclusively laid out or expended for the purposes of the trade of the English company, that the machinery and plant in question was not used for those purposes and that the deductions claimed were accordingly inadmissible.

Per *Pollock M R*— the intention of the Legislature was not to make a broad general rule that whatever a subject likes to expend in his business could be deducted but only such sums were to be allowed to which the character could be assigned that they had

been wholly and exclusively laid out for the purposes of the subject's business. The principle which is invoked is the principle, as I say of the *Usher's Wiltshire Brewery Company, Ltd*, 6 Tax Cases 399 (1915) A C 433, and I think it is important that one should just see what rule was intended to be laid down in that case. Up to that time the ruling decision was the one in *Brickwood & Co v Reynolds*, (1898) 1 Q B 95, 3 Tax Cases 600. The decision there was that the repairs which were executed by brewers to their tied houses in which their beer was sold could not be allowed as a deduction from the profits and gains of their trade in arriving at the true figure to be returned for the purposes of Income-tax and what Lord Justice Smith said there was this. It is true they incurred the expense upon these tied houses and it is true in one sense they are useful to the trade in respect of which the return to Income-tax is made but he said, by doing the repairs to the tied houses they keep up and foster the trade of the publican which is a wholly independent trade wholly independent of the brewers' trade, and he adds at the end of his judgment the expense was incurred for many other things one being the purposes of the trade of the publicans who occupy these houses. *Brickwood v Reynolds* therefore took the view that this sort of expenditure inasmuch as it was expenditure which incurred or might be considered to inure to the benefit of somebody else's trade and not the trade of the subject making the return inasmuch as that was the case, no deduction could be claimed successfully in respect of money expended for that sort of trade, a trade which did not immediately concern the subject making the return.

The House of Lords in *Usher's Wiltshire Brewery Company, Ltd*, overruled the case of *Brickwood v Reynolds*, and they said that the deduction may be allowed in cases where the payment or expenditure is incurred for the purposes of the trade of the subject that has made the return and it does not matter that this payment may inure to the benefit of somebody else to the benefit of a third party, if it primarily inures and was incurred and laid out for the purposes of the trade of the subject making the return, then it is within the clause relating to deduction.

I think that it would be a very serious mistake and very misleading if the principle of the *Usher's Wiltshire Brewery* case was to be supposed to be this: if you can find that the expenditure has been made on commercial lines advantageously for the purpose of the business, if you are able to say that then you are entitled to apply the rule in the *Usher's Wiltshire Brewery* case and to secure any deduction. I do not think that the rule was intended to be laid down so widely, you would have to scrutinise the expenditure very narrowly to find out whether it was laid out for the purpose of the subject's trade and then ask the second question—was it laid out wholly for the subject's trade and exclusively for his trade? *Union Cold Storage Company, Ltd v Jonet*, 8 Tax Cases 725 738 120 L.T. 512.

If letting machinery buildings etc. on hire is a 'business' as defined in section 2 (4) the allowances under clauses (iv) to (xii) will apply; otherwise, the case will fall under sub-section (3) of section 12. See also notes under the latter section.

(v) in respect of current repairs to such buildings, machinery, plant, or furniture, the amount paid on account thereof,

Previous law—The word 'furniture' was added in 1922

Executive instructions—The phrase "current repairs" includes minor replacements of parts provided that such replacements are not of such an extensive nature as to change the identity of the asset in question. Expenditure on any asset that would have increased its capital value if it had been done when the asset was new must be regarded as capital expenditure.

Repairs—This is a word with an indefinite connotation. It ordinarily means to make good defects including renewal where that is necessary. It will include patching where patching is reasonably practicable and 'where it is not you must put in a new piece', per *Lord Blackburn Inglis v Butrey*, 3 A C 552. But 'repairs' do not connote a total re-construction. *R v Lpsom*, 76 J P 389.

'An agreement to keep 'in repair' a house out of repair means that the contracting party is first of all to put it in good repair having regard to its age and its class—a house in Spital fields would not be repaired in the same style as one in Grosvenor Square—and (semble) you are to take into consideration the condition of the premises at the time of the contract', *Stanley v Towgood*, 6 L J P 129 (Stroud.)

'Repair and Renew are not words expressive of a clear contrast. 'Repair' is restoration by renewal or replacement of subsidiary parts of a whole. 'Renewal' as distinguished from 'repair' is re construction of the entirety meaning by the 'entirety' not necessarily the whole but substantially the whole subject matter. In each case therefore you have to consider the entirety. Thus you repair a roof by putting new tiles in place of old, but if you replace the roof entirely you are having a new one, *Lurcott v Wakeley and Wheeler*, (1911) 1 KB 905, *O Grady v Markham Main Colliery Ltd* 17 Tax Cases 93.

The replacement of a water reservoir by a better and bigger one is not even partly of the nature of renewal, it is not like the replacement of lighter by heavier rails and is really entirely of a capital nature, *Margrett v Loucastoft Water and Gas Co*, 19 Tax Cases 481.

Current—The word 'current' hardly adds to the connotation of the word 'repairs' as this word can never include total construction or re-construction on such a large scale as to make it 'capital' expenditure.

Repairs—Question of fact—The question whether expenditure in a business—say, a shipowners—is current as opposed to capital must essentially be one of degree and therefore one of fact. To elucidate the problem a number of outside considerations may have to be taken into account in addition to the materials provided by the assessee e.g., local conditions, the ordinary life of the type of boats used by the assessee and the normal cost of keeping them in serviceable condition. The assessee, however cannot neglect to provide the Income tax Officer with the information that is necessary and then take advantage of his own negligence to plead that the Income tax Officer's conclusions are based on insufficient evidence, *Ramanatha Reddi v Commissioner of Income tax*, 6 Rang 175 3 I T C. 10. To the extent that accountancy and business usage have a bearing the question whether expenditure is on 'repairs' or on 'renewals' is one of fact. *Passett and Johnston v Commissioners of Inland Revenue*, 4 A T C. 89. Heavy repairs to a newly bought asset are *prima facie* capital but not

necessarily, for example, if the assessee can show that the purchase price would have been the same even if the vendor had made the repairs, the cost of repairs might be revenue expenditure. See also *Rhodesia Railways v. Income-tax Collector*, 1933 ITR 227 (PC) referred to under clause (iv).

Such buildings, etc.—That is, building, etc., used for the purpose of the business during the previous year. As to this qualification see notes under section 10 (2) (iv).

Plant—See sub-section (5) extending the meaning of 'plant' to books, etc., and notes under clause (iv).

(vi) in respect of depreciation of such buildings, machinery, plant, or furniture being the property of the assessee, a sum equivalent, where the assets are ships other than ships ordinarily plying on inland waters to such percentage on the original cost as may in any case or class of cases be prescribed and in any other case, to such percentage on the written down value thereof as may in any case or class of cases be prescribed; and where the buildings have been newly erected, or the machinery or plant being new has been installed, after the 31st day of March 1945, a further sum (which shall however not be deductible in determining the written down value for the purposes of this clause) in respect of the year of erection or installation equivalent—

(a) in the case of buildings the erection of which is begun and completed between the 1st day of April 1946 and the 31st day of March 1948 (both days inclusive), to fifteen per cent of the cost thereof to the assessee;

(b) in the case of other buildings, to ten per cent. of the cost thereof to the assessee,

(c) in the case of machinery or plant, to twenty per cent. of the cost thereof to the assessee.

Provided that—

(a) the prescribed particulars have been duly furnished;

(b) where full effect cannot be given to any such allowance in any year not being a year which ended prior to the 1st day of April, 1939, owing to there being no profits or gains chargeable for that year, or owing to the profits or gains chargeable being less than the allowance, then, subject to the provisions of clause (a) of the proviso to sub-section (2) of section 24, the allowance or part of the allowance to which effect has not been given, as the case may be, shall be added to the amount of the allowance for depreciation for the following year and deemed to be part of that allowance, or if there is no such allowance for

that year, be deemed to be the allowance for that year, and so on for succeeding years, and

(c) the aggregate of all such allowances made under this Act or any Act repealed hereby, or under the Indian Income-tax Act, 1886, shall, in no case, exceed the original cost to the assessee of the buildings machinery, plant, or furniture as the case may be,

Written down value—See sub section (5), 'written down value' means—

(a) in the case of assets acquired in the previous year the actual cost to the assessee

(b) in the case of assets acquired before the previous year the actual cost to the assessee less all depreciation actually allowed to him under this section or any Act repealed thereby or under executive orders issued when the Indian Income-tax Act, 1886 was in force

Provided that in the case of a building previously the property of the assessee and brought into use for the purposes of the business, profession or vocation after the 28th day of February, 1946 'written down value' means the actual cost to the assessee reduced by an amount equal to the depreciation calculated at the rate in force on that date, that would have been allowable had the building been used for the aforesaid purposes since the date of its acquisition by the assessee and had the provisions of the Act relating to the allowance for depreciation been in force on and from the date of acquisition

Provided, further that where the provisions of the proviso to sub section (2) of section 26 are applicable the actual cost to the assessee referred to in clauses (a) and (b) shall be the actual cost to the person succeeded in the business, profession or vocation

The special initial allowances of 10, 15 and 20 per cent in respect of assets created after 31st March 1945 are not it should be noted, to be deducted from the costs in determining the written down values

Previous law—The word 'furniture' was added in 1922 Under the 1918 Act the rates of depreciation were maxima, now they are fixed rates Also under the 1918 Act no depreciation could be claimed unless it had been debited in the accounts Further that Act did not clearly permit unabsorbed depreciation being carried forward indefinitely until adjusted as the present enactment does

Recent changes.—The most important change made in 1939 was the adoption of the written down instead of the original cost ('straight line') basis *except* as regards ocean going ships, the other changes embodied either in this clause or in sub section (5) are more or less consequential The definition of 'written down value' in assets coming on from before 1939 was again changed in 1941, the basis being one of the depreciation actually allowed in the past instead of what was allowable The position regarding cases of successors in business was also amended and clarified in 1939 Proviso (c) is probably intended to apply only to ocean going ships which are still given the allowance on the original cost but, as a result of the omission to amend it consequently on the grant of the special initial allowances in respect of assets set up after March, 1945 the proviso [clause (c)] would seem to nullify, at a later stage, the concession of not deducting the allowance in determining written down value

Special initial allowances—It will be noted that these allowances relate only to assets set up after 31st March, 1945. The allowance for buildings is 10 per cent and for machinery and plant 20 per cent but in the case of buildings begun and completed between 1st April 1946 and 31st March 1948 the rate is 15 per cent.

Unabsorbed depreciation—Proviso (b) regulates unabsorbed depreciation in respect of periods after 1st April, 1939. As regards previous periods sub-section (5) provided that

(i) the written down value was to be the actual cost to the assessee, less for each financial year *since acquisition*, the amount of depreciation applicable (whether allowed or not) at the rates in force each year from 1st April, 1922 and at the rates in force on that date in respect of still earlier years

(ii) but that if there was any unabsorbed depreciation in respect of any of these years that amount shall not be taken off the written down value. These provisions were changed in 1941 and what is to be deducted from the cost is the sum of the allowances received whether under this Act or before.

Carry forward of losses—Where an assessee is entitled under section 24 to carry forward a loss and also entitled under section 10 (2) (vi) to carry forward unabsorbed depreciation effect shall be given first to section 24 *see* proviso (b) [not (a) as inadvertently referred in clause (b) of proviso to section 10 (2) (vi)]. This point is of importance because while a loss can be carried forward only for six years there is no limit of time for unabsorbed depreciation.

Actually allowed—It must be assumed that in assessments made by estimate under section 23 (4) or even under section 23 (3) on flat rates and so forth that all admissible allowances have been given by the Income tax Officer. The filing of the depreciation statement is only a matter of convenience and its absence does not mean that no allowance has been given, *Government Mail Motor Co v Commissioner of Income-tax Punjab* 6 ITC 120 AIR 1932 Lah. 396.

Succession (first proviso)—There had been difference of opinion under the old law (*see* below) as to whether 'original cost to the assessee' referred to the predecessor or to the successor. The Patna, Bombay and Rangoon High Courts holding the latter and the Madras High Court the former. The Privy Council overruled the Madras view but the Bombay High Court (with a dissenting judgment) did not extend the Privy Council ruling to the first assessment on a successor under section 26 (2) (as it stood before 1st April 1939) in respect of which he merely stepped, so to speak into the shoes of the predecessor. This proviso makes an exception to the general rule the latter merely following the decision of the Privy Council.

Rates of depreciation—*See* Rule 8 which sets out the different rates to be allowed for the different kinds of assets.

The rates are fixed rates and the Income tax authorities have no discretion to alter them. The rates are also standard rates for the whole of India.

The Income tax Officer will add back to the profits the amount if any written off by the assessee on account of depreciation and allow him instead this allowance as worked out under Rule 8.

Actual cost clearly includes cost of setting up, freight, etc. and all preliminary expenditure till the asset is in working order

The fact that for some reason or other the assessee is reimbursed a part of the cost of the plant or machinery will not reduce the cost for the purpose of contributing depreciation *Corporation of Birmingham v Barnes*, 19 Tax Cas 195 1935 AFR 92

Wasting assets—Depreciation is allowed only for these four items of wasting assets viz buildings machinery plant and furniture, it is not admissible in respect of other wasting assets e.g., mines patents and leases

Railways and Tramways are allowed under a notification under section 60 to claim either actual cost of renewals or the depreciation allowance, but the option once exercised cannot be changed in a later year except with the consent of the Commissioner

Furniture, tools, etc—This clause provides for the depreciation of furniture etc. however petty its cost, and as a matter of convenience both to the assessee and to the Income tax authorities such petty items are often kept out of the depreciation account and the cost of replacement allowed instead

Rule 8—Depreciation is allowable on the cost of installing i.e., laying foundations levelling etc. as also on freight to site and similar items that are part of the cost of machinery or plant e.g. pay of engineers, labour etc. the cost would also include the cost of experimental tests Where railways are allowed the cost of renewals no depreciation allowance will be given

Business newly taxed—Where a business of such a nature that the profits derived from it were not previously liable to tax owing to a special exemption conferred either by statute or by notification or rule having the force of law (example are Shipping Companies and Indigo Companies) is taxed for the first time, the assessee is not entitled to claim in the first year of taxation under proviso (b) to section 10 (2) (vi) accumulated depreciation allowances for all the years during which the profits of the business were not liable to tax. That proviso clearly contemplates liability to tax in preceding years. But in such cases depreciation must be allowed year by year for the full period whatever it may be notwithstanding the fact that the value of the assets when the assessee is first taxed may be lower than the original cost

Shares and Securities—This clause does not apply to depreciation of shares or securities held by an assessee as part of his or his capital. If it is part of his investments it will be fixed capital and any appreciation or depreciation thereof will not affect his Revenue account on the other hand if it is part of his circulating capital it is part of his stock in trade and the gain by appreciation or loss by depreciation will enter his Revenue account as profit or loss. The manner in which and the extent to which such appreciation or depreciation will enter his Revenue account will depend partly on his method of accounting including that of valuation of stock in trade. See rulings referred to below, also notes under section 13

Prescribed particulars—These are set out in Part V of the form of Return of Total Income—See Rule 19 (formerly in a separate statement under Rule 9)

Onus of proof.—Unless the prescribed particulars (Part V of form of return under Rule 19) have been furnished to the Income-tax Officer no depreciation can be claimed, *Pr Al M Muthukaruppan Chettiar v Commissioner of Income tax, Madras*, 1939 ITR 76. The onus of proof as to the correctness of the particulars furnished will, as in almost everything else, rest upon the assessee. Depreciation allowances being on a percentage basis, the assessee should furnish the prime cost of each item, *Ramanatha Reddiar v Commissioner of Income-tax*, 6 Rang 175, 3 ITC 10 AIR 1928 Rang 152. On the other hand a claim for the allowance cannot be summarily rejected. Even if the evidence produced is inadequate the Income tax Officer should arrive at some finding as to the original cost, and for this purpose he should give the assessee a further opportunity if necessary, *Bisheshwar Prasad v Commissioner of Income-tax, U.P.*, 7 ITC 74. Where the original cost can be ascertained in estimated figure cannot be substituted for it. Under the present law, however the original cost will be required only in certain cases or occasions.

The original cost is a question of fact and the mere production of documentary evidence alleging a contract is not conclusive. In *Commissioner of Income tax, Madras v Harleys, Ltd*, 1940 ITR 307, two brothers sold a gunning business of theirs to a private company, belonging mostly to them. The assets stood in the books at a value (gradually written down in the usual manner) of about rupees five lakhs but the private company took them over for Rupees fifteen lakhs and paid for them not in cash but by shares in that private company for Rs 5 lakhs and by debentures for Rs 10 lakhs (the latter being held by the High Court to be colourable and illusory). The Income tax authorities declined to allow depreciation on the inflated figures of Rs. 15 lakhs and the High Court refused to interfere.

An arrangement entered into between the assessee and the Income tax Officer as to original cost in the absence of adequate evidence does not estop the assessee from getting the figure altered if he can produce adequate evidence, *Allahabad Milling, Co v Commissioner of Income tax U.P.*, 6 ITC 286 (All). Where brothers partition an asset on a mutually agreed bona fide value, the original cost is not necessarily the mutually agreed value but may be the previous original cost. This was a peculiar case, and what it really did was to affirm the right of the Income tax authorities to go behind the apparent facts. *Commissioner of Income-tax, C.P v Seth Mathuradas Mehta*, 1939 ITR 160. Where property passes by bequest or inheritance, the real cost at the time of such passing, less the expenses in completing the title, is the original cost to the successor, *Commissioner of Income tax, Burma v Solomon and Sons*, 1933 ITR 324.

Depreciation—Meaning of.—There is no definition of 'depreciation'. The word is used in practice by Accountants in varying senses, often including even obsolescence. Modern usage, however, confines the word to the sense of wear and tear, and even of this only that portion which cannot be made good by repairs. That is to say, depreciation represents the insidious and irreparable decay of the plant or machinery, obsolescence being used to signify the unsuitability of a machine or plant on account of its getting out of date while still fit for use.

In view of the special provisions to cover obsolescence in clause (ii) 'depreciation' as used in clause (ii) clearly excludes it. The expanded definition of 'plant' in sub-section (5) covers apparatus, books, etc., used in a profession.

by mere implication to withdraw any part of the main provision, *West Derby Union v Metropolitan Life Assurance Society*, (1897) A C 647. The proviso in section 10 (2) (vi), therefore, gives only an additional alternative to the assessee and does not take away his right of deducting the depreciation even though such deduction will merely swell the loss under the business. Further according to the construction put on the words 'any business' in section 10 (1) in *Commissioner of Income tax Madras v M Ar Arunachalam Chettiar*, 1 ITC 278; 47 Mad. 660, 46 M.L.J. 66, all the businesses of the assessee taken together should be taken as a single unit for the purpose of applying the provisions of section 10. The Punjab High Court went further and decided in *Karam Ilahi Muhammad Shafi v Chief Commissioner of Income tax Delhi*, 3 ITC 456, A.I.R. 1929 Lah. 556, that unabsorbed depreciation can be set off under section 24 against profits under other heads of income.

Under section 24 as it stands to day the net loss of an unregistered firm is carried forward while that of a registered firm is apportioned among the partners, who have the right to carry forward the losses. So far as unabsorbed depreciation is concerned in the case of an unregistered firm only the firm as such and not the partners can carry it forward, while in the case of a registered firm, its net loss after allowance for all set-off, is apportioned among its partners, who alone have thereafter the right to carry forward the loss. But in all cases where both loss and unabsorbed depreciation are carried forward effect has to be given to the wiping out of the loss first because it can be carried forward only for six years while the other can be carried forward until wiped out.

Profits earned partly outside British India—Depreciation—How computed—Cases of assessee with profits accruing partly in British India and partly outside, when the foreign profits are not taxable under the Indian law. If the assessee furnishes annual accounts for the whole business, the second method of rule 33 could be applied. The 'world profits' should evidently be calculated for the business under the Indian law, i.e., deductions not permitted in India but permitted in other countries should be added back and deductions admissible in India allowed. On this 'world-profits' depreciation should be allowed according to the Indian law, e.g., allowance being made for unabsorbed depreciation of previous years, etc., and of the net income, the fraction $\frac{\text{Total receipts}}{\text{Total receipts}}$

should be taken as the net taxable income in British India (without, of course a further allowance for depreciation unabsorbed or otherwise). The same arrangement also applies to obsolescence. If shipping companies keep accounts not by the year but by 'trips', and the trade is entirely in Indian waters, the problem is simple. Otherwise some equitable method of computation has to be followed, the law not making any explicit provisions as to the computation see section 10 (3) allowing a proportionate allowance in certain cases.

Bank—Securities held by—Depreciation of—A banking concern claimed in computing its profits to deduct the amount of depreciation of war bonds and securities belonging to it arrived at by comparing the market rates at the time of closing the accounts with the original price paid for the bonds. Held, that the deduction was inadmissible.

Per *Macleod, C.J.*—From the gross income only certain debits for depreciation are to be allowed, and this debit asked for by the Bank not

being mentioned therein cannot be allowed. I think this was the obvious intention of the Legislature, since, while depreciation of machinery, plant and buildings can easily be calculated as provided in the Act, it would be a very different matter to have to enter into such calculations with regard to assets other than these. But this much is clear that if the profits of a business are to be calculated according to the legal definition of profits that method of calculation must be continued from year to year, and an assessee would not be allowed to write down his assets in a year when market values had declined without writing them up when values had increased. *In re Tata Industrial Bank*, 1 ITC 152, 46 Bom 567.

A bank claimed to deduct the depreciation in certain securities held by it on the ground that the securities represented money lent to Government just like money lent to the bank's customers. As the bank held these securities not with the object of dealing with them as stock in trade from day to day in the ordinary course of business but as an emergency reserve in lieu of cash it was held that the investments were part of the fixed Capital as distinguished from the floating Capital of the bank and that therefore the deduction on account of depreciation was inadmissible. *Punjab National Bank v Emperor*, 2 ITC 184, 7 Lah 227 AIR, 1926 Lah 373. This does not, however, mean that the securities held by a Bank are always of the nature of fixed capital see *In re Amritsar Produce Exchange, Ltd* 1937 ITR 307 and notes under section (3) as to 'Capital and Income'.

A company is not ordinarily entitled to any allowance or deduction on account of capital lost by depreciation of its investments. *Irish Catholic Church Property Insurance Co v Commissioners of Inland Revenue*, (1918) 2 IR R. 510 12 Tax Cases 13.

In *Scottish Investment Trust Co v Forbes*, 3 Tax Cases 231, 31 Sc L R 219, it was held that the net profit made by an investment trust company during the year by realising investments at higher prices than they were bought for, should be taxed even though in the books this profit had been set-off against the depreciation of other securities which the company possessed.

In all such cases if the business of the Bank or Company is to trade or deal in shares or securities such depreciation would be automatically allowed inasmuch as the shares or securities would be treated as stock in trade and valued at cost price or market price whichever was lower.

Machinery let—Depreciation on—It is a condition under this clause that the machinery, etc. should be the property of the assessee and used for the purpose of the business under assessment. In *Commissioner of Income tax v Mangalagiri Sri Umamaheswara Gin and Rice Factory*, 2 ITC 251 51 MLJ 360, AIR 1926 Mad 1032, the assessee, who were a limited company elected not to work their mill but to let it out to other persons who worked it. Held, by the Madras High Court that the assessee used the factory for the purpose of the business—not of working it but of leasing it—and that deduction for depreciation was admissible. The Articles of Association contemplated the mill being let out if the company did not want to work the mill and this seems to have weighed with the Court.

Following the above the Calcutta High Court have held that leasing out a jute press can be a business and that the lessor can claim depreciation allowance in respect of the plant so leased. *In re Sadhucharan Roy Chowdhry*, 1935 ITR 114. The hirer of plant etc. may be allowed the cost

the sums allowed in respect of repair, and renewals having been sufficient to meet the loss by wear and tear. They also refused to grant any allowance under the section for depreciation of new plant which had not yet been in need of repair. The decision of the Commissioners was confirmed.

Per Lord Gifford—The Company cannot get deduction for deterioration twice over first by deducting the actual expense of repair and renewal and then by deducting an additional estimate for the same thing. Nor will it do so the Railway Company urge to make a distinction between old and new plant and to deal with the old plant in one way and with the new in another. I think the same principle must be applied to both. *Caledonian Railway Company v. Banks*, 1 Tax Cases 487 18 Sc 1 R. 85.

In this case it was obviously open to the Crown to have disallowed the deduction on account of renewals and allowed a deduction for wear and tear but the Revenue evidently as a matter of convenience both to the assessee and to the Revenue allowed the cost of renewals as a deduction.

The London County Council acquired some horse tramways and reconstructed them for electric traffic. At the time of reconstruction only a part of the track was completely worn out the average unexhausted life of the horse rails replaced being eight years. Under an arrangement agreed to by the Crown and the Council it had been the practice to allow as a deduction from profits the cost of the actual renewals in each year. The Council claimed that the deduction under the practice should not be restricted to the cost of renewal of the rails wholly exhausted (as conceded by the Crown) but should include an allowance for the partial exhaustion of the remainder of the track which had been reconstructed. Failing this they asked that the assessment should be amended by allowing the depreciation during the year. *Held* that no question of law was involved that accepting the practice the Council were not entitled to more than an allowance for renewal of the lines which had been completely worn out and that they were not entitled to have the case reheard on a different principle. *London County Council v. Edwards* 5 Tax Cases 383, 25 T.L.R. 319.

See also *Rhodesia Railways v. Income Tax Collector* 1933 I.T.R. 227 (P.C.) referred to under clause (xx) (Accumulated Repairs).

Live stock—*Per Roulatt J*—Now those words authorise such deduction as the Commissioners may think just and reasonable as representing the diminished value by reason of wear and tear during the year of any machinery or plant. I do not know whether a horse used for traction comes within that or whether it does not but I am clearly of opinion that the diminished value of a breeding animal merely due to the fact that having lived a year it is a year nearer its end is not within this section. You need not take only the case of an animal you may take the case of the value of a prolific tree. You have here an article which you are not wearing out by use. You have got an article whether it be an animal or a vegetable article the life of which is only a limited term of years. As the years go on you take the produce and reproduction of the animal or the tree but when the years come to an end the animal or the tree or whatever it may be dies or is killed because it is no longer worth keeping. The diminished value of an animal or tree by the efflux of time is not diminished value.

by reason of wear and tear it is simply diminished value because you have invested your money in a source of production which is a wasting source of production *Derby Earl of v Asher* 6 Tax Cas 665 (1915) 3 K.B 374

The Indian law see clause (vii) below specifically allows for the cost of replaced dead and discarded livestock used in the business

(vii) in respect of any such building, machinery or plant which has been sold or discarded or demolished or destroyed, the amount by which the written down value thereof exceeds the amount for which the building machinery or plant as the case may be is actually sold or its scrap value

Provided that such amount is actually written off in the books of the assessee

Provided further that where the amount for which any such building machinery or plant is sold exceeds the written down value so much of the excess as does not exceed the difference between the original cost and the written down value shall be deemed to be profits of the previous year in which the sale took place

Provided further that where any insurance salvage or compensation moneys are received in respect of any such building machinery or plant which has been discarded or demolished or destroyed and the amount of such moneys does not exceed the written down value the amount allowable under this clause shall be the amount if any by which the difference between the written down value and the scrap value exceeds the amount of such moneys

Provided further that where any insurance salvage or compensation moneys are received in respect of any such building machinery or plant as aforesaid and the amount of such moneys exceeds the difference between the written down value and the scrap value no amount shall be allowable under this clause and so much of the excess as does not exceed the difference between the original cost and the written down value less the scrap value shall be deemed to be profits of the previous year in which such moneys were received

Provided further that for the purposes of this clause the original cost of a building the written down value of which is determined in accordance with the first proviso to sub-section (5) shall be deemed to be the written down value so determined as

at the date of its being brought into use for the purposes of the business, profession or vocation

Recent Changes—Three important changes were made in 1939

(i) The condition of obsolescence was given up, but

(ii) the loss should be actually written off by the assessee and

(iii) excess sale proceeds will be deemed to be income when such excess arises

In 1946 the concession was extended to buildings, and also so as to cover in all cases loss through demolition or destruction. Furthermore, the excess of sale proceeds over the original cost was exempted from tax as a capital receipt. Provisos were also added to ensure that insurance and other moneys for loss of machinery, etc., were deducted from the admissible allowance.

The rulings both in the United Kingdom and in India as to what constitutes obsolescence are of no interest now.

Any machinery or plant—Till 1946, the word 'such' did not find a place in this clause in the beginning words, so the questions that arise about user during the year in respect of clauses (iv) to (vi) did not arise under this clause. But any claim under any of these clauses can arise only in respect of a continuing business and not in respect of one which is sold as a whole or wound up. Similarly profits on the sale of machinery or plant in such circumstances could not be taxed under the proviso.

Buildings Furniture, etc—Note that neither the old nor the new clause (before 1946) applies to buildings or furniture whereas clauses (iv) to (vi) (both old and new) so apply. See also *Rao Bahadur Laxminarayan v Commissioner of Income tax, UP*, 3 ITC 269. In 1946 the clause was extended to buildings.

History—The pre-1939 law is of little interest now. *Secretary Board of Revenue, Madras v S R M A R Ramanathan Chettiar*, 1 ITC 244, decided under the old law is of interest only in that it held that as the statute was punctuated, it was open to it to take punctuation marks into account, and that the absence of a comma gave the clue to the correct interpretation.

Original cost—Succession to business—The original cost to the assessee for the purpose of this clause would apparently be the same as for the purpose of clause (vi). See notes under that clause as regards the difference of opinion on the subject.

Second proviso—This proviso as amended in 1946 results in the excess of the sale proceeds over the original cost being free from tax, but the excess up to this limit and over the written down value is taxable as a receipt.

Third and fourth provisos—These deal with cases other than sale. In these cases the estimated scrap value of the asset has to be taken into account and the difference between the written down value and the scrap value has to be considered in making the allowance. If the insurance etc. moneys do not exceed the written down value allowance is given of the written down value minus the scrap value minus the insurance moneys. In the converse case, no allowance is given and the amount received minus the written down value plus the scrap value is taxed as a receipt in the year in which the money is received.

Fifth proviso—This fills a lacuna and withdraws an unintended benefit. It has to be read with the first proviso to sub-section (3) which was inserted simultaneously. In the absence of these two provisos obsolescence allowance would be allowed on the basis of an original cost relating to a time when the building was not used for the business and higher than its value when it first came to be used for the business.

Saleable but not sold—When claim arises—In respect of machinery and plant discarded but not sold the claim for obsolescence (now for write-off) even if not obsolescent can be allowed only in the accounting year in which the machinery or plant is discarded. *Radha Kishen & Sons v. Commissioner of Income tax Punjab*, 3 ITC 73. If the discarding and sale do not take place in the same accounting year there will be only one allowance viz. in the year of discarding and at the difference between the written down value and the estimated scrap value and there will be no further adjustment in a later year when the machinery etc. may be sold either by way of further allowance because it was sold for less than estimated scrap value or by way of addition to profit because the machinery etc. fetched more than scrap value. An addition to profit will be made under the second proviso only if the selling price exceeds the written-down value which is an entirely different thing from scrap value.

(viii) in respect of animals which have been used for the purposes of the business, profession or vocation otherwise than as stock in trade and have died or become permanently useless for such purposes the difference between the original cost to the assessee of the animals and the amount if any realised in respect of the carcasses or animals,

History—The clause was inserted by Act III of 1928. Draught animals and other live-stock are not plant see *Derby v. Aylmer* 6 Tax Cases 655 (1915) 3 K.B. 374 under section 10 (2) (vi) but they are analogous to plant and it was therefore thought desirable to give some concession in respect of them. The allowance is independent of replacement. Note the word realised, not realised or realisable.

The business etc. referred to is the business the income of which is under assessment. Accordingly where a dairy business had been closed in 1930 and the live stock sold in 1932 and this loss was claimed in 1933-34 in an assessment of income from brick kilns and property the claim was disallowed. *In re Ganeshilal Bhattarala* (1938) I.T.R. 489 (All.)

(ix) any sums paid on account of land revenue local rates or municipal taxes in respect of such part of the premises as is used for the purposes of the business, profession or vocation,

Allowance on account of rates or taxes—

The allowance under this clause covers only the land revenue and local rates or municipal taxes paid in respect of the portion of the premises used for the purposes of the business. Any other local rate or tax which is payable irrespective of whether profits are made or not can be allowed only under clause (xv) if it is not prohibited by sub-section (4).

Previous law—Under the 1918 Act the whole tax was deductible even if only a part of the premises was used for the business. A proviso to clause (ix) [corresponding to present clause (xv)] of this sub-section inserted by Act III of 1928 prohibited the allowance of local rates on

profits. The substance of this proviso was transferred in 1939 to sub section (4).

Cesses based on Income—In *In re Raja Jyoti Prasad Singh Deo*, 1 ITC 103 the Patna High Court held that road, public works and similar cesses paid on income from royalties are not admissible deductions under section 12 the relevant condition in which was then identical with and is now similar, to the corresponding condition in section 10. See clause (ix) of sub section (2). The principle of the above decision was reaffirmed in *Commissioner of Income tax v Shree Prasad Singh* 2 ITC 57, 4 Pat 752 AIR 1926 Pat 109 by the same Court. In *Isabella Coal Co v Commissioner of Income tax* 2 ITC 87 53 Cal 76 AIR 1926 Cal 396 however Calcutta High Court ruled that a cess paid in respect of a colliery to a local authority on the basis of the average income of preceding years is an admissible deduction under this clause because the cess was paid in respect of the premises. A proviso to old clause (ix) was introduced in 1928 in order to counteract this ruling and this proviso, now embodied in sub section (4) overrides both clause (ix) and clause (xv) of sub section (2).

But cesses which have to be paid on output or despatches, whether profits are made or not are an admissible deduction. In *In re The K M Selected Coal Company*, 1 ITC 281—a case under section 10 (2) it was held,

that such cesses based on output and despatches—are not rates or taxes upon the premises of the business within the meaning of clause (2) (viii) [now clause (ix)] but that such expenses can be fairly said to come within the meaning of clause (2) (ix) [now clause (xv)] i.e. expenditure incurred solely for the purpose of earning the profits or gains.

In *Commissioner of Income tax, Bengal v Gurupada Datta* 1943 ITR 499 confirmed by the Privy Council 1946 ITR 100 it was held that the rates imposed on business premises within village unions under the Bengal Village Self Government Act are an allowable deduction not being rates based on profits but on the circumstances and property of the assessee within the union where the rate relates only partially to the premises the rate would have to be apportioned.

See also *Howrah Amta Railway v Commissioner of Income tax*, 2 ITC 509 AIR 1928 Cal 579 referred to under section 10 (2) (i) as to share of surplus profits in which such share was unsuccessfully claimed to be a local rate.

Owner's taxes—In *Inland Revenue v Scottish Central Electric Power Co*, 15 Tax Cas 761 it was held (by the House of Lords) that owner's rates paid *qua* owner and not *qua* trader were not incurred for the purpose of the trade but in that case the assessee had already received an allowance under Schedule A and was refused a further allowance under Schedule D. Also that case dealt with land within the United Kingdom i.e. within Schedule A. The ruling therefore is of limited application. Ownership of land may be necessary for the purpose of the trade and the payments in respect of the land may therefore be *qua* trader.

The position in India is clear. Section 9 does not apply to premises used for the owner's business profession or vocation and while under section 9 no allowance can be given for owner's rates such allowance is admissible under section 10 (2) (ix), which does not distinguish between

owners and occupiers rates and allows local rates and municipal taxes on such on the premises (if the allowance is not prohibited by sub section (4)). This is one of the several differences that can arise when an allowance is given under section 10 instead of under section 9.

Municipal taxes—Licence fees—On companies—In *Commissioner of Income tax v Nedungadi Bank* 1 ITC 355 47 Mad 667 it was held following *Smith v Lion Brewery Co*, 5 Tax Cases 568 and *Usher's Wiltshire Brewery Ltd v Bruce* 6 Tax Cases 399, (1915) A C 433 that a company tax levied by a Municipality based on the capital was an expenditure incurred solely for the purpose of earning profits or gains.

Per Courts Trotter C J— This is a tax or a toll not on profits or on income or on profession since it is based not on the amount of profit or salary earned but on the paid up capital. It is therefore, in no sense an income or profession tax. It is a compulsory toll on such trading companies without which they are permitted to carry on their trade for more than 60 days in any half year. It is not strictly a licence fee but is nearer in analogy to that than it is to an Income tax.

It is clearly not in the nature of capital expenditure since it is not met out of capital and does not diminish the capital. We are of opinion that it is not. It is not a tax on profits or income but a necessary condition precedent to any earning of profits. It is an impost without paying which the firm cannot trade within the Municipality.

Municipal taxes—Profession taxes—Under the Madras City Municipal Act a tax is levied on professions trades etc. It was contended on behalf of an assessee that the tax was a licence fee and therefore an expenditure that had to be necessarily incurred as a preliminary expenditure before any profession could be exercised and therefore deductible from the income under section 11. *Held* that (a) the words 'by way of a licence fee' in section 111 of the City Municipal Act do not imply that the tax is a licence fee but that it should be paid like a licence fee as there is no provision which makes the carrying on of a profession illegal unless the fee has been paid nor is any formal licence issued authorising the exercise of a profession. (b) professional men are taxed not because they carry on a profession but because they earn income. It seems to us impossible to pred cate that Government officers pay profession tax to enable them to earn their salary. (c) being a payment out of income and not a preliminary expenditure necessary to the earning of income the tax cannot be deducted under section 11. *Commissioner of Income-tax Madras v King and Partridge* 2 ITC 142 49 Mad. 296 AIR 1926 Mad 368.

Income tax itself cannot be deducted from the profits—Now the profit upon which the Income-tax is charged is what is left after you have paid all the necessary expenses to earn that profit. Profit is a plain English word that is what is charged with income-tax. But if you confound what is the necessary expenditure to earn that profit with the income-tax which is a part of the profit itself one can understand how you get into the confusion which has induced the learned counsel at such very considerable length to point out that this is not a charge upon the profits at all. The answer is that it is. The income-tax is a charge upon the profit the thing which is taxed is the profit that is made and you must ascertain what is the profit that is made before you deduct the tax—you have no right to deduct the

Income tax before you ascertain what the profit is. I cannot understand how you can make the Income-tax part of the expenditure per *Halsbury L C*, in *Ashton Gas Co v Attorney General*, (1906) A C 10

See also the case of the *Eastern Extension Australasian, etc., Telegraph Company* 44 Mad 489 1 I T C 120 under section 42

In *Johnston v Chestergate Hat Manufacturing Co*, (1915) 2 Ch 338 in which a manager was entitled under an agreement to a salary plus a share in the net profits net profits being defined in the agreement to mean 'the net sums available for dividends as certified by the auditors of the company after payment of all salaries rent interest at the rate of 5 per cent per annum on the capital and after making such allowance for depreciation as the auditors may advise' it was held by *Sargant, J*, that income tax was part of the profits and could therefore not be deducted from the profits in settling the share due to the manager. If the agreement had expressly provided that the income tax should be deducted before ascertaining the share due to the manager the position would have been different

In construing a lease deed of a colliery which ran thus 'the lessee shall also pay and discharge all taxes rates, assessments and impositions whatever being in the nature of a public demand which shall be charged assessed or imposed upon the said mines,' it was held that the lessor was not entitled to claim from the lessee the income-tax paid by the former since the tax was not on the mine but on the lessor's income, *Bengal Coal Co v Janardan Kishorilal Singh Deo*, 1938 I T R 632 (P C)

Foreign taxes—As regards foreign taxes paid the practice in the United Kingdom has been to allow such taxes as business expenses though there is no express legal provision to that effect—see *Stevens v Durham Roodepoort Gold Mining Company* 5 Tax Cases 402 25 T L R. 316 but not if there is an arrangement for Double Income tax Relief. Rule 1 of Case I of Schedule D however provides for allowance of foreign income-tax in respect of foreign income from securities and it has been held that the allowance can be claimed only in respect of such part of the income as is taxed in the United Kingdom, *Scottish American Investment Trust v Commissioners of Inland Revenue* 17 A T C 49 (C S). In India the position is as below. If the income is entitled to Double Income tax Relief—whether under section 49 (United Kingdom) or under section 49 A—(Indian States and British Dominions) or under section 49 D—it should be computed in the manner laid down in this section i.e. foreign taxes should not be deducted unless covered by clauses (x) and (xv) and sub-section (4).

(x) any sum paid to an employee as bonus or commission for services rendered when such sum would not have been payable to him as profits or dividend if it had not been paid as bonus or commission

Provided that the amount of the bonus or commission is of a reasonable amount with reference to—

(a) the pay of the employee and the conditions of his service,

(b) the profits of the business, profession or vocation for the year in question; and

(c) the general practice in similar businesses, professions or vocations,

History—This clause was inserted by Act XXIII of 1930. It renders the Madras High Court ruling in *R. E. Mahammad Kasim Routler's case*, 2 ITC 482 obsolete. The exemption from double taxation given by Notification No. 8 dated 24th March 1928 (see section 60) however still continues and applies to cases not covered by this clause.

Double taxation—Under this notification, the following class of income shall be exempt from the tax payable under this Act but shall be taken into account in determining the total income of an assessee for the purpose of this Act:

(1) Sums received by an assessee on account of salary, bonus, commission or other remuneration for services rendered or in lieu of interest on money advanced to a person for the purposes of his business.

Where such sums have been paid out of or determined with reference to the profits of the business and by reason of such mode of payment or determination have not been allowed as a deduction but have been included in the profits of the business on which income tax has been assessed and charged under the head 'business'.

Provided that such sums shall not be exempt from the payment of super tax unless they are paid to the assessee by a person other than a company and have already been assessed to super tax.

It will be noted that the above notification applies only to a business and not to profession or vocation and also only where the disallowance is because of the particular mode of payment or determination. It might seem therefore that if the disallowance is on other grounds e.g. extravagance of remuneration, double taxation is permissible but this would not be correct because even in such a case the disallowance is ultimately based on the ground that the case is one of distribution of profit and not one of expenditure to earn the profit.

Scope—The object of this clause is to allow only *bona fide* payments and the various conditions laid down are intended to secure this object. The condition in the substantive part of the clause is intended to prevent partners of firms and dominant shareholders in private companies from abusing this concession. The conditions in the proviso are intended to prevent collusive deductions in combination with employees.

The conditions of service need not be contractual. The questions arising under this clause are mostly questions of degree and therefore of fact.

Where under an agreement the managers of an assessee were entitled to retain the net profits after paying the assessee-proprietor a percentage of gross realisations *plus* a fixed sum it was held that the assessee was not entitled to deduct from his taxable profits the amounts retained by the managers for, even if such amounts were bonus or commission they were not sums which would not have been payable to him as profits or dividend if it had not been paid as bonus or commission as stated in this clause. In *re Nrisinga Chandra Vandy* 1946 ITR 423 (Cal).

(xi) when the assessee's accounts in respect of any part of his business, profession or vocation are not kept on the cash basis, such sum, in respect of bad and doubtful debts, due to the assessee in respect of that part of his business, profession or vocation, and in the case of an assessee carrying on a banking or money-lending business, such sum in respect of loans made in the ordinary course of such business as the Income-tax Officer may estimate to be irrecoverable but not exceeding the amount actually written off as irrecoverable in the books of the assessee:

Provided that if the amount ultimately recovered on any such debt or loan is greater than the difference between the whole debt or loan and the amount so allowed, the excess shall be deemed to be a profit of the year in which it is recovered, and if less, the deficiency shall be deemed to be a business expense of that year

Bad debts—This clause incorporates in the statute what had been originally included in executive instructions and what, in any case was covered either by the Privy Council ruling in the *Chitnavis case* or by first principles of accountancy and commercial usage

It will be noted that this clause contemplates the possibility of the accounts of a part of the business profession or vocation being on a cash basis and the rest on a mercantile i.e., accrued basis. But can the accounts of the same part of the business be on a cash basis in respect of certain items and on an accrued basis in respect of others? See notes under section 13

Cash basis—There is no definition of this expression but what is evidently meant is a basis under which debits and credits are made only when cash (or its equivalent) is received or paid instead of when a liability is created or extinguished. Under a cash basis, the problem of allowance for bad debts will not arise because *ex hypothesi* such debts will have been excluded in working out Profit and Loss

Under the mercantile accountancy system an entry is made on the receipt side when a sale is concluded although the money on account of such a sale has not been paid and in making up the accounts at the end of the year such entries are treated as receipts, and the tax is levied on these "book profits". It may happen that some of these 'book profits' cannot be recovered, they are written off as 'bad debts' when found to be irrecoverable and since such 'book profits' have been included in the income assessed to income tax, the "bad debts" must be written off against the 'book profits' in the year in which they are written off in the accounts as irrecoverable. Where the cash system is adopted, there can as already stated be no 'bad debts'

Irrecoverable loans of money-lenders—Money is the stock-in-trade of money-lenders and bankers and it is immaterial in their case whether the accounts are on a cash or on a mercantile basis. The claim can be made only in respect of losses in the ordinary course of money lending or banking, i.e., not relating to transactions of a capital (i.e., fixed capital) nature or to other parts of the assessee's business if any.

Actually written off—*i.e.* deducted as loss in preparing the Profit and Loss Accounts according to the assessee's system of accounting—See section 13. It is not necessary that the bad debt or irrecoverable loan should have been forgiven or finally written off from all the accounts of the assessee.

Such sum as the Income tax Officer may estimate—The question is one of fact to be determined by the Income tax Officer with reference to the evidence. The Income tax Officer is to make an estimate of the allowance each year on the facts before him.

Conditions—A bad debt or irrecoverable loan will be allowed only if—

(a) the assessee has written it off his accounts

(b) it has actually become bad or irrecoverable and

(c) it actually became so in the previous year but (d) any receipt in later years, in respect of the loss written off will be liable to tax as income.

Irrecoverable—The word 'irrecoverable' in the term 'irrecoverable loan' should be given a wider sense than its technical legal meaning—See rulings referred to below.

It is for the assessee to prove when an item became irrecoverable and the fact that a suit became time-barred is not conclusive.

The contention that a debt or loan had been written off the books of the creditor and could therefore no longer be recovered by suit will not be admitted by the Income tax Officer because a creditor who has written off a debt or loan in his accounts as bad or irrecoverable is not in any way debarred from suing for its recovery unless the act of writing off is communicated to the debtor or it is agreed between the creditor and debtor that a certain amount shall be paid and accepted in full satisfaction. See *Shyam Chamber, Ltd v Commissioner of Income tax, Punjab*, 1941 ITR 224.

Excess recoveries—Under the proviso if a bad debt allowed for is afterwards recovered it is treated as income and similarly if a debt originally considered good by the Income tax Officer is finally lost it is treated as an allowance in the year of loss. The word 'ultimately' is evidently subject to no limitation of time. The words 'business expense' which have nowhere been defined apparently mean revenue expenditure admissible under clause (xv).

There is no provision in the United Kingdom law corresponding to this proviso. According to *Anderson and Halstead v Birrell* 16 Tax Cases 200 once a debt has been valued that value is final and cannot be reopened on the ground that the debt had grown either more or less in value. Also according to *Lawrence J in Lock v Jones* 23 Tax Cases 749, "in strictness if after a debt has been valued it is subsequently realised at a higher figure then the excess is to be disregarded". See also the *British Mexican Petroleum Co's case*, 16 Tax Cases 570 (H.L.) referred to under section 13.

On the other hand when referring to the practice of Revenue authorities in the United Kingdom allowing as bad debts in later years items considered good at an earlier stage, Lord Simon said in *Absalom v Talbot* 1944 (H.L.) 26 Tax Cases 166 that the practice of the Revenue "is not due to benevolence but to statutory law".

The law in the United Kingdom on this subject is by no means clear, (see the dissenting judgment of Scott, L.J., in the above case) and practice

seems to be to tax excess recoveries in later years and also to allow further deficiencies in such years

Debts not connected with business—These are of a capital nature, see *Stott v Hoddinott* 7 Tax Cases 85 and similar cases. The loss arising to a businessman out of his current account with his banker as a result of the latter's bankruptcy is a bad debt of the businessman. *Commissioner of Income tax, Burma v Haji Abdul Gany Ayub*, 1941 ITR 339

A debt due to a company on account of call of its capital is not a bad debt arising out of its business and any eventual receipt on that account is a capital receipt. *In re Multan Electric Supply Co*, 1945 ITR 457. Where a firm doing money lending business and also holding the managing agency of a company advanced a large sum of money to the company and eventually wrote off the loan it was held by the tribunal that the loan had not been made in the course of the money lending business and was therefore not a bad debt. There was evidence for the finding by the Tribunal *Vissonji & Sons v Commissioner of Income tax*, 1946 ITR 272 (Bom). Evidently the assessee did not seek to claim the deduction as expenditure necessary for the agency business, if he did it would have been disallowed a capital expenditure.

Debts of closed business—The proviso applies only to a continuing business and recoveries of bad debts of closed businesses already allowed for when the businesses were carried on would be capital receipts. Losses arising in later years in respect of the outstandings of a closed business are not bad debts of current businesses in those later years. See rulings under section 24 in respect of set-off of losses.

Where a money lender starts a separate partnership business which he winds up on loss he cannot convert that loss into a bad debt of the money-lending business merely by treating in his books as a debt due to that business from the partner of the defunct business. *Mothay Gangarazu v Commissioner of Income tax, Madras*, 1939 ITR 149.

Advances by professional men to clients—Money advanced by a law agent to a client and lost will be deductible from the law agent's profits only if the making of loans of this kind is an ordinary incident in his professional trade or business. Loans, which are bald advances to comparatively new clients made by a solicitor and lost would not therefore be deductible. Lending money to clients may often be done by solicitors but it is not an essential and ordinary fact of their profession. The law is not concerned with the motives for such transactions and no custom can rest on what an individual solicitor does. *Hagar and Burn Murdoch v Inland Revenue*, 1929 AC 386 45 TLR 338.

A firm of solicitors who also acted as insurance agents, factors and registered stock brokers but did not hold itself out as financiers or money-lenders was however in the habit of lending money to clients and a question arose as to the deductibility of bad debts arising out of such lending. The firm sought to distinguish its case from that of *Hagar and Burn Murdoch* on the ground that its business was a composite one including money lending but the Court of Session saw no difference because even in the other case there was a finding that the assessee in addition to their other work as law agents carried on the business of lending money. The claim to deduct bad debts was therefore disallowed. *W. A & F Rutherford v Inland Revenue* 18 ATC 273.

Bad debts—Although the Act (as it stood before 1939) nowhere in terms authorised the deduction of bad debts of a business such a deduction was necessarily allowable. What are chargeable to income tax in respect of a business are its profits and gains of the year, and in assessing the amount of profits and gains of a year, account must necessarily be taken of all losses incurred. Otherwise you would not arrive at the true profits and gains. For the purpose of computing profits and gains each year is a separate self-contained period of time in regard to which profits earned or losses sustained before or after it are irrelevant. It follows therefore that a debt which had in fact become bad before the commencement of a particular year could not properly be deducted in ascertaining the profits of that year. The assessee has no option as to when he should declare a debt to be bad. Whether a debt is bad and when it becomes such are questions of fact to be determined in cases of dispute not by the assessee or by the exercise of any 'option' on his part but by the appropriate tribunal on a consideration of all relevant and admissible evidence. *Commissioner of Income tax, C P v Sir S M Chitnavis*, 59 IA. 290 36 C.W.N 797, 63 M.L.J 361 (P.C.) See also *Lawless v Sullivan* (1881) 6 A.C 373 (New Burnswick case) and *Gleaner and Co v Assessment Committee*, (1922) 2 A.C 169 (Jamaica case). In the latter the Privy Council held that once debts had been valued and allowance made for bad and doubtful debts further alteration in later years could not be made. See also *British Mexican Petroleum Co v Inland Revenue*, 16 Tax Cases 570 (H.L.) in which debts forgiven in a later year were not treated as trading receipts. The practice in the United Kingdom however appears to have been to allow a debt as bad in a later year even though in an earlier year it may have been treated as good and similarly to tax realisations of written off debts. The correctness of the practice was considered by the House of Lords in *Absalom v Talbot* (1944) 26 Tax Cases 166 in which the soundness of the decision in *Gleaner & Co's* case was doubted and Lord Simon observed that 'the Revenue practice is not due to benevolence but to statutory law'. The correct position, ultimately it would seem is that the badness of a debt is a question of fact and that there being no *estoppel* or *res judicata* in such matters changed circumstances would justify changed conclusions. See also *Briston v William Dickinson & Co* 1946 K.B.D. to a similar effect.

The finding as to the nature of a specific item of debt however, operates only for the particular assessment. *Rulimal Rammall Ram v Commissioner of Income-tax, Punjab*, 7 I.T.C. 352 and can be set aside by the Court if it is not based on materials or is perverse. *P R Ar M Muthukaruppan Chettiar v Commissioner of Income tax Madras*, 1939 I.T.R. 76. *Hukamchand Jagadhar Mal v Commissioner of Income tax Punjab* 1935 I.T.R. 211. *British Cotton Growers' Association v Commissioner of Income tax, Punjab* 1937 I.T.R. 279. The form in which a question of law usually arises is whether the Income-tax Commissioner was upon the evidence, obliged in law to allow the deductions and if not whether in arriving at his decision he has departed from or misapplied the principles which in law govern the matter. In *re Binjraj Hukuncand* 5 I.T.C. 303, 58 Cal 1446 A.I.R 1931 Cal 683. *Ditturam Idan v Commissioner of Income tax, Punjab* 1937 I.T.R. 502. The Income-tax Officer must be consistent in his findings. For example, having found that in the accounts of a continuing business, a debt was good in 1931-32 he cannot find on the same evidence that it became bad before 1932-33.

Hanutram Bhura Mal v Commissioner of Income-tax, Bihar and Orissa, 1938 ITR 290 On the other hand where, in the first year, the Income-tax Officer held that a debt had not then become bad, and in the next year held that it had already become bad, his action was not disapproved, because there was additional evidence before him justifying the contrary conclusion *Kaniram Ganpatani v Commissioner of Income tax, B & O*, 1941 ITR 332

The mere fact that a debt was incurred at a date beyond the period of limitation will not itself make a debt bad, still less will it fix the date at which a debt will become bad. A statute barred debt is not necessarily bad nor a non statute barred debt necessarily good, *Sir S M Chitnavis case, supra*. The age of the debt is no doubt a relevant matter to take into consideration. In every case it is a question of fact to be determined by the appropriate tribunal after consideration of all relevant circumstances. There is nothing wrong in the assumption that so long as there is any ray of hope left however dim to recover a debt and so long as the debt is in process of realisation the debt is not irrecoverable, *British Cotton Growers' Association v Commissioner of Income tax, Punjab*, 1937 ITR 279

It makes no difference whether the debt is due from a human being or from a joint stock company in either case it is a question of fact whether and when a debt becomes bad. There is no justification for treating all debts from companies as necessarily good merely because the debtor company has not gone into liquidation, *Dinshaw v Commissioner of Income tax, Bombay*, 1934 ITR 319 (PC) 61 IA 318 58 Bom 579

The departmental practice of declaring a debt to be *prima facie* bad when it is barred by limitation is not unreasonable but this presumption is rebuttable *Bansidar Poddar v Commissioner of Income tax Bihar and Orissa*, 7 ITC 117 AIR 1934 Pat 46 Refraining from pressing a debt out of extra business motives, e.g., friendship or relationship will not make the debt bad *Prag Narain v Commissioner of Income tax, U P (All)*, 6 ITC 110

Where there is a default in respect of hire purchase payments the question of an allowance for bad debts can arise only after the property recovered from the debtor had been properly valued e.g., if a motor lorry by attempting to sell it, *Shamsher Ali Abdul Hussain v Commissioner of Income tax, CP*, 1945 ITR 240 A fair, expert valuation would doubtless be sufficient evidence of value

When accounts are kept on the mercantile basis and interest is added to a debt from year to year and tax charged on such interest it would not be ordinarily open to the Income tax Officer to hold that the debt had become bad in an earlier year *Hanutram Bhura Mal v Commissioner of Income tax, Bihar and Orissa*, 1938 ITR 290 Similarly if no interest has been added it would not be open to the assessee to claim that the debt had not become bad when the interest ceased to be so added *Sheo Sahay Mal v Commissioner of Income tax, B and O*, 1938 ITR 485

Where an assessee took over the assets and liabilities of a debtor of his and paid off the latter's creditors including himself at 8 annas in the rupee, and claimed to deduct as a bad debt in a later year the debt still alleged to be due from the debtor it was held that since the debtor had been absolved from all further liability when the compounding with creditors was made, the debt became bad then and not in a later year as claimed *Sheo*

Sahay Mal v Commissioner of Income tax, Bihar and Orissa 1938 ITR. 485

Where a partnership is dissolved and a partner takes over outstanding debts as his share of the assets such assets are ordinarily part of his capital and any bad debt arising out of them is a capital loss, *Chimanlal Ramanlal v Commissioner of Income tax, Bengal* 1940 ITR. 408 *Commissioner of Income tax, Burma v S P K. A R M family*, 1941 ITR. 685 but if the debt was a trading debt e.g., due from a customer or a loan due to a money lender from a borrower, and if at the time of dissolution the debt was not bad loss due to subsequent badness of the debt is a trading loss since trading debts are circulating capital and the loss arose after the dissolution. This is no doubt the underlying idea in *Commissioner of Income tax, Madras v Venkatasubbiah Chetti*, 1946 ITR 227 and *Deokinandan & Sons v Commissioner of Income tax, Punjab*, 1941 ITR 202, though there are suggestions in the latter that even if the debt had been bad at the time of dissolution this loss would still be allowable. Such an allowance could be claimed it is submitted, only if at the time of dissolution the extent of badness of the debt could not be estimated or if full value had been placed on the debt without any attempt to estimate its badness. The ultimate criterion in all such cases is whether the debts are circulating capital or fixed capital. In the Madras case the interest on the debts taken over was regularly assessed. A partner in a firm cannot ordinarily single out a particular bad debt as his share he can only take his share in the result of the firms getting an allowance for bad debts *Motilal Onkara Chandra v Commissioner of Income tax, C.P.*, 6 ITC. 16

Bad debts due from ex partners in a business cannot be set off against profits in any other business they are not bad debts of the latter business, *Commissioner of Income tax Madras v Arunachalam Chettiar*, 1934 ITR. 401 (P.C.) A partner in a continuing partnership making a loss is not a debtor, in respect of the business of the partnership to his other partners, and the latter cannot claim an allowance for bad debts on the ground that the first partner was not solvent and that therefore the other partners would have to bear the whole loss of the partnership *Commissioner of Income tax, Sind v Khemchand Ramdas* 1936 ITR 173 (P.C.) see also notes under section 24 as to set off of losses

A real debt must have been in existence if a claim for an allowance for bad debts is to arise. Therefore where a successor in a business had taken over among the assets the right to the refund of customs duties which the predecessor had paid under protest and in respect of which he had both petitioned the Government and sued in the Courts, and having lost the claims the successor sought to deduct the amounts as bad debts the claims to refund being his circulating capital for which he had paid the predecessor, the claim was disallowed. As subsequent events showed duty had been properly paid in the first instance and a mistaken belief that a refund was due cannot create a debt, and it was immaterial that the assessee chose to keep the item in a suspense account *National Petroleum Co v Commissioner of Income tax, Bombay* 1945 ITR. 338

Where a debtor had absconded and the Income tax Department contended that the bad debt should have been claimed at the time of the debtor's absconding it was held that such a claim would have been premature before three years had elapsed since, if the debtor had returned it would have been possible for the creditor (assessee) to sue within three years

Harnand Rai Harbagat Rai v Commissioner of Income tax, Punjab, 1936 ITR 366

A debtor's insolvency does not by itself necessitate the conclusion that the debt is wholly or even partially bad, and in the absence of other stronger evidence, the date on which the Official Receiver announces the final dividend would be an appropriate date for declaring the debt to be bad finally, *Deokinandan & Sons v Commissioner of Income tax Punjab*, 1941 ITR. 202, *Commissioner of Income tax, Burma v Hajee Abdul Gany Ayub*, 1941 ITR 339

A debtor of an assignee became insolvent in 1929 and there was litigation in respect of preferential claims against the insolvent, culminating in an appeal disposed of by the Privy Council in 1934. The assessee consulted the Official Assignee in 1936 as to the prospects of a further dividend and on receiving a discouraging reply, wrote off the bad debt in his accounts for 1936-37. The Income-tax department disallowed the write-off on the ground that the debt should have been written off earlier even in 1929, when it was possible to infer that hardly any dividend would be paid. It was held that there were no materials for the conclusion of the department, *Alaganda Mudaliar v Commissioner of Income tax, Madras*, 1940 ITR. 69

In December, 1921 an assessee obtained a mortgage deed in his favour. In 1924 he sued for the usual mortgage decree which was made in December, 1925. The property was sold and there was a balance still due for which he got a personal decree against the debtor in 1928. Against this decree there was an appeal which was dismissed in November 1931. In the meantime the creditor (assessee) had unsuccessfully attempted to enforce the decree. On his claiming the amount as a bad debt in the accounts of 1932-33, the Income tax Officer held that the debt had become bad in 1929, while the Assistant Commissioner held that it had not become bad even in 1932-33. The Commissioner agreed with the Income tax Officer. It was held that there was no evidence for the finding that the debt had become bad in 1929. The assessee would have been guilty of a fraud if he had attempted to claim it as a bad debt before 1932-33, since the personal decree had still been pending till November, 1931. Whether it became a bad debt in 1932-33 or later was a question of fact to be determined by the Income-tax authorities. *Commissioner of Income tax, Punjab v Hukumchand Jagaddharmal* 1936 ITR. 380

A firm consisting of two partners was dissolved at the end of 1939 and each partner took a half share of the assets and liabilities. One of the assets was a loan of \$5 000 advanced on second mortgage and this debt had been written down to \$5 as being worthless. So that each partner's share was \$2 50. One of the partners started a new firm with his sons on the 13th April 1940 and on this date the new firm showed the amount in its books at \$2 50. The new firm claimed that it was entitled to deduct \$2500 (half of 5000) plus expenses in its accounts for 1940-41 on the ground that it was not bound by the notional figure of \$2 50. It was held that the correct criterion was the true value of the debt on the 13th April 1940 when the new firm started. On that date its value was nil as subsequent events showed. The first mortgagee took steps to bring the property to sale, and there was not enough even to pay him. Therefore the debt in question had become bad before 1940 and not during 1940-41, *Commissioner of Income-tax, Madras v Ar M M Firm* 1945 ITR 290

Burden of proof.—The burden of proving that a debt has become bad lies on the assessee. *Binjraj Hukumchand v Commissioner of Income-*

tax, Bengal 5 I.T.C. 303 *Dutturam Idan v Commissioner of Income tax, Punjab* 1937 I.T.R. 502 *Banmal Dalal v Commissioner of Income tax, Punjab* 1941 I.T.R. 222 So also the burden of proving that what is claimed as a bad debt has already been taxed in an earlier year *In re Bal devdas Rameshwar* A.I.R. 1931 Cal 761 135 I.C. 280

Suspense accounts—Bad debts—Interest on.—If an assessee keeps a regular suspense account for interest on bad or doubtful debts and if there is no reason to suspect the *bona fide* nature of the accounts interest accruing on these debts would not be taxable profits till it was actually realised or otherwise adjusted. When however the bad debts are realised the interest would automatically go into the profits as *ex hypothesi* the accounts are maintained on the commercial or mercantile system.

(xi) any expenditure (not being in the nature of capital expenditure) laid out or expended on scientific research related to the business,

(xii) any sum paid to a scientific research association having as its objects the undertaking of scientific research related to the class of business carried on, and any sum paid to a university, college or other institution to be used for such scientific research,

Provided that such association, university, college or institution is for the time being approved for the purposes of this clause by the prescribed authority,

(xiv) in respect of any expenditure of a capital nature on scientific research related to the business, an allowance for each of the five consecutive previous years beginning with the year in which the expenditure was incurred or where the expenditure was incurred prior to the commencement of the business, for each of the five consecutive previous years beginning with the year in which the business was commenced, one fifth of such expenditure

Provided that no allowance shall be made for any expenditure incurred more than three years before the commencement of the business

Provided further that—

(a) where an asset representing scientific research expenditure of a capital nature ceases to be used for scientific research related to such business—

(i) no allowance shall be made in respect of any previous year after the previous year in which the cessation takes place, and

(ii) if the aggregate of the amounts allowed under this clause added to the value of the asset immediately before the cessation is less than the said expenditure, there shall also be

allowed in respect of the previous year in which the cessation takes place an additional deduction equal to the difference ;

(b) where such asset is sold without having been used for other purposes, the sale proceeds shall be taken to be the value of the asset immediately before the cessation, and if an additional allowance or a greater additional allowance would have been made in respect of the previous year in which the cessation occurred on the basis of that value, an amount equal to the additional allowance which would have been made or as the case may be, to the difference between the additional allowance which would have been made and the additional allowance which was made for that year shall be made in respect of the previous year in which the sale occurs.

(c) where the proceeds of the sale *plus* the total amount of allowances made under this clause exceed the amount of the expenditure, the excess or the amount of the allowances so made whichever is the less, shall be treated as a receipt of the business accruing at the time of the sale ;

(d) where a deduction is allowed for any previous year under this clause in respect of expenditure represented wholly or partly by any asset, no deduction shall be allowed under clause (vi) or clause (vii) for the same previous year in respect of that asset ;

(e) where an asset is used in the business after it ceases to be used for scientific research related to the business, and a claim for an allowance under clause (vi) or clause (vii) is made in respect of that asset, the actual cost to the assessee of the asset shall be treated as reduced by the amount of any deductions allowed under this clause ;

(f) clause (b) of the proviso to clause (vi) shall apply in relation to deductions allowable under this clause as it applies in relation to deductions allowable in respect of depreciation ;

(g) if any question arises under clause (xii), clause (xiii) or this clause as to whether, and if so to what extent, any activity constitutes or constituted, or any asset is or was being used for, scientific research, the Central Board of Revenue shall refer the question to the prescribed authority, whose decision shall be final :

Explanation.—In clause (xii), clause (xiii) and this clause,—

(i) ' Scientific research ' means any activities in the fields of natural or applied science for the extension of knowledge ;

(ii) references to expenditure incurred on scientific research do not include any expenditure incurred in the acquisition of rights in, or arising out of scientific research but, save as afore-

said, include all expenditure incurred for the prosecution of or the provisions of facilities for the prosecution of scientific research,

(iii) references to scientific research related to a business or class of business include—

(a) any scientific research which may lead to or facilitate an extension of that business, or as the case may be, all businesses of that class,

(b) any scientific research of a medical nature which has a special relation to the welfare of workers employed in that business, or as the case may be, businesses of that class,

History—These clauses, which are closely modelled on recent additions to the United Kingdom law were added in 1946. The major part of the expenditure intended to be covered by clauses (xi) and (xiii) would it is submitted be allowable under clause (xv) even if these clauses did not exist and any way the new clauses remove doubt.

(xi) This covers cases of revenue expenditure on scientific research related to the business under assessment—not to the *class of business* and in the former case it is immaterial whether the expenditure is incurred by the business itself or through some other agency and if through another agency, the question of that agency being approved will not arise. If for example a specific problem in which the business is interested is referred to a scientific institution and the latter charges a fee or the actual expenses, the expenditure if of a revenue nature is allowable whether or not the institution has been approved.

Capital expenditure—See notes under clause (xv) below.

(xiii) This relates to cases in which the research is related not specifically to the business under assessment but to the *class of business* the business may not benefit directly at all. Even so the money paid to the association or institution is allowable but (1) the association etc. must be approved by the prescribed authority, and (2) though the point is not stated in terms the sum paid to the association etc. must not be of a capital nature,

(xv) governs expenditure of a capital nature on research. Such expenditure will be allowed in five consecutive equal instalments and in respect of what was incurred not more than three years before the commencement of the business. The various elaborate provisions are intended partly to avoid double allowances once under this clause and again under the obsolescence or depreciation clauses and partly to provide for supplementary allowances under other circumstances. Broadly speaking full allowance, but not exceeding the original cost less scrap value will be given under one clause or another.

Retrospective effect—The Finance Act of 1946 gave retrospective effect to the three clauses by one year.

Prescribed authority—The Central Board of Revenue will by rules announce the authority who will approve associations and institutions for the purpose of grants under clause (xiii) and the authority who will deter-

mine disputes generally under these three clauses as to whether particular activities constituted 'scientific research' or whether particular assets are or were used for such research. The two authorities need not be identical. The draft rules issued by the Central Board of Revenue prescribe the Council of Industrial and Scientific Research, the Imperial Council of Agricultural Research and the Indian Research Fund Association as the authorities for this purpose. Where doubt arises as to whether research relates to the business or class of business or not, no reference would seem to lie to the prescribed authority, which is concerned only with whether the research is scientific and whether the assets are used for it.

Explanation clauses—Sub-clause (i) The definition of 'scientific research' is wide, and where a doubt arises the prescribed authority will resolve it. Sub-clause (ii) excludes the cost of purchase of patent rights and the like. What restricts the concession is the condition that the research showed be 'related to the business'. This is obviously a question of fact to be determined by the revenue authorities. Sub-clause (i), liberalises the condition by allowing the concession even where the advantage is somewhat indirect, but even this sub-clause can give rise only to questions of fact. It should be noted that the research of a medical nature should be *specially* related to the welfare of workers in the business or class of business.

(xv) any expenditure (not being in the nature of capital expenditure or personal expenses of the assessee) laid out or expended wholly and exclusively for the purpose of such business, profession or vocation.

History—The main part of the clause has been coming on from 1918, a proviso which was introduced in 1928 has now been embodied in sub-section (4). The ruling in *Isabella Coal Company v Commissioner of Income tax, Bengal*, 53 Cal 76, 2 I T C 87, was nullified by the proviso.

The wording of this clause, before 1st April, 1939, was as below—

"Any expenditure (not being in the nature of capital expenditure) incurred solely for the purpose of earning such profits or gains

Provided that nothing in clause (viii) or clause (ix) shall be deemed to authorise the allowance of any sum paid on account of any cess, rate or tax levied on the profits or gains of any business or assessed at a proportion of or otherwise on the basis of any such profits or gains"

Personal expenses—The reference to "personal expenses" inspired evidently partly by old section 11 and by section 12 and partly by the United Kingdom law, is otiose, for, *ex hypothesi*, such expenses would not satisfy the other conditions.

Death duties—Expenditure on death duties or in resisting their payment or in obtaining probate or letters of administration cannot be deducted from the profits of a business, profession or vocation. *Ramaswami Ayyangar v Commissioner of Income-tax, Madras*, 1943 I T R. 594, *Arunachalam Chettiar v Ibid*, 1945 I T R. 183. Such expenditure is clearly of a 'personal' nature and is not laid out for the purpose of business, profession or vocation, perhaps, also, it is of a 'capital' nature. It is no argument to say that if

the expenditure was not incurred the business a sets would have been dis-trained, for the assessee does not incur such expenditure as the owner of a business

Relation of clause (xv) to other clauses—It will be seen that the allowance under clause (xv) which is the residual clause overlaps the allowances under some of the previous clauses, with the exception of depreciation which is not an actual but only a notional expense and of loss which arises when machinery is discarded or sold, all the other expenses set out in the previous clauses are undoubtedly incurred, if not solely for the purpose of earning the profits at least wholly and exclusively for the purpose of the business profession or vocation. Nor can any of them be capital expenditure. It would seem therefore that this clause should be construed to refer only to those expenses—not being items referred to in the previous clauses, and not being capital expenditure—which are incurred solely in earning the profits. Otherwise the restrictions and conditions imposed in the previous clauses become a nullity and the proper construction, it is submitted, is one that does not so make the previous clauses a nullity see *Commissioner of Income tax, Bombay v Haji Jamal Nur Mahomed* 49 Bom 362, 1 ITC 396

In *Rathan Singh v Commissioner of Income tax, Madras*, AIR. 1926 M 462, 2 ITC 294, however, the Madras High Court held that the reliefs in the several clauses of sub-section (2) were disjunctive and cumulative, and that if a deduction falls expressly within the words of any one of the clauses the Crown could not withhold the deduction on the ground that the assessee had already received a larger benefit under another clause. The Court accordingly held that the cost of certain renewals which were neither current repairs under clause (v) nor capital expenditure, should be allowed as a deduction under clause (x) [now (xv)], even though the depreciation allowance granted under clause (vi) is meant to cover such renewals. It is submitted that the distinction between repairs and renewals is one of degree, that according to commercial practice repairs are revenue expenditure and renewals capital expenditure and that the difficulty contemplated by the Madras High Court cannot arise. If expenditure on renewals is not capital expenditure, it must be expenditure on current repairs, and therefore admissible under clause (v).

The cases referred to under this clause (xv) fall broadly into two classes raising the following questions (a) what is capital expenditure? and (b) when is expenditure laid out for the purpose of the business, etc. Attention is also invited to the rulings set out under section 12 (other sources) in respect of which also the same two questions arise.

Capital expenditure—As regards capital expenditure, see also the Introduction and notes under section 3. Broadly speaking, it is the deduction of expenditure on fixed capital that is prohibited, not that on circulating capital.

Broadly speaking outlay is deemed to be capital when it is made for the initiation of a business, or for a substantial replacement of equipment"—Per Lord Sands in *Commissioners of Inland Revenue v Granite, etc., Steamship Co*, 6 A.T.C 678, 13 Tax Cases 1

"It is according to the legitimate principles of commercial practice to draw distinctions, and sharp distinctions, between capital and revenue

expenditure, and it is no use criticising these, as it is easy to do, upon the ground that if you apply logic to them they become more or less indefensible. They are matters of practical convenience, but practical convenience which is undoubtedly embodied in the generally understood principles of commercial accounting"—Per *L P Clyde* in *Lothian Chemical Co v Rogers*, 11 Tax Cases 508

'I know of no standard for making the vital, but often delicate, distinction between a revenue charge appropriate to form a deduction from trading receipts and a capital charge which ought not to enter into the ascertainment of trading profits, except the standard set up by the prudence and experience of merchants'—Per *L P Clyde* in *Roebank Printing Co v Commissioners of Inland Revenue*, (1928) S.C. 701, 13 Tax Cases 864

'Now what is capital and what is attributable to revenue account I suppose is a puzzling question to many Accountants, and I do not suppose that it is possible to lay down any satisfactory definition', per *Pollock M R*, in *Atherton v British Insulated and Helsby Cables Ltd*, 10 Tax Cases 155 (1926) A.C. 205

The question of allocation to capital or income runs on fine lines of distinction and the Commissioners have to direct themselves upon the questions of law involved. The question of allocation therefore is not a pure question of fact, *Anglo Persian Oil Co v Commissioners of Inland Revenue* 16 Tax Cases 253, (1932) 1 K.B. 124

From the large number of rulings on the subject, the following broad but by no means conclusive tests can be gathered, viz

(1) Does the expenditure relate to the main framework of the assessee's business? *Vanden Berghs v Clark*, 19 Tax Cases 390 (H.L.), a case relating to capital receipts,

(2) Is the expenditure incurred as trader or as owner of property? *Inland Revenue v Scottish Central Electric Power Co* 15 Tax Cases 761 (H.L.), a case of assessment relating both to Schedule A (like section 9 in India) and to Schedule D (like section 10 in India)

(3) Is the payment recurrent? *Vallambrosa Rubber Co v Farmer*, 5 Tax Cases 529 *Ounsworth v Vickers*, 6 Tax Cases 671

(4) Does the expenditure relate to fixed or to circulating capital? *John Smith & Sons v Moore* 12 Tax Cases 266 (H.L.)

(5) Does it bring into existence an asset for the enduring benefit of the trade? *Atherton v British and Helsby Cables* 10 Tax Cases 155 (H.L.)

Wholly and exclusively laid out for the purpose of the business etc

The words used in the United Kingdom statute and now since 1939 adopted in clause (xv) of the sub-section here are 'wholly and exclusively laid out or expended for the purposes of the trade' which are somewhat wider than the words 'incurred solely for the purpose of earning such profits' in the clause as it stood before 1939 and in section 12 (1) as it stands even now, but this difference is not as material as would seem at

first sight, for various rulings had interpreted the words "for the purposes of the trade" as equivalent to "for the purpose of earning the profits", see, for example, per Pollock, MR, in *Rountree & Co v Curtis*, 8 Tax Cases 678, per Lord Davey in *Strong v Woodfield* 5 Tax Cases 215, (1906) A C 448

The Rangoon High Court (see per Dunkley, J, in *Commissioner of Income-tax v N S A R Concern*, 1938 ITR 194) was impressed by the wider terms of the United Kingdom (and since 1939, also the Indian) formula, and so, it would seem, was the draftsman of the amendment in 1939. Cases of expenditure, not being of a capital or personal nature, but yet wholly laid out for the purpose of a business, through not to earn the profits thereof are so rare and difficult to conceive of that the old rulings in India cannot be treated as obsolete. The real advantage in the new formula is that it creates no difficulties in respect of correlation in time or even otherwise between expenditure and profits but this difficulty had been removed even in respect of the old formula by various rulings, both in the United Kingdom and in India negating the need for any such correlation whether in time or otherwise

As regards what is meant by "incurred solely for earning the profits" it is impossible to define it, though it occurs in the Acts of other countries. It is clear, however, that counter advantages of an indirect kind do not make moneys spent moneys incurred solely for earning the profits see per Sargent, L J, in *Union Cold Storage Co v Jones*, 8 Tax Cases 725

On the other hand one must rid one's mind altogether of the idea that you cannot ask for a deduction of an expense laid out in good faith and exclusively for the purposes of your business unless you can show that it was a profitable expenditure of the business per L P Clyde in *Commissioners of Inland Revenue v Falkirk Iron Co*, 12 A.T.C 239, Tax Cases 625. The statute does not require the party claiming the deduction to show that any profit was in fact earned by the expenditure in question per Lord Pearson in *Moore v Stewarts and Lloyds*, 6 Tax Cases 501, 43 Sc L.R. 811

"A sum of money expended, not of necessity and with a view to a direct and immediate benefit to the trade, but voluntarily and on the grounds of commercial expediency, and in order indirectly to facilitate the carrying on of the business, may yet be expended wholly and exclusively for the purposes of the trade"—Per Cave, L C, in *Atherton v British, etc, Cables supra*

'Mr Justice Rowlatt a Judge of great experience and learning in Revenue matters has frankly said that he does not see his way to give a general definition of the true construction of the section, but that he is content to say about each case as it comes along whether in his view, it falls within the section per Coultis Trotter, J, in *Board of Revenue v Muniramu Chetty & Sons*, 1 ITC 227, 47 Mad 653, 45 M.L.J 711

'Their Lordships recognise the difficulty which may often exist in deciding whether expenditure, not in the nature of capital expenditure, has been incurred solely for the purpose of making or earning 'income profits and gains', and they agree that it may be impossible to formulate a test which will always suffice to discriminate between expenditure which is and expenditure which is not allowable for the purpose of

income tax', *Indian Radio and Cable Communications, Ltd v Commissioner of Income tax, Bombay*, 1937 ITR 270 (PC)

In the earlier English decisions, the tendency was to take an unduly strict view of what constituted expenditure for earning profits. Thus, in regard to advertisements

I am not aware that there is any authority whatever for any deduction of any expenses whatsoever incurred after the beer is produced, and really to promote or increase its sale', per *Kelly, CB*, in *Watney and Co v Musgrave*, 1 Tax Cases 272, 5 Ex D 241

It follows from this that expenditure on advertisements could not be allowed as a necessary expense for earning the profits. The Chief Baron imported the idea of 'necessarily' into the words "wholly and exclusively" (corresponding to solely in the Indian Act). The word 'necessarily' occurs only in Schedule E in the United Kingdom [corresponding to section 4 (3) (vi) in India]. In later decisions, however, culminating in *Usher's Wiltshire Brewery v Bruce*, 6 Tax Cases 399, (1915) AC 433, this strict view was departed from though *Watney and Co v Musgrave, supra*, has not been definitely overruled.

" It seems to me that the question whether money is wholly and exclusively laid out or expended for purposes of a trade is a question of fact. Judges of the High Court may know, by the accident of their previous training, something about a particular trade. Merely to take a personal instance, I should be assumed to know something about shipping but there are many trades about which I should know absolutely nothing whatever, and there are equally many trades about which any of my learned Brethren would know nothing whatever except what they were told by the Commissioners and in many cases the question whether the money was wholly or exclusively laid out or expended for the purposes of the trade must depend upon a knowledge of the facts of the trade, of the way in which it is carried on, of the effect of payments made in that trade, all of which are questions of fact. There may be cases where it is clear even to a Judge who knows nothing about the trade that a particular payment could not be wholly or exclusively laid out for the purposes of the trade. I do not desire to go into politics, but I take examples which seem to me fairly clear. Payments for political purposes might conceivably be for the purposes of trade. It might be that a payment by a company to the Tariff Reform League might be of great advantage to its trade. It might be that a payment by a company to a political party which was supposed to be identified with the interests of a particular trade might be to the advantage of the trade, but one can easily imagine cases such as payment by a company to the National Service League where it would be impossible to conceive that anybody could find that such money was wholly or exclusively laid out or expended for the purposes of the trade. There may be cases in which the Court would have to say there is no evidence on which any tribunal could find that this sum was laid out or expended for the purposes of such trade but in most cases it appears to me that it depends on the facts of the trade of which the Court has no knowledge and for which it must depend on the findings of the Commissioners" per *Scrutton, LJ* in *JW Smith v Incorporated Council of Law Reporting for England and Wales*, 6 Tax Cases 477, 484, (1914) 3 KB 674

A somewhat different opinion was held by Sir Samuel Evans in the Court of Appeal in *Usher's Wiltshire Brewery v Bruce*, 6 Tax Cases 399 (1914) in which he said that a finding of fact would by no means settle the question to be determined and that when the facts are found the proper inference to be drawn in order to determine whether the disbursements or expenses were wholly and exclusively laid out for the purposes of the trade or concern within the meaning of the provisions referred to is a question of law but this was considered to be an *obiter dictum* by Scrutton L.J., in *Smith v Incorporated Council of Law Reporting* cited *supra*. Sir Samuel Evans judgment was ultimately reversed by the House of Lords see per Lord Sumner—

"The effect of this structure I think is this that the direction to compute the full amount of the balance of the profits must be read as subject to certain allowances and to certain prohibitions of deductions but that a deduction if there be such which is neither within the terms of the prohibition nor such that the expressed allowance must be taken as the exclusive definition of its area is to be made or not to be made according as it is or is not on the facts of the case a proper debit item to be charged against incomes of the trade when computing the balance of profits of it *Usher's Wiltshire Brewery Case* 6 Tax Cases 399 *supra*.

This was re-stated by Finlay J. as follows — If you get the legislature dealing expressly with any subject matter if you get the legislature making a prohibition authorising a deduction authorising an allowance or doing anything of that sort then you are bound by what the legislature has said. If there are cases where the legislation so to speak is blank that is where the legislature has neither given an allowance nor made a prohibition then you go on the ordinary principle of commercial trading *Sinclair v Cadbury Bros Ltd* 18 Tax Cases 156.

After reviewing various authorities the Master of the Rolls said in *Morley v Lawford & Co* 14 Tax Cases 299 45 TLR 30. After looking at these cases with some care it appears to me that the solution of the problem (*i.e.* whether an expenditure is wholly and exclusively laid out for the trade etc.) must in some cases be determined as a question of fact. On the other hand there may be some cases in which it is a mixed question of fact and law and it is in all cases a question of law whether there was any evidence at all on which the conclusion reached by the Commissioners or by another Court can be sustained.

The Bombay and Calcutta High Courts held that the question is primarily one of fact *Tata Hydro Electric Agencies Ltd v Commissioner of Income Tax Bombay* (1936) 1 TR 92. In re *Lakshmi Narayan Sen and Sons Ltd*, (1936) 1 TR 225 (Cal). But the Privy Council have ruled that the question on the facts found can be agitated before the court as a question of law *Tata Hydro Electric Agencies Ltd v Commissioner of Income Tax, Bombay* (1937) 1 TR 202 (P.C.).

Need not be compulsory expenditure nor directly remunerative — It was made clear in the above cited case of *Usher's Wiltshire Brewery Ltd v Bruce* and *Smith v Incorporated Council of Law Reporting* that a sum of money expended not of necessity and with a view to a direct and immediate benefit—but voluntarily and on the grounds of commercial expediency and in order indirectly to facilitate the carrying on of the business may yet be expended wholly and exclusively for the purposes of the trade, per Viscount Cave in *Atherton v British Insulated and Helsby Cables Ltd*,

10 Tax Cases 155, see also *Morley v Lawford and Co*, 14 Tax Cases 229, and *Bourne and Hollingsworth Ltd v Ogden*, 14 Tax Cases 349

'Expenditure in course of the trade which is unremunerative is none the less a proper deduction if wholly and exclusively made for the purposes of the trade and it does not require the presence of a receipt on the credit side to justify the deduction of an expense', per Lord Thankerton in *Hughes v Bank of New Zealand* 17 A T C 139 1938 I T R 636 at 644

Reasonableness of expenditure—The tribunals of fact have the inherent right to question the *bona fide* nature of any item of expenditure and of its *quantum* and the mere fact that the accounts of the assessee contain a debit and that the debit has been duly authorised by or on behalf of the assessee will not in itself make the debit deductible from taxable profits. Thus though as between a company and its directors and shareholders, the directors may be paid such remuneration as the company's articles and regulations may lay down and it is not for the commissioners to interfere with these payments the commissioners are entitled to find in a proper case that the sums so paid are not wholly and exclusively laid out for the business etc. of the company. In fact it is their duty to apply their minds to this question and they are entitled to disallow any sums which can reasonably be held not to be spent for the purpose of the business e.g., payments in utter disregard of the value of the corresponding goods or services and without any satisfactory explanation for such disregard *Copeman v William Flood & Sons* 1941 I T R. 85 (Sup.) In *re Aspro, Ltd*, 1932 A.C. 683 and In *re Lakshmi Narain Sen*, 1936 I T R 255 (Cal.) In practice however, the tribunals refrain from exercising this power except in cases which clearly show *mala fide*

General principles—Whether a particular expenditure has been laid out for the purpose of the business etc., (or incurred solely to earn the profits) or whether it is capital expenditure depends in each case on the nature of the business commercial practice the nature of the expenditure and other circumstances. It is not therefore possible to enumerate what would or would not be admissible deductions under clause (xv). The following few examples are illustrative of the general principles. Thus advertisement charges would be allowed if they were incurred for selling the goods in the ordinary course but if a special campaign of advertisement was launched say, for expanding the business or floating a new company or extending the activities of the business in new directions the expenditure would be disallowed. Taking legal expenses for example expenditure on acquiring a patent or any new asset or goodwill or the like would not be an admissible deduction whereas the same expenditure incurred in defending a patent might be allowed. In *Kangra Valley Co v Commissioner of Income tax Punjab* (1934) I T R. 199 a contrary view was taken but it was departed from *Mahabir Prasad & Sons v Commissioner of Income tax, Punjab*, 1945 I T R 340 the *Kangra Valley Case* being distinguished on its facts. Legal and other similar expenses e.g. arbitration costs would be allowed if not for capital purposes irrespective of whether the assessee won or lost on the action. Expenses for fighting the liability to income tax need not be allowed as the expenditure is by no means necessary for earning the income that is the subject of charge but the Central Board of Revenue has authorised *ex gratia* the allowance of auditor's fees including the fees for settling liability to tax but not fees for appeal or revision. Bonuses to employees pensions salaries boarding and lodging expenses for employees clothing for them, would all be ordinarily allowed (always within

reasonable limits only) as deduction. Fees paid to Accountants and Auditors would be allowed if paid for normal work, that is, the every day work of the business but not if paid for special work by way of floating new capital, etc. Expenditure on development, prospecting etc. would not ordinarily be allowed, as they are essentially of a capital nature. Similarly, in regard to expenditure on removal from one premises to another, alterations of buildings, plant, machinery, etc. expenditure on fixtures and fittings. The primary test would be whether the expenditure was unusual or non-recurring and whether it brought into existence a new asset or effaced a capital liability. Embezzlements stand in a peculiar position. Embezzlement by or through the carelessness of an employee in the course of business may be allowed as deduction, but not money lost through the person responsible for the business or money lost by theft in the business—see *Curtis v. Oldfield* 9 Tax Cases 319, 41 T.L.R. 373 and other rulings, *infra*. Bad debts in the course of business would be allowed under clause (x) but not lost money loans unless lending money was part of the business. Broker's charges would be allowed if for selling goods or securing orders but not for raising loans or underwriting the issue of capital. In India, royalties paid for patents are a permissible deduction. In England they are not allowed to be deducted but the person paying the royalty is entitled to deduct tax from the person receiving the royalty.

Insurance premia on account of theft accidents etc., would all be allowed in most cases and the loss when realised from the insurance company, should be taken into the profit and loss account. Damages paid by an assessee would or would not be allowed according as they were paid in the ordinary course of business or not. It is usually a difficult question to decide whether damages paid is capital expenditure or not.

Correlation of profits and expenditure with reference to time —
The following dicta may be noted

'Such profits refer to the profits earned by the business generally and not to the profits of a particular year on which a particular assessment is levied. This is obvious because expenditure necessarily precedes the earning of the profits, and much of the profits of one year must be earned by the expenses incurred in the previous year or years, per *Macleod C.J.*—In *re Tata Iron and Steel Co.*, 1 I.T.C. 131, 45 Bom. 1306 A.I.R. 1921 Bom. 391.

'I do not feel any difficulty in rejecting the suggestion made by the learned Advocate-General that the 'profits' referred to in the clause must mean the profits of one particular year in which the expenditure in question is incurred. There is no such limitation in the section and in the absence of any words indicating such a limitation it is clear that the contention cannot be accepted"—Per *Shah, J.* (*Ibid*)

The above was endorsed by the Calcutta High Court in *Anglo Persian Oil Co. v. Commissioner of Income tax, Bengal*, 1933 I.T.R. 129. These doubts which arose with reference to the words 'incurred solely for the corresponding purpose of earning such profits or gains' (which appeared before 1939 in clause (xv) and the essential words in which still appear in section 12) do not arise now with reference to the words 'laid out etc., wholly and exclusively for the purpose of the business' etc.

See also the *Vallambrosa case* 5 Tax Cases 529 [under sect. 2 (1)], in which it was held that expenditure on maintaining rubber trees was an admissible deduction even though the trees may not yield any profits in a

particular year also *Ounsworth v Vickers*, 6 Tax Cases 671, (1915) 3 K.B. 267 *Hancock case* 7 Tax Cases 358, (1919) 1 K.B. 25

The profits for income tax purposes are the receipts of the business less the expenditure incurred in earning those receipts

Receipts include debts due and they also include at any rate in the case of a trader goods in stock. Expenditure includes debts payable and expenditure incurred. Repairs the running expenses of a business and so on cannot be allocated directly to corresponding items of receipts and it cannot be restricted in its allowance in some way corresponding or in an endeavour to make it correspond to the actual receipts during the particular year. If running repairs are made if lubricants are bought of course no inquiry is instituted as to whether those repairs were partly owing to wear and tear that earned profits in the preceding year whether they will not help to make profits in the following year and so on. The way it is looked at and must be looked at is that that sort of expenditure is expenditure incurred on the running of a business as a whole in each year and the income is the income of the business as a whole in each year without trying to trace items of expenditure as earning particular items of profits

—Per Rowlatt J in *Naval Colliery Co v Commissioners of Inland Revenue* 138 L.T. 593 12 Tax Cases 1017

Nevertheless there may be items which are clearly traceable to particular accounting periods e.g. reconditioning the mines in the very case above reserves to meet future expenditure. It is always a question of fact

It would be a fallacious view to take it that each particular year is to be treated as a water tight compartment and each item of expenditure in that year is to be strictly correlated to the profit of that year. Every company carrying on business makes future contracts. It may turn out that one of these contracts is a source not of profit but of liability. The company must fulfil its contract. Fulfilment of (its) contract is a fulfilment of one of the purposes of the business per Lord Sands in *Commissioners of Inland Revenue v Falkirk Iron Co* 12 A.T.C. 235 17 Tax Cases 625

Nor do their Lordships agree that expenditure in order to form a permissible deduction must have been incurred in the production of the actual year's income which is the subject of the assessment if by this is meant that the benefit of the expenditure must not extend beyond the year of assessment for very many repairs have the result of enabling income to be earned in future years as well as in the year in which they are effected *Rhodesia Railways Ltd v Income tax Collector Bechuanaland Protectorate* 1933 I.T.R. 227 (P.C.)

The question of law to be determined is whether the expenditure in question was or was not exclusively incurred in the production of the assessable income derived by the appellants in the tax year 1918-19. In considering that question their Lordships put aside the circumstance that the expenditure was not of such a nature as to produce income in the actual tax year in which it was incurred. In every trade much of the expenditure in each year such as expenditure in the purchase of raw material in the repair of plant or the advertisement of goods for sale is designed to produce results wholly or partly in subsequent years but nevertheless such expenditure is constantly al

lowed as a deduction for the year in which it is incurred in *Hard & Co v Commissioners of Taxes, New Zealand* (1923) A.C. 145 (P.C.)

On the other hand the assessee cannot claim to deduct expenditure not incurred in the year of assessment but several years before *Commissioner of Income tax U P v Basant Rai Takht Singh* 1933 I.T.R. 1917 A.I.R. 1932 All 451 (P.C.) See also *Naval Colliery v Inland Revenue* 12 Tax Cas 1017 (H.L.) referred to above.

Where receipts not taxable—No deduction is permissible in respect of expenditure related to income that is not brought into charge e.g. agricultural income or in certain circumstances, foreign income. Where expenditure relates partly to taxed and partly to the taxed income an allocation should be made. See notes under section 10 (2) (iii) in respect of interest. Whether such allocation can or should be made in a given case and if so, on what basis are all questions of fact.

Bad debts—See the Income tax Manual and notes under clause (xi) ante as regards the extent to which and the time at which bad debts can be claimed as a deduction.

Unexecuted contracts—Acquisition of—Price paid for—Whether 'capital' expenditure—A part of the business acquired by a company consisted of unexecuted contracts. The company claimed that the price paid for such contracts should be deducted in assessing the profits arising out of the execution of the contracts. Held that the price paid was capital expenditure and could not therefore be deducted. *City of London Contract Corporation v Styles* 2 Tax Cases 239 4 T.L.R. 51 (C.A.). This was followed by the Court of Appeal in *Ahanza Co v Bell* 5 Tax Cases 172, (1906) A.C. 18 and approved by the House of Lords in *John Smith & Son v Moore* (1921) 2 A.C. 13 12 Tax Cases 266 (Lord Finlay dissenting who thought that the facts could be distinguished).

An assessee acquired as part of a business certain unexecuted contracts left by his father for the supply of coal to him at favourable prices. The value of these contracts was estimated by Chartered Accountants at £30,000 which the assessee actually paid for. Later on, the price of coal rose very high and the assessee made huge profits. The question arose whether the £30,000 should be deducted from the profits as the purchase price of the stock in trade and the House of Lords (by a majority) negatived the assessee's contention that the sum should be deducted. *John Smith & Son v Moore* (1921) 2 A.C. 13 12 Tax Cases 266.

Per Viscount Haldane—profits may be produced in two ways. It may result from purchases on income account the cost of which is debited to that account and the prices realised therefrom are credited or it may result from realisation at a profit, of assets forming part of the concern. In such a case a prudent man of business will no doubt debit to profit and loss the value of capital assets realised, and take credit only for the balance. The appellant had brought as part of the capital of the business his father's contracts. These enabled him to purchase coal from the colliery owners at what we were told was a very advantageous price. He was able to buy at this price because the right to do so was part of the assets of the business. Was it a trading capital?

My Lords, it is not necessary to draw an exact line of demarcation between fixed and circulating capital. Since Adam Smith drew the distinction in the Second Book of his *Wealth of Nations*, which appears in the chapter on the Division of Stock, a distinction which has since become classical, economists have never been able to define much more precisely what the line of demarcation is. Adam Smith described fixed capital as what the owner turns to profit by keeping it in his own possession, circulating capital as what he makes profit of by parting with it and letting it change masters. The latter capital circulates in this sense.

My Lords, in the case before us the appellant, of course, made profit with circulating capital by buying coal under the contracts he had acquired from his father's estate at the stipulated price of fourteen shillings, and reselling it for more, but he was able to do this simply because he had acquired, among other assets of his business, including the good will, the contracts in question. It was not by selling these contracts, of limited duration though they were, it was not by parting with them to other masters, but by retaining them, that he was able to employ his circulating capital in buying under them. I am accordingly of opinion that, although they may have been of short duration, they were none the less part of his fixed capital. That he had paid a price for them makes no difference."

On the other hand Lord Finlay who was in the minority said

If the amount of coal, which they represented had been in stock in yards belonging to the coal-dealer, it could not have been disputed that the price paid for it would have been a proper deduction as against the price realised by the resale. It can make no difference for this purpose that the coal dealer followed the more convenient practice of having contracts with the collieries and despatching it from the pit's mouth straight to his customers. There is not here any provision of coal for a long time ahead—there is no purchase of a colliery from which the coal is to be extracted—that is merely provision in the only convenient way for the stock required up to 31st December, 1915, from 7th March, 1915. There is nothing in the nature of capital expenditure in the purchase of the stock wanted for re-sale during the current year.

The coal represented by the contracts was circulating capital. It was bought for use in the business, and was so used. At one stage of the argument in this House, an attempt was made to distinguish the case of contracts for coal, from the case of coal already delivered and stored in a coal dealer's yards and the Lord Justice Clerk in part rests his judgment in favour of the Crown upon the distinction between "goods" and "choses in action", such as contracts for coal. This distinction seems to me to be for this purpose untenable. The contracts gave the means of getting coal, and there is no difference for this purpose between having coal stored in your yard and having a contract which enables you to get it from time to time as you want it. This, indeed, was admitted by the Lord Advocate in argument when he was asked the question specifically by Lord Haldane. If the Crown is entitled to disallow what the appellant had to pay for these contracts, it would be equally entitled to disallow as a deduction the price paid for coal actually in stock.

For the present purpose these coal contracts are not distinguishable from the coal which they represent

The contracts cannot be regarded either in whole or in part as a fixed asset like a coal mine they are merely the machinery for getting coal and the coal which they commanded is the article by the re-sale of which the applicant made his profit. A contract for delivery of certain quantities of coal at a certain price may be made in consideration of a bonus paid when the contract is entered into in which case the price to be paid on delivery would be somewhat lower or it may be constituted simply by the price to be paid on each delivery. In each case the whole amount so paid represents circulating capital the coal which the purchaser means to re sell. The purchaser does not re sell the contracts he uses them from time to time as he requires coal for re sale. Where there is no bonus paid it would not I suppose be suggested that there was any element of fixed capital in such contracts. How can the payment of a bonus affect the case? The only difference is that the price which the mine owner is content to take and the coal dealer to pay is in the first case made up by a bonus on entering into the contract and the amounts paid on each delivery while in the other case it consists simply in the payment of a large amount as the price payable on each delivery. . . .

Viscount Caza who was in the majority put the case on different grounds

The £30,000 was not paid by the firm for coal nor was it paid by the trading firm as such for coal contracts it was paid by John Ross Smith out of his private pocket as part of an overhead transaction under which the business with its assets and future profits passed into his hands and it left the trading profits of the firm unaltered

If I buy the crop of an orchard in a particular year for £20 and sell it for £40 my profit is only £20. But the profit of the orchard is £10 and in comparing the produce of the orchard in that year with its produce in another year it is the £40 and not the £20 that must be taken into account

I may add that the contrary view would lead to strange results. If John Smith jun had lived until the end of 1915 it is clear that he would have earned the profits assessed and would have had to pay the duty claimed. Can it be that because he dies in March and the business and business assets were transferred to his son upon terms involving a payment of £30,000 for one of the assets the assessable profit was reduced by that amount? If so then if John Smith jun had lived for another six months and had then died the contracts being still unperformed the contracts might then have been valued at £60,000 and the assessable profits would have been reduced by that sum. And upon the same showing if John Smith jun instead of dying had at some time in 1915 converted the business into a company the company paying £30,000 or a larger sum for the coal contract the company would have been entitled to deduct the whole purchase-money paid for those contracts from its assessable profits and John Smith jun if he had held all the shares of the company would have received the whole profit freed to that extent from Excess Profits Duty. I cannot think that this is the true meaning and effect of the Act.

John Smith & Son v Moore (1921) 2 A.C. 13

Fixed capital and circulating capital—The following dicta may be noted.

What is circulating capital and what is fixed capital is a question which in many cases may well embarrass the businessman and the accountant as well as the lawyer. According to some of the definitions the same asset may be fixed capital in one company and circulating capital in another. *The Ammonia Soda Co., Ltd v Arthur Chamberlain and Others* (a case under the Companies Act) (1918) 1 Ch. 266 (CA).

In one sense the words capital asset are words of art because you do not have one set of assets representing capital and another set of assets representing income but what is meant is that this is an asset which represents fixed capital as opposed to circulating capital that is to say that this is an article which is possessed by the individual in question not that he may turn it over and make a profit by the sale of it to his advantage but that he may keep it and use it and make a profit by its use. For instance if a bank or a mercantile company finds it is more expensively housed than it needs and sells its country house and its offices that is not part of the business of banking' per Rowlatt J in *Rees Ro urbo Development Syndicate v Commissioners of Inland Revenue* 6 A T C 597 13 Tax Cases 366 (1928) A C 132.

money may be capital expenditure of the person who pays it and the income of the person who receives it. Per Rowlatt J in *Thomas v Richard Evans & Co* 5 A T C 551 11 Tax Cases 790 (1927) 1 K.B 33 (1927) A C 827.

Thus the cost of machinery or plant purchased by a business would ordinarily be expenditure on its fixed capital but the same machinery or plant would be part of the stock in trade i.e., the circulating capital of the manufacturer of or plant machinery. For further examples see the judgment of Rankin CJ in *Anglo Persian Oil Company (India) Ltd v Commissioner of Income tax, Bengal* 1933 I T R. 129 60 Cal 843 6 I T C 419. There is however no overriding principle of law that income-tax can be levied at least once on every payment—either in the hands of the payer or in those of the payee and the taxability of a particular item at each stage should be considered with reference to the circumstances of each stage i.e. those of the payer and of the payee.

While a kennel of a breeder may be stock in trade the kennel of a company supplying runners (greyhound racing) or running its own dogs is not stock in trade additions to it therefore constitute capital expenditure and reductions therefrom capital reduction. The kennel is not to be valued as stock for the purpose of ascertaining profits *Abbott v Albion Greyhounds Ltd* (1945) 1 All E R. 308.

Whether to a given person a particular thing is fixed or circulating capital would depend on the nature of his business and of the raw materials of the business. If a gas manufacturer buys coal the cost of the coal can be deducted from his profits if on the other hand he owns a colliery he cannot get an allowance for the cost of acquiring the mine or for the depletion of the deposit. Similarly the cost of dumps of tailings of gold ore can be allowed in the case of a refiner of gold to whom the ore is raw material but not to a miner of gold to whom it is not raw material *Golden Horse shoe (New) Ltd v Thurgood* 18 Tax Cases 280 (1934) 1 K B 548 (CA).

Similarly the owner or lessee of a brickfield cannot deduct from his profits the value of earth or claim an allowance for depreciation, even though if he bought the earth from outside as necessity arose the cost of the earth could be deducted, *Commissioner of Income tax, UP v Tikaram and Sons*, (1937) ITR 544 (All) *A fortiori* the cost of purchasing land for extracting earth for bricks cannot be deducted. In *re Ganeshlal Bhattawala*, (1938) ITR 489 (All) The Chief Court of Oudh went even further in *Sardar Singar Singh & Sons v Commissioner of Income-tax*, 1944 ITR, 504, in holding that the cost of acquiring a lease of brickfields for a period of years is capital expenditure even if a part of the cost is described as advance payment of rent. If the rent had been payable annually and only for the period of occupation or with reference to the quantity of earth removed the decision may have been different.

Where an assessee obtained the exclusive privilege of excavating lime shells in an area for three years in return for which he paid a sum in twelve quarterly instalments it was held that the payments were not of the nature of rent (though the area was leased) nor of that of cost of raw materials. The shells were not of the nature of raw materials since they had not already been excavated and dumped, and it was left to the lessee to quarry as much or as little as he chose. The fact that payment was made by instalments did not alter its true nature which was to start a new venture and not to carry on an existing business, *Chengalvaraya Mudahar v Commissioner of Income-tax, Madras*, (1934) ITR 395. Nor would the mere use of the words "annual lease amount" in a lease of this kind convert the payments into revenue expenditure, *Chengalvaraya Chettiar v Commissioner of Income tax, Madras*, (1937) ITR 70. The payment for an exclusive right for a period to collect chanks from chank beds the payment not depending on the quantity collected and not being an outlay in an already existing business was held to be of a capital nature even though the payment was made in instalments. *Abdur Kayum Sahib Hussain Sahib v Commissioner of Income tax, Madras*, (1939) ITR. 652.

Where, however, in order to extract saltpetre and common salt an assessee acquired on short leases for a year or two plots of land containing saltpetre it was held that the expenditure was revenue expenditure. The raw material was the earth which was not a marketable commodity and according to custom could only be got by short leases. The consideration for each lease was not a separate investment for a separate transaction. The expenditure on the leases was therefore incurred for running the business and not for acquiring it. In *re Parmanand Hazellram*, (1945) ITR. 157 (Lah) following the observations of Channell J, in *Alanza Co v Bell*, 5 Tax 60.

It should be noted that the case where the assessee owns a mine or acquires it under long lease is essentially different from what he acquires on yearly or short term leases, in the former case, what is acquired is fixed assets and in the latter, circulating capital. What is a short lease and what is a long one is obviously a question of degree, and the more important test is whether the asset is of the nature of fixed capital or of that of circulating capital. In *re Parmanand Hazellram*, (1945) ITR. 157 was followed in *In re Nandlal Bhojraj*, (1946) ITR. 181 (Lah.) in which the cost of acquiring year after year leases of saltpetre lands for periods of about 5 to 10 years each the periods varying with the available saltpetre in the land was allowed as revenue expenditure. In *Commissioner of Income tax v*

Bhojraj Harichand, 1946 ITR 277, the same High Court went further and ruled that irrespective of the duration of the leases, the expenditure was revenue expenditure so long as in truth the transaction is one of selling the earth or the periodical saltpetre crop

Money-lending—A money lender's stock in trade is his money, and if he has a money lending business both abroad and in British India, the loss on account of exchange in respect of his remittances to and from British India is a legitimate debit to his Revenue account, *Commissioner of Income tax, Burma v A S A Concern*, (1937) ITR 456

Goodwill—Fixed capital—"It is necessary, however, to consider whether the depreciation in goodwill and leases is to be treated as loss of 'fixed capital or of floating or circulating capital' Depreciation of goodwill seems to me to be loss of 'fixed capital' It closely resembles the loss which a railway company might be said to sustain if it were found that a line, which had been made, say ten years ago, at a certain cost, could now be made for a very much smaller amount and consequently would not yield if it were sold the price expended in making it' *Wilmer v M'Narma & Co, Ltd* (a case under the Companies Act), (1895) 2 Ch 245

Transfer of business—Consideration for—When the Royal Insurance Company acquired the business of the Queen Insurance Company, it was also provided in the agreement of transfer that the manager of the latter company should be taken into the service of the former, at a salary. But liberty was reserved for the Royal Insurance Company to commute the salary by payment to the manager of a gross sum on the basis of the Company's Annuity Tables subject however to the condition that he should not at any time accept office under any other fire or life insurance company. Shortly after the transfer of the business the Royal Insurance Company paid the manager the commuted value of his annual salary. The Company claimed to deduct this lump sum from the taxable profits. *Held*, that this payment formed part of the consideration for the transfer of the business and therefore being capital expenditure, could not be deducted. *Royal Insurance Company v Watson*, 3 Tax Cases 500, (1897) AC 1. Similarly the consideration paid by one Bank to another in return for the transfer of a right to issue notes is not deductible, since it is capital expenditure, *London Bank of Mexico v Aphorpe*, 3 Tax Cases 143 (1891) 2 QB 378

In a case in which the facts were complicated and peculiar but broadly speaking, a family company, which was involved in discord and paid the various members salaries for sinecure jobs and had a neutral manager who was allowed to have other pursuits, had to pay compensation to the above employees for terminating their services such termination being required for the purpose of transferring control of the company to outsiders, it was held that the compensation was capital expenditure, *Bassett Enterprize, Ltd v Petty* 17 ATC 272 (K.B.). There was a partition between a Hindu father and his son under a Court's decree and the father retained the old trade name, the goodwill of the old business and the card of membership of a stock exchange in the old name while the son started a new business in a slightly different name. At the partition the son was given the right to recover a certain debt nominally about Rs 113,000 but valued for the purpose of the partition at Rs 22,000. Eventually the debt was settled for Rs 12,000. It was held that the loss was of capital the debt having been taken over as a part of the capital assets of the new business.

which was not a successor to the old one, and not as part of outstandings in a continuing business, *In re Bissendoyal Dojaram*, (1938) ITR 165

Tea Gardens—See *Vallambrosa case*, 5 Tax Cases 529 and notes under section 2 (1) as regards expenses of cultivation

Contracts—Cancellation of—Compensation for—A company, which owned a ship, contracted for the construction and purchase of a new ship for the sum of £226 000 of which £30,000 was payable on the signing of the contract, and the balance of instalments as the building of the ship progressed. Before any substantial progress had been made a heavy slump in trade occurred and the company cancelled the contract by payment, to the builders, of £60 000, including the £30 000 already paid. *Held*, that the payment of the whole of the £60,000 was in the nature of capital expenditure, and was not an admissible deduction in the computation of the profits of the company for income tax purposes, *'Countess Warwick' Steamship Company, Limited v Ogg*, 8 Tax Cases 652, (1924) 2 KB 292

If, on the other hand, the contract was one for goods or stock in trade (as distinguished from capital goods like a ship), the compensation might be an admissible deduction

A Marine Insurance Company claimed to deduct from its profits a sum of money paid as compensation for cancelling contracts to build ships which it had ordered but did not require. The Commissioners were not satisfied with the explanation offered as to the object of the transaction. It was held that on the facts the loss was not a trading loss, *i.e.*, that dealing in ships was no part of the business of the company, *Deion Mutual Steamship Insurance Association v Ogg*, 6 ATC 1010, 13 Tax Cases 184

In all cases relating to the payment of sums in connection with cancellation of leases and the like, an important test is whether the payment is merely the commutation of what is clearly a revenue charge. See *Smith v Incorporated Council of Lau Reporting*, 6 Tax Cases 477, *Noble v Mitchell*, 11 Tax Cases 372, or whether the payment is really not for the purpose of the continuing business, *i.e.*, closing down of the business *Union Cold Storage Co v Ellerker*, 17 ATC 479 (K.B.D.)

See also the cases cited under section 3 as to when such compensation is a capital receipt and when not

Preliminary expenses—Such expenses are clearly of the nature of capital expenditure. A company formed to run a mill merely accumulated funds and invested them, and earned no profit as a mill, not fully functioning as such. *Held* that only such expenditure could be deducted as related to the earning of the income from investments and that no expenditure on the mill proper could be claimed. The assessee's plea was that the disallowed expenditure was a necessary incident of the business and required to put the mill on a profit earning basis, *Mahalakshmi Textile Mills, Ltd v Commissioner of Income tax, Madras*, 6 ITC 83

Where a company formed *inter alia* for the purpose of searching for and winning mica stopped work because of a cyclone and incurred expenditure in prospecting some time later with a view to resuming production it was held that the expenditure was deductible from other taxable income, *General Corporation, Ltd v Commissioner of Income tax, Madras*, (1935) ITR 350. Whether business is actually being carried on is a question of fact and not of law

Loss in winding up—Such loss is necessarily of a capital nature see *Commissioners of Inland Revenue v Burrell*, 9 Tax Cases 27, (1924) 2 K.B 478, *In re Armutage*, (1893) 3 Ch 377 and *In re Crichton's Oil Co*, (1902) 2 Ch 86 See also notes under section 24

Lease—Foreclosure of—A Company whose business was not to trade in mining licences but to win coal got rid of an onerous licence involving the payment of a heavy dead rent and a minimum royalty by paying a lump sum to the lessor. *Held*, that the payment was capital expenditure, *Mallett v Staveley Coal and Iron Co, Ltd*, (1928) 2 KB 405, 13 Tax Cases 772 (CA). Whether you acquire an asset by the expenditure, whether it is debited to Profit and Loss Account whether it is recurrent or not—these, though helpful tests, are not conclusive. If you redeem an annual recurrent business expenditure by a commuted lump payment, such payment can be deducted (see *Hancock's case*, *infra*), but if you pay something now to avoid losses in future years the payment is analogous to a loss of fixed capital. In this case what really happened was that the company disposed of a burdensome capital asset.

In *Coucher v Richard Mills and Co, Ltd*, (1927) 13 Tax Cases 216 it was held that the lump sum consideration paid to the landlord as compensation for the premature surrender of a lease of certain shops which had to be closed was capital expenditure.

Recurring capital expenditure—Whether a recurring payment is merely an instalment of a Capital debt or a Revenue expenditure depends both on the form and on substance. An annual rent would be clearly a Revenue charge but if a contract is made under which the assessee secures the right to use the land for a certain number of years and a lump sum is fixed as the consideration for this right but payable in annual instalments such payments would be Capital charges. See *Commissioners of Inland Revenue v Adam* (Lord Blackburn dissenting), 7 ATC 397, (1928) 14 Tax Cases 34, also *Anley v Eden*, 14 ATC 243 (K.B.D.) referred to under section 10 (2) (i). Where however a lessee of a coal seam, in return for the lessor's indemnifying him against liability for surface damage, paid the lessor so much per acre as each acre was worked it was held that these payments were legitimate deductions from taxable profits *O'Grady v Bullcroft Main Collieries*, 17 Tax Cases 93.

Where a local authority arranged to take water from a colliery company and the latter erected wells in accordance with the designs etc., of the former and received from it annually (a) fixed sum, (b) 1/30th of the capital cost of the works, (c) Interest on outstanding capital, and (d) a penny for every 1,000 gallons of water supplied, it was held that item (b) could not be deducted from the profits of the local authority, *Coalville Urban District Council v Boyce*, 18 Tax Cases 655. See also *Ostime v Pontypridd and Rhodda Joint Water Board* 1944 C A referred to under section 4 (3) (iii).

A Colliery Company undertook either to restore to an arable condition all land occupied by the Company, etc., or to pay the lessor for land not so restored at so many years' purchase of the agricultural value of the land. The Company paid a lump sum under the option. *Held*, that the payment was capital expenditure.

Per the Lord President—"It seems to me that on the question of the capital or revenue character of the cost of restoration, or of the compensation payable for land damaged or not restored

it makes no difference whether the company had acquired the property or a servitude right at the commencement of the lease in consideration of a price paid or whether they merely acquired a personal right for the duration of the lease upon condition that they paid for it at the end of the lease by restoring the land to its original condition or by paying the value of the land if it was not restored *Robert Add & Sons' Collieries v Commissioners of Inland Revenue* 8 Tax Cases 671

If however, instead of arranging in advance for such a lump sum payment the Colliery owner goes to arbitration each time damage on the surface is caused to the property of a person the damage awarded by the arbitrator might be a revenue charge. In a case in which compensation was paid as each acre was broken not on the basis of ascertained damage but at a pre arranged rate of so much per acre it was held that the expenditure was a revenue charge. The test applied—following the *British Insulated Cables* case 10 Tax Cases 155—was whether by such a payment an asset or right was acquired or whether payments were made as the business progressed and necessitated by it *O Grady v Markham Main Colliery Ltd* 17 Tax Cases 93

A coal mining company was under a statutory obligation to remedy injuries to a drainage system caused by subsidence. The Drainage Commissioner prepared a comprehensive scheme by contributing to which the company was relieved of its statutory obligation. The contribution was payable in instalments. *Macnaghten J* allowed the contribution on the ground that the company thereby got rid of an annual liability *viz* of remedying the injuries to the drainage system from time to time but the Court of Appeal disallowed it. Though the case was near the borderline the company obtained an enduring benefit for it was enabled to work a large quantity of coal for several years. The case was therefore one of capital expenditure rather than expenditure to earn normal profits *Bean v Doncaster Amalgamated Collieries* 1944 C.A.

Colliery—Restoration of seams—If a seam is allowed to get into a non profit earning condition expenditure incurred in getting it back into a working condition is capital expenditure on the other hand expenditure on keeping up a seam continuously in a profit-earning condition is revenue expenditure. It is all a question of degree *United Collieries Ltd v Commissioners of Inland Revenue*, 8 A.T.C. 522 12 Tax Cases 1248.

Repairs—Accumulated—Additions and improvements.—In *re King's Lynn Harbour Moorings Commissioners* 1 Tax Cases 23 the Court upheld the contention of the Mooring Commissioners that money applied in the repayment of debts previously incurred in the renewal of works necessary for earning the income was deductible. Some of the later decisions about capital expenditure cited below are however against the view in this decision.

Where certain ships had been sunk by the Admiralty in the outer part of a harbour as part of a scheme of defence and later on when that part of the harbour was handed over to the Harbour Board the latter claimed to deduct from their profits the cost of removing the sunken ships. The Commissioners held as a fact that the removal of the sunken ships was of the nature of dredging and that the expenditure on removal was therefore a revenue charge which could be deducted from the profits. Both *Finlay J*, and the Court of Appeal declined to interfere *Whelan v Dover Harbour Board* 13 A.T.C. 123 18 Tax Cases 555

The expense laid out in keeping a ship which is employed in trade in proper repair, is certainly an expense necessary for the purposes of the trade. It is made for the purpose of earning the profits of the trade. Repairs may be executed as the occasion for them occurs or if they are such as brook delay, they may be postponed to convenient season, but in either case they truly constitute a constant recurring incident of the continuous employment of the ship which makes them necessary. They are therefore an admissible deduction in computing profits, per the *Lord President in Law Shipping Co v Commissioners of Inland Revenue* 12 Tax Cases 621.

But the accumulated repairs on account of purchasing a ship in disrepair are capital expenditure and may not be admitted as deductions, per the *Lord President (ibid)*. In this case a second hand ship in bad repair was purchased by the assessee in circumstances not constituting succession to the seller's business and repairs attributable to the period of use by the assessee were allowed as Revenue expenditure and the only dispute was as to the repairs to make good initial defects. The cost of repairing a newly bought asset need not however always be capital expenditure e.g. if the assessee can show that the price that he paid for the asset would have been the same irrespective of whether the vendor or purchaser made the repair.

A company owned a single steamship which was seized and used by the Germans during the War. The ship was returned to the owners after the War and heavy repairs were found necessary for reconditioning it. The company received compensation from the German Government. Since the compensation was clearly of the nature of damages and not of the nature of freight for the period of use by the Germans and the reconditioning was not in the course of the daily business of the company it was held that the cost of reconditioning could not be deducted from the company's profits.

Per *Lord Sands* — It is clear that if the respondents had purchased another dilapidated ship and reconditioned her the expense of such reconditioning would have been held to be capital outlay (*Law Shipping Co* 12 Tax Cases 621). Does it make any difference that the ship which they so treated was their own old ship of which they had recovered possession after $4\frac{1}{2}$ years? I come to the conclusion that it makes no difference and I do so on the grounds that the respondents had not been in possession of the ship for $4\frac{1}{2}$ years had not during that time handled or traded with the ship and that the dilapidations which had to be made good were not dilapidations suffered by the ship in the course of the respondents trading with her. *Commissioners of Inland Revenue v Granite City Steamship Co*, 6 A.T.C. 678.

The cost of reconditioning coal mines pumping and restoring pit props as a consequence of damage resulting from the stoppage of work during a prolonged strike was held to be a capital loss by the Court of Appeal (*Sargant L.J. dissenting*). Since, during the period the colliery had stopped work and was not trying to win coal *Norfolk Colliery Co Ltd v Commissioners of Inland Revenue* 6 A.T.C. 351 12 Tax Cases 1017.

'The loss even if made good out of revenue is not a revenue loss the injury to the mine is an injury to a fixed capital asset — Per *Hartworth M.R.*

'It was an existing loss chargeable against the profits of the period in which it was made and liable to be defrayed in the ordinary course

out of any moneys that might come to their hands in the succeeding period. It was throughout an income loss'—*Per Sargant, L.J.*

The periodical renewal by sections, of the rails and sleepers of a railway line as they were worn out by use is in no sense a reconstruction of the whole railway and is an ordinary incident of railway administration. The fact that the wear although continuous is not, and cannot be, made good annually does not render the whole cost of renewal when it comes to be effected necessarily a capital charge. Such expenditure is incurred in consequence of the rails having been worn out in previous years the income of which had been taxed without deduction in respect of such wear, and merely represents the cost of restoring the rails to the state in which they could continue to earn income. It does not create any new asset, *Rhodesia Railways Ltd v Income tax Collector*, 1933 ITR 227 (P.C.). On the other hand a railway is not entitled to deduct from its profits the cost of any improvements effected at the time of renewals such as increasing the weight or quality of the rails or that of the sleepers and chairs and anchors or introducing new types of points and crossings signals etc., *Highland Railway Co v Balderston* 2 Tax Cases 485. See also *Caledonian Railway v Banks* 1 Tax Cases 487, set out under clause (vi) (Depreciation allowance), Notification under section 60 under which railways are allowed to claim cost of renewals as made in lieu of the depreciation allowance. In the Privy Council case from Rhodesia above referred to the railway had been disallowed its claim for 'wear and tear' on the ground that the railway was permanent and not liable to wear and tear and its claim for renewals on the ground that they were not 'repairs'. The Privy Council's decision in effect was that the renewals were merely accumulated repairs.

Reserves—Future repairs—A corporation which purchased gas works in a defective structural condition was held not to be entitled to deduct sums set aside annually to be expended in later years on restoring the plant and apparatus to its proper condition *Clayton v Newcastle-Under-Lyme Corporation*, 2 Tax Cases 416.

Accumulated Royalties—The Patna High Court in *Maharajahthiraj of Darbhanga v Commissioner of Income tax*, 4 ITC 283 allowed as a deduction from the taxable profits of a successor in a business the accumulated arrears of royalties that had mounted up during the time of his predecessor. The royalties it was argued were not a personal liability of the predecessor, and further mining operations could not be effected except on the payment of these royalties. This view was not accepted by the Privy Council. If the assessee had known (what was concealed from him) that arrears of unpaid rent had accumulated which the assessee would have to pay to the superior landlord he would have correspondingly diminished the purchase price of the colliery. Whether he could recover it or not he had a claim against the vendor, and if it was recovered it would go in reduction of purchase price and not as a credit to the Profit and Loss Account of the colliery. The arrears of rent therefore were not loss on the income account of the colliery but a sum payable to get possession of the colliery—not to carry it on. It was therefore not incurred to earn the profits and gains of the colliery business. *Commissioner of Income tax, B & O v Kameshwar Singh* 1933 ITR 94 12 Pat 318, AIR 1933 PC 108.

A mine was subject to a minimum dead rent but when the royalties exceeded this figure the surplus could be retained and the company had

recouped the excess in former years of the dead rent over the royalties. It was held that the mine was assessable on its full profit without deduction of the surplus royalties retained, although in earlier years the dead rent had been paid and assessed when the mine had not begun to work, *Broughton & Plas Power Coal Company v Kirkpatrick*, 2 Tax Cases 69, 14 QBD 491.

Lease—Premium—A premium for the renewal of a lease for five years was held to be capital expenditure in *Mac Taggart v Strump*, 4 ATC 455, 10 Tax Cases 17.

Per *Lord Cullen*—"The distinction between capital and revenue expenditure is very elusive, and is more formal than real, and whether expenditure for a particular purpose is capital expenditure or revenue expenditure may depend, as has often been said, upon the mode in which the expenditure is made. Here I think that

(a trader) would regard it as a payment of capital which he had, in unusual circumstances been forced to make, although as a matter of ordinary prudence, he would probably see to it that this depletion of his capital was made good gradually out of his profits when earned."

A brewer paying a premium for the lease of a public house, for the purpose of letting it to a tenant under covenant to buy beer brewed by him, is not entitled to a deduction on account of the gradual exhaustion of the premium, *Knowles v McAdam*, 1 Tax Cases 161, distinguished, *Watney & Co v Musgrave*, 1 Tax Cases 272.

Where a company leased a cinema for a long period (21 years) in return for an annual rent *plus* a premium payable in quarterly instalments throughout the period of the lease, it was held that the premiums were capital expenditure, *Green v Favourite Cinemas, Ltd*, 15 Tax Cases 390.

Where, however, an assessee acquired, in return for an annual payment the under lease of certain cinema premises and also the goodwill of the cinema business for the period of the lease, together with the option to acquire the headlease and goodwill on a further lump sum payment, it was held that the annual payment was a revenue charge—neither a capital outlay nor an appropriation of profits, *Ogden v Medway Cinemas, Ltd*, 13 ATC 473, 18 Tax Cases 691. The annual payment in this case was unrelated to any lump sum consideration for the purchase of the right, it was not an instalment of a lump sum.

It is not necessary that rent should be a constant figure from year to year. The mere fact that, in a renting agreement for a term of years more than one half of the total rent is paid in the first year will not of itself convert the rent of the first year into a capital payment. On the other hand if there are relevant facts, *e.g.*, the total rent over the term being in truth the cost of machinery or other asset rented (it being of no value at the end of the term), it might be possible to hold that the entire rent—not merely that of the first year—is capital expenditure. Where, therefore, certain machinery and plant, leased for a term of years, remained the property of the lessor who had access to them to alter, adjust and repair them, and the machinery, etc., were eventually to revert to the lessor, and there was no evidence to suggest that the rent was really a payment by instalments for the machinery, etc., it was held that the rent should be allowed as a deduction, *In re Hakim Ram Prasad*, 1936 ITR 104. See also section 10 (2) (1) and notes thereunder.

Colliery—Sinking new shaft or pit—A call was made upon the shareholders of a Cost book Mine, for the purpose of sinking a new shaft, and the concern claimed to deduct the amount expended on such sinking. The Commissioners allowed the claim, as they were of opinion that in the case of a Cost book Mine there was no such thing as capital, and that there could be no profit in working such a mine until every expenditure had first been met. *Held*, that the Commissioners were wrong, and that the question, whether the expenditure in respect of which a deduction was sought was capital or not was one of fact, and the case was accordingly sent back to the Commissioners to ascertain the facts. A 'cost book' mine is one in which the owners, who form a common law partnership, run the mine jointly, without keeping any Capital Account, the excess of expenditure over receipts being borne by the partners as a capital loss and the excess of receipts over expenditure being distributed as profits.

Per Wright, J—'The real question is Is the expenditure in respect of which a deduction is sought to be made, capital or not? That must be to a great extent, or may be to a great extent, a question of fact. One can very well imagine in cases of mines where minerals lay at shallow depths, and where it was necessary to open them out from time to time, frequently, by shallow shafts, that in those cases, it might well be that the sinking of shafts would be properly treated as part of the ordinary working expenditure. On the other hand you have a case such as I suppose the present case is, where a large area of ground has been worked from one shaft, and it is apprehended that it will soon become impossible to work any further from that shaft, and a new mine, so to speak, must be opened by a new shaft altogether."

Per Collins, J—It seems to me that on the authority of *In re Addie & Sons*, 1 Tax Cases 1, 12 Sc L.R. 274, expenditure in sinking a shaft would be capital expenditure, and it is possible to conceive of cases in which the making of a shaft, having regard to the lie of the minerals and the very small length of the shaft might be described as working expenditure," *Morant v Wheel Grenville Mining Company*, 3 Tax Cases 298.

A deduction is not ordinarily allowable for expenses of pit sinking.

Per Earl Cairns—'I am not prepared to say that a mine-owner might not in some cases be entitled to an allowance in respect of the cost of sinking a pit by means of which the minerals are gotten which are the source of profit."

Per Lord Blackburn—'I do not wish to lay down any general proposition either that money expended in sinking pits can never be in the nature of expenses incurred in working the coal so as to be properly taken into account in estimating the profits made or to say what, if any, the circumstances are under which it may be done," *Coltress Iron Co v Black*, 1 Tax Cases 287, 6 App Cas 315, overruling the decision in *Knowles v McAdam*, 3 Ex.D 23, 1 Tax Cases 161.

Per the Lord President in Addie's case—"Now I am quite clear that the making of a new pit in a trade of this kind, is in every sense of the term, just an expenditure of capital. It is an investment of money of capital and must be placed to capital account in any properly kept books applicable to such a concern," *In re Addie & Sons*, 1 Tax Cases 1.

The cost of a new chimney has been disallowed as being capital expenditure, *O'Grady v Bullcroft Main Collieries, Ltd.*, 17 Tax Cases 93.

A mining company claimed as a deduction the cost of deepening a main shaft, the bodies of ore accessible from the original level having been practically worked out. *Held*, that there was no evidence on which the opinion of the Commissioners, that the expenditure was proper working cost, could be supported, and that the deduction could not be allowed, *Bonner v Basset Mines, Ltd*, 6 Tax Cases 146, 108 LT 764.

Where a mining company first allowed its lower seams to be filled with water because it was not intended to work these seams and later on dewatered them in order to work them it was held that the cost of dewatering was of a capital nature. *United Collieries, Ltd v Commissioners of Inland Revenue*, 12 Tax Cases 1248.

Wasting assets—An English Company owned nitrate grounds in Chile, which with the factory machinery etc., would become useless when the nitrate was exhausted. The raw material from which the nitrate was produced was found in natural deposits on the grounds at or near the surface. The company claimed that a deduction should be allowed for the cost of the raw material worked up and exhausted each year. *Held*, that the deduction in question could not be allowed.

Per Lord Macnaghten—‘It appears to me that it is money wholly and exclusively laid out and expended as capital’.

Per Lord Robertson—First of all is this capital which he proposes to obtain a deduction for? Now that my Lords, seems to me to be entirely concluded by the findings in the case. There is no doubt whatever that the scheme of the enterprise of this Company was to invest their capital in the acquisition of this property and then to proceed to work it as a mining concern.

My Lords, that being so the Master of the Rolls seems to me to be abundantly justified in saying that this is merely another case where capital has been embarked in a wasting subject matter, *The Alhansa Company, Ltd v Bell*, 5 Tax Cases 172, (1906) AC 18.

In *Kauri Timber Co v Commissioner of Taxes*, (1913) AC 771—a New Zealand case—a company acquired certain forests mostly by purchase or by a 99 years lease. Under the New Zealand law no deduction may be made from taxable profits on account of loss of capital. The question therefore arose whether the value of the timber cut down every year could be deducted. The Privy Council held that the deduction was not permissible.

“there is no obligation upon the company immediately to cut down and remove the timber, or indeed to do so at any specific date their rights with regard to the timber being co extensive in time with the currency of their leases. The case is thus removed in fact from an analogy with decisions in which a sale of standing timber was coupled with the duty of its instant removal from the ground. the transaction under which these timber rights were acquired was not one under which a mere possession of goods by a contract of sale was given to the appellant company, but was one under which they obtained an interest in and possession of, land. So long as the timber, at the option of the company, remained upon the soil it derived its sustenance and nutriment from it. The additional growths became *ipso jure* the property of the company. All rights of possession necessary for working the business of cutting or even for preserving uninjured the standing and growing stock of timber were ceded under the leases. All this, together with the business facilities for removal and sale was granted to

the company which thereby became invested with the possession of and an interest in the land.

It has long been the law of the United Kingdom that the exhaustion of capital however it might be treated on strict actuarial principles or according to certain principles of economics may for the purpose of taxation be treated as profit. The profit may be temporary and so when it ceases the capital may be gone and with the going of the capital there will also go the subject and the possibility of the tax.

The law—so clearly stated with regard to the working of coal and nitrates and settled upon a broad general principle—is in no way different when it comes to be applied to timber bearing lands. The principle as to the true reason for holding that such timber rights are of the nature of possession of and interest in the land itself has long been settled. *Aauri Timber Co v New Zealand Commissioner of Taxes* (1913) A C 771.

Subsidiary and allied businesses—Losses arising from—A Company carried on the business of zinc smelting for which purpose it required large quantities of blende. To supply the blende a new Company was formed which from time to time received assistance from the old Company in the form of advances on loan. The new Company proving unsuccessful, and going into liquidation the amount due from it to the old Company was written off as bad debt. *Held* that the advances were an investment of capital and that the loss was not deductible in arriving at the profits of the old Company for assessment.

Per Bray J—What you have to see is whether an expenditure which on the ordinary profit and loss account would not appear as a debit at all but would appear as a debit when you are dealing with assets.

If this were an ordinary business transaction of a contract by which the Welsh Company were to deliver certain blende it may be at prices to be settled hereafter and that this was really nothing more than an advance on account of the price of that blende there would be a great deal to be said in favour of the appellants. But it is quite clear that the Commissioners have not taken that view and it seems to me rightly they have not taken that view. It is impossible to look upon this as an ordinary business transaction of an advance against goods to be delivered. It is really nothing of the sort. The Welsh Company were in this difficulty. They had great difficulties in opening their mine they had to expend large sums of money for that purpose and they applied to the appellant Company—the English Company to lend them money and they lent them money.

Now I can come to no other conclusion but that this was an investment of capital in the Welsh Company and was not an ordinary trade transaction of an advance against goods.

English Crown Smelter Co v Baker 5 Tax Cases 327 99 I T 353.

In *Jacobs Young & Co v Harris* 5 A T C. 735 11 Tax Cases 221 where a principal company sank its money in a subsidiary company and the latter lost its money it was held that the loss was to the former a loss of capital and not a deductible expense. The point is that it was not the trade of the principal company in which the loss occurred.

A company manufacturing fountain pens formed a subsidiary company for the manufacture of a low grade pen. The issued capital of the new company was wholly subscribed for (except for one share) by the sole director of the parent company who also became sole director of the new

company The new company was suddenly required by Government to make aeroplane parts, and there was delay in the receipt of moneys from Government The parent company went on making loans to the new company and eventually took over its business A part of the advances was written off and the company also repaid the director the capital subscribed by him The question arose whether these amounts could be deducted from taxable profits *Held*, that there was no evidence to justify the findings of the Commissioners that the deductions were admissible, *Baker v Mabie Todd & Co, Ltd*, 13 Tax Cases 235

The taking over of a large stock of goods at an inflated price from a subsidiary company merely to avert the latter from disaster cannot cause a trading loss but only a capital loss to the parent company when the goods are ultimately written down, that is, the loss cannot be deducted *Commissioners of Inland Revenue v Huntley and Palmers, Ltd*, 7 A.T.C. 323, 12 Tax Cases 1209

An oil producing and refining company which had regularly bought oil for a long time from another company which it largely controlled bought the plant and equipment of that company and also the oil estimated to be in its wells A certain sum was paid for the oil in the shape of shares in the purchasing company, the cost of these shares being placed under "crude oil suspense" in its books, the suspense being cleared gradually as oil was produced It was argued that the company had only bought stocks of crude oil having accurately estimated the deposits underground and that the expenditure, being on circulating capital, was deductible from taxable profits. This was negatived on the ground that the wells were an 'enduring asset' in the words of Lord Cave in *Atherton v British Insulated and Helsby Cables*, (1926) A.C. 192, 10 Tax Cases 155, *Hughes v British Burma Petroleum Co*, 17 Tax Cases 286.

A Brewery Company granted loans to their customers on the security of Public houses If the security did not realise the amount of the loan the Company wrote off the loss as a bad debt *Held*, that in arriving at the profits of the Brewery Company, for assessment to income tax the Company was entitled to deduct the amount of such losses or bad debts, *Watney & Co v Musgrave*, 5 Ex. D 241, 1 Tax Cases 272 distinguished, *Reid's Brewery Co, Ltd v Male*, (1891) 2 Q.B. 1, 3 Tax Cases 279

In order to establish a new source of supply, a paper maker in the United Kingdom advanced money to a wood pulp manufacturer in Canada the money bearing interest and being repayable gradually when supplies were made During the war the British Government stopped the import of wood pulp and the Canadian firm disclaimed all liability in respect of the advance *Held* that the advance was in the nature of capital expenditure 'since you do not pay in advance for goods simpliciter ten years in advance' *Charles Marsden & Sons v Commissioners of Inland Revenue*, 12 Tax Cases 217

Three closely connected companies—two in England and one in India—entered into an elaborate arrangement under which certain shares sold by the English companies to the Indian company were allowed to remain with the former (in their own names) who received the dividends, sold the shares from time to time and retained the proceeds and in fact had the same dominion (including power to pledge for debts) over the shares as if they had not been sold The shares were paid for, at rates higher than the true price, by the issue of fully paid up shares of the Indian company

The position therefore was that while in certain events the Indian company might have received the shares *in specie*, it might equally have received nothing more than a sum of money, which might be and was less than the nominal fully paid up value of the shares. The difference between this value and the sale proceeds of the English shares was eventually claimed by the Indian company as a loss. The Privy Council held following *Moffy v Koffeyfontein Mines, Ltd*, (1904) 2 Ch. 108, that in the circumstances of the case (the consideration having been manifestly less than the fully paid value of the shares) the issue of fully paid shares by the Indian company could not be justified, that the English companies were responsible to make good the discount and that the Indian company had therefore made no loss, *Trustees Corporation (India), Ltd v Commissioner of Income Tax, Bombay*, 57 I.A. 152, 54 Bom 437, 59 M.L.J. 242, 4 I.T.C. 378 (P.C.).

A Company (A) had an agreement with another Company (B) carrying on a similar business under which it obtained, in return for an undertaking to make up the yearly profits of Company (B) to a certain amount, a commanding interest in its management. Company (A) claimed to deduct in computing its yearly profits for income tax purposes the payment made to Company (B) under the terms of this agreement. The Commissioners found that the payment was made by Company (A) for the purpose of its trade so that it might sell its goods at a better price, and therefore allowed the deduction. *Held*, that the question was one of fact rather than of law and that the deduction had rightly been allowed, *Moore v Stewards and Lloyds, Ltd*, 6 Tax Cases 501, 43 Sc.L.R. 811.

Per the Lord President—"It all depended on whether this expenditure was really an outlay to earn profit or was an application of profit earned. Well that is a question of fact."
(*Ibid*)

Per Lord McLaren—"If the payment made to the affiliated Company could be regarded as charity, my opinion would be that it was a payment out of income, and that it was subject to income tax. But mercantile companies are not in the habit of subsidising competing companies from motives of benevolence. Such a payment would not be a legal application of the shareholders' money, and, in the absence of evidence or an admission to the contrary effect, I think it is a just legal inference that the payment in question was a payment made for the advancement of the respondents business and with a view to augmenting its capital or its income. As this is an annual payment it would as a matter of accounting be regarded as a payment made with a view to the increase of income and would be properly entered in the annual accounts. The Commissioners have found in fact that the payment was with a view to earning larger profits."
(*Ibid*)

Per Lord Pearson—"But the statute does not require the party claiming the deduction to show that any profit was in fact earned by the expenditure in question. It is enough that it shall have been laid out for the purposes of his trade as this expenditure clearly was. But then it must be laid out wholly and exclusively for these purposes and it was argued that the agreement was at least in part for the benefit of Wilsons Ltd. It may have operated to their benefit. But we have to do only with Stewarts and Lloyds' part of it, and even with that, not as a definite source of ascertainable profit but as

inferring the expenditure of the sum of money here in question for the purposes of their trade. I think it clear that from their point of view the expenditure was made for those purposes and for no other. (*Ibid*)

As regards purchase of shares in allied concerns see also *Trenchard [as liquidator of the National United Laundries (Greater London), Ltd] v Bennett* 12 A T C 1 17 Tax Cases 420 in which the value of deferred shares issued in consideration of guarantee of a preference dividend was held not to be a trade receipt.

A land company is developing and selling building plots arranged with a firm of builders to erect houses and find purchasers. The builders were reimbursed their costs as each house was sold and the land company reserved a chief rent for itself. The firm took a loan from outside which the company guaranteed. Eventually the company had to pay a part of the guaranteed loan and this payment was disallowed from its taxable profits on the ground that the payment was made for the business of the builder firm and not for that of the company. *Homelands, Ltd v Margerison* 1943 K B D 25 Tax Cases 414.

A Company A did work for a subsidiary Company B in which it held all the shares and charged £10118 for the year at current trade prices. Company B eventually made a loss of £2927 in that year and company A wrote off this amount claiming it as a deduction either as a rebate of price or as a bad debt. The Special Commissioners held that in fact the payment was not laid out wholly for the purpose of the trade of company A (the assessee) and that it was capital expenditure. The House of Lords (agreeing with the lower Courts) held that on the first ground alone the claim of the assessee was inadmissible and did not decide whether the expenditure was of a capital nature or not. *Oldhams Press Ltd v Cook* 19 A T C 19 1941 I T R (Sup) 92 see also *Commissioners of Inland Revenue v Huntley and Palmers Ltd* 12 Tax Cases 1209 *supra*.

A sum paid by a principal shareholder promoter and Managing Director of an Insurance Company as a gift to that company to enable it to get out of difficulties was claimed by him as revenue expenditure because it was incurred to protect his shares his salary as Managing Director and his business reputation. The claim which was made under section 7 section 10 and section 12 was wholly disallowed. The expenditure was of the nature of capital. *Commissioner of Income tax Bombay v Sir Homi Mchta* 1943 I T R 142.

Lump sums received in commutation of annual charges—A cemetery company received lump sums in commutation of the annual charge for the keep of lairs in perpetuity and invested such sums as capital. Held that such sums are not a deduction in arriving at the profits of the company for assessment, *Paisley Cemetery Company v Reith* 4 Tax Cases 1 35 Sc L R 947.

Another commercial and dividend paying Cemetery Company undertook in consideration of lump sum payments to maintain in perpetuity the repair of graves and monuments and the decoration of graves in one of its Cemeteries. The Company was assessed in respect of its profits under Schedule A (Property) and the Crown contended that, in computing the liability the lump sum payments of each year should be included in the entirety in the gross receipts of the year, the expenses of the upkeep of the graves for the year being allowed as a deduction. Held that in arriving at the profits assessable in respect of the lump sum payments the estimated

future expenditure of the Company on the maintenance and repair of the graves and monuments should be deducted (*The Paisley Cemetery Company v Reth* 4 Tax Cases 1, distinguished *Sun Insurance Office v Clark* 6 Tax Cases 59 (1912) A C 443 followed) *The London Cemetery Company v Barnes*, 7 Tax Cases 92 (1917) 2 K B 490

Another Cemetery Company sold the use in perpetuity of grave spaces in the Cemetery to be used for burial purposes only. Held that a deduction could not be allowed in respect of the estimated cost price of the grave spaces. The ratio decidendi was the same as in the *Coltuss Iron Company case* 1 Tax Cases 287 *supra* i.e. that no allowance may be made for the depletion of capital *Edinburgh Southern Cemetery Co v Kinnmont* 27 Sc L R 71 2 Tax Cases 516

Reserve for Insurance—A Company who were shipowners and importers of coal insured their ships at half their value and created a reserve fund for the balance. A ship valued at £15 000 was lost. It was insured for £8 000 and the Company claimed £7 000 as a deduction from profits. Held, that the loss was one of capital *Legg & Son Ltd v Commissioners of Inland Revenue* 12 Tax Cases 391

A shipping company insured a ship partially with underwriters and bore the remainder of the risk itself. It set aside a portion of its profits to form an insurance fund and was not allowed to deduct this portion of profits in computing its liability to tax every year. Later on the ship was lost, and the Company claimed to deduct the amount which it transferred from the Insurance Fund to meet the loss. Held that the deduction was inadmissible the loss being a loss on capital account

Per Lord McLaren.— This is not insurance in the legal sense of the term but only a reservation of the profits to provide for future losses *Thompson v The Western Steamship Co Ltd*, 44 Sc L R 715

Sinking fund—Payments into—A Company was empowered by Act of Parliament to raise money upon mortgage for the purpose of carrying out a Government contract but was required by the same Act to establish a sinking fund for the extinction of the mortgage-debt. A sum was to be set aside for payment into the sinking fund out of each quarterly payment received under the contract or out of other moneys belonging to the Company. Held following the decision in *Mersey Docks and Harbour Board v Lucas* 2 Tax Cases 25, 8 App Cases 891 that the sums thus set aside are not allowable as a deduction in arriving at the Company's assessable profits *City of Dublin Steam Packet Co v O'Brien* 6 Tax Cases 101

A Company undertook to construct a railway in Brazil under a Government guarantee of 7 per cent. It raised capital by means of debentures at 5½ per cent, and devoted the 7 per cent. to payment of debenture interest, and to the formation of a sinking fund to pay off the debentures. Held that the whole of the sum paid under the guarantee during construction, i.e. including the portion paid into the sinking fund was liable to pay income-tax as interest *Blake v Imperial Brazilian Railway*, 2 Tax Cases 58 1 T L R 68. Under the United Kingdom law the interest paid on debentures could not be deducted and tax on such interest is recoverable by the payer from the payee at the time of payment.

Bonus—On repayment of loan—A Company borrowed money to be employed in its business, and covenanted to pay annual interest thereon and

to re-pay the capital with an additional bonus of 10 per cent. *Held*, that the bonus paid could not be claimed as a deduction in computing the assessable profits of the Company, *Arizona Copper Company v Smiles*, 3 Tax Cases 149, 29 ScLR 134.

Investment for securing custom—Loss of—In order to secure contracts for the erection of mills, it was necessary for an Architect to take up shares of certain Milling Companies granting the contracts. The shares taken up were subsequently sold at various dates at a loss. The sale of the shares was necessary to provide funds for securing new contracts. *Held* that the loss was a loss of capital and was not an admissible deduction in arriving at the profits for assessment, *Stott v Hoddinott*, 7 Tax Cases 85.

As the result of a change in the system of sale of salt by Government which substituted a system of cash sales for a system of credit sales on the deposit of securities a trader had to sell his securities and incur a loss on the sale. It was held that the loss was one of capital, *Hirantand Jayaram Singh v Commissioner of Income tax, Punjab*, 1935 ITR 309, 8 ITC 395.

Where, however, a firm guaranteed a part of the costs of an exhibition in the reasonable belief that the firm would be given preference in the allotment of contracts for work at the exhibition and had to pay a part of the guaranteed amount even though the firm received no opportunity to tender and did not receive any work, the amount paid by the firm was allowed as a deduction by the General Commissioners. The Court of Appeal held that the question was primarily one of fact and saw no reason to interfere with the finding of the Commissioners, *Morley v Lawford & Co*, 14 Tax Cases 229, 45 TLR 30.

Where an oil importer lent money to a foreign oil merchant in order to secure the sole selling agency of the oil of the latter's companies and the loan was not fully repaid it was held, distinguishing *Anglo Persian Oil Co v Dale*, 16 Tax Cases 253, (1932) 1 KB 124 and following the *Atherton case*, 10 Tax Cases 155, (1926) AC 205, that the loss was capital expenditure. *Henderson v Meade King Robinson & Co*, 17 ATC 241 (KBD).

A railway company agreed to close down its own steel works (and not to allow them to be worked by others) for ten years and take during that period its requirements of steel from two steel companies who in return, were to pay to the railway £180,000 in 120 equal monthly instalments. These payments were held to be capital expenditure, because the extinction of the railway's own works constituted a capital asset to the company. If the sum had been paid once for all there would have been no doubt as to its capital nature, and the fact that it was paid in instalments could not alter its nature. *United Steel Companies v Cullington*, 18 ATC 311 (CA).

Removal Rebuilding, etc—A Company established for the buying and selling of granite moved its business to larger premises and defaced the whole cost of removal out of revenue. In calculating its profits the Company claimed a deduction for the expenses of carting granite from the old yard to the new, and of taking down and re-erecting two cranes. *Held* that these items were not allowable deductions.

Per Lord McLaren—"I think that the cost of transferring plant from one set of premises to another more commodious set of premises is not an expense incurred for the year in which the thing is done for the general interest of the business. It is said, no doubt, that the transference does not add to the capital value of the plant, but I think

that is not the criterion. There are costs that would not properly be set against the income of the year, and which yet may not add to the capital value. Suppose a person is imprudent enough not to insure his premises or his goods, which can be insured, and they are burned down, and he has to replace the building, he could not be allowed to charge the new building against the income of the year, although the putting up of it does not add to the value of his property but merely enables it to maintain its original value. I agree therefore, that the cost of re-erecting the cranes and the cartage of materials being a thing not done for the benefit of the one year, is not a proper deduction from income," *Granite Supply Association v Kilton*, 5 Tax Cases 168, 43 Sc.L.R. 65. In cases of this kind so much depends on the occasion and magnitude of the expenditure. For example the cost of transferring stock from one branch to another is clearly of a revenue nature, so also, when stocks are removed during repairs.

This decision was approved by *Cave, L.C.* in *Atherton v British Insulated & Helsby Cables*, 10 Tax Cases 155, (1928) A.C. 205.

In order to extend its business, a Company opened a manufactory and fitted machinery, but subsequently closed it, removed a portion of the machinery, and re-opened the manufactory on a smaller scale, and thereby lost a portion of the original expenditure. *Held*, that this was a loss of capital, for which deduction could not be allowed, *Smith v Westinghouse Brake Co*, 2 Tax Cases 357.

The moving expenses of a travelling business, e.g., a circus or a travelling butcher, including the cost of closing up at the old and fitting up at the new place, can however, be deducted from profits, but not if the business is a fitting (as opposed to a travelling) business. Accordingly, in the case of a firm of meat importers and retailers who owned a very large number of shops and constantly opened new shops and closed old ones with the changing circumstances of their business as a whole, it was held that the cost of equipping new shops was capital expenditure, *Eastmans v Shaw*, 14 Tax Cases 218 (H.L.), 45 T.L.R. 12.

The cost of wholly fittings in a new place of business is capital expenditure even though the renewal may be compulsory. *Hjain v Commissioners of Inland Revenue*, 8 A.T.C. 275, 14 Tax Cases 479, *Commissioner of Income tax, Bombay v Hemraj Khemji*, 1933 I.T.R. 304, A.I.R. 1933 Sind 145, 145 I.C. 202.

An assessee, a wine merchant in Dublin, was lessee of premises which he was bound to keep in proper repair. The premises were burnt in a local rebellion. He could not recover the loss either from the insurance company or under the Criminal Injuries Act, and had therefore to spend money in rebuilding. He had also to spend money in salvaging his books, and in fitting up and adapting temporary premises elsewhere. In connection with the levy of Excess Profits Duty it was held that the expenditure in question was capital expenditure, and not an admissible deduction. *Martin Fitzgerald v. Commissioners of Inland Revenue*, 5 A.T.C. 414. The Privy Council refused leave to appeal in this case.

Electric Company—Change of current—Where an Electric lighting and power Company changed over from Direct Current to Alternating Current and for this purpose replaced at its cost consumer's fans and other fittings and also renewed the Service mains, it was held that the expenditure was of a capital nature. *Nagpur Lighting, etc., Co v Commissioner of Income tax*, 6 I.T.C. 303.

Docks—Ship-building—Deepening of—The works of a Company carrying on the business of Ship builders and Engineers were approached by a channel. It was the duty of the Harbour Authorities to keep this channel dredged, but they neglected to do so, and the channel consequently began to silt up. As the Harbour Authorities were not in a position to find the funds necessary for the complete restoration of the channel, a cheaper scheme was devised, involving a lesser depth of dredging and the provision of a deep water berth, to which the Company and the Harbour Authorities contributed the Company's contribution being the greater. If this expenditure had not been incurred by the Company, it would have been impossible for them to deliver a battle cruiser which was then in course of completion at their works. The Company claimed that this expenditure should be deducted in ascertaining their liability to tax. *Held* that the expenditure was capital expenditure and was not an allowable deduction in the computation of profits. After quoting the following dictum of the Lord President in *Vallambrosa Rubber Company, Ltd v Farmer*, 5 Tax Cases 529, 47 Sc L R. 488

Now I don't say that this consideration is absolutely final or determinative but in a rough way I think it is not a bad contention of what is capital expenditure—as against what is income expenditure—to say that capital expenditure is a thing that is going to be spent once and for all and income expenditure is a thing that is going to recur every year.

Rowlatt, J said with reference to the above passage

there is no stress on the words every year. The real contrast is between expenditure which is made to meet a continuous demand for expenditure as opposed to an expenditure which is made once for all to put it shortly. Now Mr Tate argued that the expenditure on any work might be revenue expenditure although the result of it endured beyond that year. Well I do not know that I differ with that altogether but it seems to me that it must always be a question of fact whether any particular expenditure can be put up against any particular work or whether it is to be regarded as enduring expenditure to serve the business as a whole. *Ounsuorth v Vickers Ltd*, 6 Tax Cases 671, (1915) 3 KB 267.

This was approved in *Atherton v British Insulated and Helsby Cables* 10 Tax Cases 155, (1926) A.C. 205, by *L. C. Cave*, who also referred to *Smith v Incorporated Council of Law Reporting*, 6 Tax Cases 477 (1914) 3 KB 674 and *Hartcock v General Reversionary etc, Co*, 7 Tax Cases 358, (1919) 1 KB 25 as instances in which payments which did not recur were rightly considered to be income expenditure.

Bills—Promotion of—Cost of—In view of the unsatisfactory facilities given by a Railway Company, a firm of coal masters joined with some other traders in promoting two private Bills in Parliament for the construction of a railway line which was intended to give them the necessary facilities and to make them independent of the Railway Company. The Bills were ultimately dropped by agreement under which the Railway Company undertook to grant the desired facilities. *Held*, (*Lord Johnston* dissenting) that the expenditure incurred by the firm in the promotion of the two Bills constituted a capital outlay and was inadmissible as a deduction in computing the firm's liability to income tax. *Moore & Company v Hare*, 6 Tax Cases 572, 52 Sc L R 59.

This was also approved by *L. C. Cave* in *Atherton v British Insulated & Helsby Cables* 10 Tax Cases 155, (1926) A C 205

Investments for the purpose of the trade—All money laid out by persons who are traders whether it be in the purchase of goods be they traders alone whether it be in the purchase of raw materials be they manufacturers, or in the case of money lenders be they pawnbrokers or money-lenders whether it be money lent in the course of their trade is used and comes out of capital but it is not an investment in the ordinary sense of the word per *Pollock B*, in *Reid's Brewery Co v Male* 3 Tax Cases 279 (1891) 2 Q B 1

A man speculating and building for himself not only a brewery but a couple of hundred houses, in order that people who inhabited those houses might deal with the brewery In such a case the money could not be said to be money expended by the brewer upon the business or brewery (*Ibid*)

Loss in investments—If an assessee not dealing in stocks and shares loses on their sale such loss is a capital loss and cannot be deducted from his business profits *Ganga Sagar v Commissioner of Income tax, UP* 5 ITC 458 53 All 451 A I R 1931 All 417 See also notes under section 10 (2) (vi) in respect of depreciation of securities Similarly the loss incurred in buying and selling land when it is not part of the assessee's business so to deal in land cannot be deducted from his business profits *Hemraj Kanji v Commissioner of Income tax, Sind*, 6 ITC 354 So also the loss incurred by a mortgagee (whose business is not to take such mortgages) who buys property in part satisfaction of the mortgage decree and sells later and loses, *Himatlal Motilal etc v Commissioner of Income tax, Bombay* 6 ITC 159

On the other hand when a money lender had to take over agricultural lands from his debtors he was allowed by the Madras High Court to deduct not only the interest on borrowed capital locked up in the land but the management and cultivation charges of the land and the cost of obtaining conveyance of the lands *S A S S Chettiappa Chettiar v Commissioner of Income tax Madras* 1937 ITR 97 This ruling however has been dis-sented from by the Rangoon High Court *Commissioner of Income tax, Burma v N S A R Concern* 1938 ITR 194 (Rang) The main point in the Madras case was the question of interest and it was conceded by the Crown in it that the claim under section 10 (2) (ix) [now clause (xi)] rested on the same footing as that under clause (iii) *Hughes v Bank of New Zealand* (1936) 3 A.E.R. 975 cannot be followed in India because the Acts are not *in pari materia* and it has to be remembered that agricultural income is entirely outside the Indian Income-tax Act see *Darbhanga case*, 14 Pat 623 (P.C.) Therefore no expenses incurred in respect of agricultural income can be deducted from non agricultural income The position is comparable to that of expenditure incurred in respect of foreign income of *Provident Investment Co*, 135 I.C. 810 and other cases referred to under section 10 (2) (iii)

An assessee purchased shares in a company which went into liquidation A new company was formed to acquire the assets and it agreed to allot a certain number of shares and debentures to the members of the old company The debentures were not issued and the new company also was liquidated It was held that in the absence of a finding that the assessee's business was to deal in stocks and shares the loss was of capital *Maharajahdhiraj of Darbhanga v Commissioner of Income-tax, B & O*, 1938 ITR 681

An assessee, a money-lender, to whom Rs 8,503 was due from a firm purchased land from it for Rs 18,000 while insolvency proceedings were pending against it. He paid Rs 9,497 in cash and adjusted the debt against the balance. The Insolvency Judge converted the sale into a mortgage for Rs 8,500 and made the assessee an unsecured creditor for Rs 9,497. The assessee who received his Rs 8,500 and another Rs 3,097, leaving a deficit of Rs 6,403 claimed to deduct this deficit from his money-lending profits. The claim was disallowed on the ground that purchasing lands was not his business and that if his idea was merely to realise his dues, he could have bought a part of the land instead of the whole, *Badrishah Sohanlal v Commissioner of Income tax, Punjab*, 1936 ITR 303.

A money lender lent money from time to time to a building contractor, and at a certain date viz., July, 1928, accounts were made up between the two and it was agreed that the debt was to be discharged out of the cheques received by the contractor from Government for whom he was working and that the excess or deficiency of these cheques over or from the debt was to be divided equally between the two. After paying a few small amounts, the contractor, an Afghan left British India, and the Commissioner held that the loss sustained by the money lender was a loss of capital in partnership. It was held that there was no evidence to support this finding *Harnand Rai Harbhagat Rai v Commissioner of Income tax, Punjab*, 1936 ITR 366.

It is a question of fact in each case whether a particular transaction of a money lender is part of his business of money lending or a capital investment unconnected with that business. There is nothing to prevent his investing his capital or accumulated profits in forms of investment which are in law loans e.g. Government loans, or debentures and mortgages, and this in itself would not make the investments a part of his money lending business. Any loss therefore in such investments cannot be deducted from his business profits either under this section or under section 24, in the absence of a finding that the investments are an integral part of the money lending business. *Sir Chinubhai Madhavlal v Commissioner of Income tax, Bombay*, 1937 ITR 211.

An assessee, who was *inter alia* a moneylender, made a deposit with an oil selling company under a contract appointing him sole organising agent for an area. He was to recommend selling agents and to recoup himself from the deposits made by the latter. The deposit bore interest at 7 per cent per annum while his money lending earned 15 per cent on the average. He also received a commission on sales in the area whether through the selling agents or by the company. The company went into liquidation and the assessee lost a part of his deposit. It was held in the High Court that the loss was a trading one and not of capital.

This decision was overruled by the Privy Council. The deposit was a condition of the agency, and its purpose was to obtain an enduring benefit of a capital nature. It was not a loan in the course of carrying on the business of organising the agencies or in the course of business as a money-lender, *Commissioner of Income tax, C P v Motiram Nandram*, 1940 ITR 132.

If a money lender has two mortgages on the same property and chooses to sue only in respect of the first and the property does not cover the principal and interest thereof he is entitled to claim the entire principal of the second mortgage as a loss. It is not open to the Revenue to lump the two mortgages together and say that the difference between this sum and the

value of the property (or the limit to which the creditor restricted his claim) is all that can be allowed as a loss, *Chockalingam Chettiar v Commissioner of Income tax, Madras, 1941 I T R 278*

Option to purchase—Consideration for—In order to obtain railway wagons for the conveyance of coal from their collieries to their customers, a Coal Company entered into agreements with a Wagon Company under which a certain annual sum was paid for a period of years for a certain number of wagons. By the terms of the agreements the Coal Company, during the period of the payments, used the wagons at their own risk and were bound to keep them in repair, and at the end of the period they had the option of purchasing the wagons at the nominal price of one shilling for each wagon. *Held*, that the annual payments under the agreements were divisible into (i) consideration paid for the use of the wagons and (ii) payments for an option at a future date to purchase the wagons at a nominal price, and that, in so far as the payments represented the consideration for the use of the wagons during the period of agreement, they were admissible as a deduction in the computation of the Coal Company's profits. *Darngarh Coal Company, Limited v Francis, 7 Tax Cases 1* 40 Sc L.R. 427

Rebates as Compensation.—A company which intended to set up its own chlorine plant for the manufacture of magnesium was induced by a chlorine producing company not to set up such plant but to take chlorine from the latter. The price of chlorine was to be £10 per ton but the first company was to receive simultaneously £7½ per ton as compensation for loss of profit in not setting up its own plant. The Court of Appeal held that the £7½ per ton was a trade receipt in the hands of the first company, *Thompson v Magnesium Elektron Co., C.A.* The rebate was clearly deductible from the profits of the chlorine company.

Where a rebate is received in respect of revenue expenditure only the net expenditure can be allowed i.e. the rebate should be brought in as a trade receipt. See *Westcombe v Hadnock Quarries, 16 Tax Cases 137*

Salaries of partners.—Sub-section (4) inserted in 1939 forbids the deduction of salaries interest commission or remuneration paid to partners. Before 1939 the deductibility of such items depended on the facts of each case and there was considerable litigation. Those rulings are of no interest now. See notes under sub-section (4), which however applies only to firms and not to other association.

Employees—Commission.—A father was sole partner, and employed his two sons on salaries plus a commission on profits varying from year to year. The commission was raised from 5 to 10 per cent and then to 33 1/3 per cent, the last, when the father broke down in health and threw the entire responsibility on the sons. Later on, the firm was reconstituted the father and each of the sons possessing equal shares. The Special Commissioners decided that the 33 1/3 per cent. commission was not on a commercial basis. *Held*, that the amount deductible in respect of the commission as money wholly and necessarily laid out for business expenditure, was one of fact on which the High Court could not interfere, *Stott and Ingham v Trehearne, 9 Tax Cases 69*

See also section 10 (2) (x) and notes under it.

Employees-perquisites.—Boarding expenses of servants, and payment to a servant of his expenses incurred in going to his home from the

place of employment in so far as they are not charitable payments, but part of the servant's wages should be considered to be incurred solely for the purpose of earning profits or gains *Babu Jagannath Theram v Commissioner of Income tax, Bihar and Orissa* 2 ITC 4, 4 Pat 385, AIR 1925 Pat 408 Expenses in the nature of increment to salaries such as perquisites or free food etc in lieu of cash can be treated as trade expenses but they must have been made without any intention of recovery from the servants and be claimed as deductions in the year in which they are incurred *Chittarmal Ramdayal v Commissioner of Income tax*, 3 ITC 54 A loan given to a servant cannot be deducted from the profits if and when it is written off as irrecoverable It is not a trade debt Whether gifts can be deducted or not will depend on the nature of the gifts If they are given as a mere act of charity, they cannot be deducted but if they are intended to be perquisites for the employees in return for their services they can be deducted even though the employees could not legally claim such gifts *ibid* Gifts to employees at retirement have been allowed in the United Kingdom in the view that the gifts are bonus, *Wston v Hearn*, 1943 KBD

Entertainment—Dewali and Holi expenses have been held to be inadmissible *Ganga Sagar v Commissioner of Income tax UP* 5 ITC, 458, 53 All 451 AIR 1931 All 417 Though presents to customers such as cakes sweets, fruits etc are not ordinarily admissible deductions they may be allowed if such presents are necessary for the purpose of securing business *Commissioner of Income tax v Hemraj Khanji* 1933 ITR 304 (Sind)

Welfare schemes—Expenditure on—It is one thing to spend money on welfare schemes for employees in order to secure a contented staff that would earn profits for the employer and quite a different thing to contribute to welfare schemes which happen to cater for employees The difference is clear though somewhat fine Held accordingly in a case in which the employer maintained private nursing homes for his staff but also paid subscriptions to a Hospital which also attended to his employees and paid unusually large subscriptions to the Hospital in certain years that the subscriptions to the Hospital were not deductible from taxable profits *Bourne & Hollingsworth v Ogden* 45 TLR 222 14 Tax Cases 349

Shares at concession rates—Where a company issued shares to its employees at less than the market value of such shares it was held that the difference in value was not deductible from the company's profits as an item of payment of remuneration to employees *Loury v Consolidated African Selection Trust* 1940 ITR (Sup) 88 (HL) The decision (Lords Wright and Romer dissenting) which reversed that of the Court of Appeal rested on the form of the transaction rather than on its substance *Obiter dicta* in the judgments indicate that if the company had paid cash to the employees and replenished itself by issuing shares in the open market the payment would have been deductible The point is that the company should have discharged an ordinary trading obligation or debt due to the employees in order to claim an allowance In this case, the employees gave up nothing and the company parted with no asset The fact that the difference between the market value and the issue price may be taxable as money's worth in the hands of the employees is irrelevant

If the shares had been issued at a premium, the premium would not have been taxable, and by merely electing not to get something, you cannot claim it as an actual deduction, even though if you had received it, it would not have been part of taxable profit.

Employees' share of profits—See clause (x) and notes thereunder. The law in the United Kingdom is governed by the following rulings.

When employees are remunerated by a share of the profits in computing the profits of the business, allowance should be made for the work and labour done by people who charge nothing expressly because they have got their share of the profits which is a sufficient inducement to them to do the work. See per *Roulatt, J.*, in *Johnston Bros & Co v Commissioners of Inland Revenue*, 12 Tax Cases 147, (1919) 2 K.B. 717. Bonuses paid to directors at a certain percentage of profits after the distribution of dividends to shareholders are not an expense of the business but an appropriation of profits. It is in every case a question of what is the real effect of the transaction, *Pegg & Ellam Jones, Ltd v Commissioners of Inland Revenue*, 12 Tax Cases 82. In this case even though the bonuses may have taken the place of salary or commission the bonuses were treated in the resolution and the accounts as an appropriation of profits, and had not been claimed as a deduction for income-tax purposes, the deduction being claimed only in respect of Excess Profits Duty. See also *Stott and Ingham v Trehearne*, cited above, in which the Revenue conceded such an allowance and *Eyres v Finnieston Engineering Company*, 7 Tax Cases 74.

In *Commissioners of Inland Revenue v George Thompson & Co*, 9 A.T.C. 965, 12 Tax Cases 1091, *Roulatt, J.*, suggested that while no payment which depended on the assessee's profits as a whole could be deducted from his taxable profits, deductions should be allowed of payments depending on the profits made on individual transactions. Thus, if the assessee hired a ship on condition that he would pay a part of the profits of that particular ship, the hire was deductible, but not if it depended on the profits in the assessee's business as a whole. The Court also held that hire which represented depreciation was deductible even if it depended on the ship's earning profits. The distinction between this case and that of *Walker & Sons*, 12 Tax Cases 297 is that while in the latter what was shared was the profits of the business, in this case, what was shared was the profits of certain ships which did not constitute the whole of the business. If the particular ship had made profits and even if the business as a whole had made a loss, a share of the profits on the particular ships would have been payable. The assessee in this case, claimed not to deduct the share, since he desired to realise his standard profits for excess profits duty.

In India before clause (x) [formerly clause (vii-a)] was introduced a different view had been taken. In *Commissioner of Income tax v RE Mahomed Kassim Rowther*, 3 ITC 482, 54 M.L.J. 249, AIR 1927 Mad 1053, the Madras High Court held that no deduction may be made on account of the wages paid to an employee in so far as such wages take the form of a share of profits. This decision is practically ineffective now partly because of the subsequent insertion of clause (vii-a) [now clause (x)] in this sub-section and partly because of the relief from double taxation given by Notification No 8, dated 24th March 1928, under section 60.

Where a proprietor had his business run by managers who retained as their remuneration the balance of the net profits of the business after

In the *Pondicherry case* Lord Macmillan was referring to the real net profit when using the word profits and in that case the question was simple. As Lord Maugham pointed out in the *Indian Radio & Cable case* 1937 ITR 270 the word profits can be used in more than one sense and as *Mackinnon LJ* observed in this case it is as much a truism to say that a payment necessarily made in order to earn profits cannot properly be described as a payment out of profits as to say with Lord Macmillan in the *Pondicherry case* that a payment out of profits and conditional on profits being earned cannot be accurately described as a payment made to earn profits. The facts of each case have therefore to be examined. In this case the payment was on a basis of profits ascertained *ad hoc* (before allowing for depreciation) and not of profits divisible between the company and anybody else interested in them and it was therefore a payment precedent to the ascertainment of the real net profits of the company, *British Sugar Manufacturers v Harris* 16 ATC 421 (CA)

A payment to Secretaries Treasurers and Managers at a certain percentage of the net profits and not exceeding another percentage of gross proceeds was held to be expenditure incurred for earning the profits and not a distribution thereof *Commissioner of Income tax, Burma v Bombay Burma Trading Corporation* 1941 ITR 155 following *British Sugar Manufacturers v Harris*

A trading company leased premises for its business at a fixed rent payable quarterly from which however the lessor was to allow at the end of the year such abatement as may be necessary to enable the lessee company to meet its obligations and pay certain fixed rates of dividend on its shares. It was held by the House of Lords that in so far as the transaction was *bona fide*, the rent was not a payment out of profits of the company or dependent upon it but expenditure incurred for the purpose of earning and antecedent to the ascertainment of, profits. The *Pondicherry Railway's case* was distinguished. In that case the profits had to be first ascertained and then a share of profits paid to the French Government while in this case the profits could not be ascertained until the rent had been first paid. The rent actually borne therefore was deducted from taxable profits *Union Cold Storage Co v Adamson* 16 Tax Cases 293, 146 LT 172

A agreed to get all his raw cotton ginned by B who in turn agreed not to gin for any one else. B received in addition to his ginning charges on a certain tariff a share in the net profits (but not the losses) of A. It was held that the profits paid to B were not of the nature of rent nor were incurred to earn the profits but were an appropriation of profits. *Gapunath I'ir Bhan v Commissioner of Income tax Punjab*, 1938 ITR 243

A company in which half the shares were held by Government bought crude resin from Government at a price which involved the payment of royalty in the first instance at a certain rate and also the payment of a further royalty in the following year based on the net profits of the company during the previous year. The Allahabad High Court held that the second payment of royalty was deductible under section 10 (2) (ix) [now clause (x)] for the following reasons—(1) The payment was analogous to the payment to a Managing Director of a share of the profits. (2) The money was not available for distribution to shareholders. (3) The cost of production of resin by the company clearly included the second royalty. (4) The second royalty was not part of the consideration for

which Government sold the factory to the company but consideration for the resin supplied. (5) The primary object with which Government formed the company was to obtain a market for its resin. (6) The charging of a nominal royalty in the first instance and then a further payment was because there were no data on which the royalty could be fixed. *Indian Turpentine & Resin Co., Ltd., Coimbatore v Commissioner of Income tax*, 3 ITC 219

Royalties on patents—Even though a royalty may be paid to a patentee on the basis of output, the expenditure would still be capital if the royalty was one of the considerations paid by the user of the patent to acquire it outright from the patentee. *Commissioner of Income tax Madras v Minsararasam Ltd*, 63 MLJ 11 6 ITC 65 AIR 1932 Mad 437

As regards payments on account of patents generally see the group of cases referred to under section 3. It should be noticed however that a payment which is capital or income as the case may be to the receiver is not necessarily of the same nature to the payer. See also *Commissioners of Inland Revenue v Adam* 14 Tax Cases 34

Buying out partners or competitors—Payments made in purchase of the share or rights of a deceased or retiring partner are of a capital nature even though the payments may be assessed in terms of profits and for a comparatively short period. *Rutherford v Commissioners of Inland Revenue* 10 Tax Cases 683. *Commissioners of Inland Revenue v Ledgard & Pymms*, 16 ATC 68 (KB). Any loss that may arise from revaluing a business as the result of reconstructing a partnership is a capital loss. *K A R A Firm v Commissioner of Income-tax Burma* 7 ITC 44 11 Rang 462, AIR 1934 R 1. Similarly, the write-off of debts due from old partners at the time of disruption is not a proper revenue charge against a new firm, *Amar Chand Madhaji v Commissioner of Income tax Bombay*, 8 ITC 224

Where according to a statement recorded by the Income tax Officer in the following words of one of the partners of a firm *M* would get Rs 16000 a year for five years irrespective of the firm's trading results and *S* would get Rs _____ a year on the same conditions as in *M*'s case and *I* would be in sole charge and owner of the firm's profits and losses, it was unsuccessfully claimed on behalf of *I* that the firm was still a going concern and that the payments to *M* and *S* were for the use of goodwill premises and staff for the five years in question. The claim was disallowed as being payments for buying out the rights of *M* and *S* and therefore capital expenditure. *In re Ramji Das Jains & Co*, 1945 ITR 430 (Lah)

Where in order to ensure that a retiring director and manager in a private company did not set himself up in opposition after retirement the company bought up the assets of the retiring director and also remitted a debt due from him it was held that the expenditure was not trading but capital expenditure, *Deverell Gibson and Hoare v Rees*, 25 Tax Cas 467 (KB)

Similarly, lump sums paid to a retiring director and a retiring managing director respectively in order to restrain them from competitive activities have been held to be capital expenditure, *Associated Portland Cement Manufacturers v Kerr*, 1945 KB 21 (CA). The case was held to be nearer to *Collits v Joseph Adamson & Co* 21 Tax Cas 400 than to *Southern v Borax consolidated*, 23 Tax Cas. 597, but the distinction is by no means clear

Where a firm of money-lenders carried on a business in yarn in a particular year jointly with certain other persons, and disputes started after some time between the firm and the others, ending in litigation and the decree of a Court in favour of the others in respect of their shares wrongly withheld by the firm it was held that the payment of the decree was not deductible from the firm's profits, being merely an allocation of profits already earned and in the nature of payment of a capital debt. Nor did the payment arise out of transactions in the course of trade but out of wrong allocation of profits in the past and the expenditure was therefore not incurred for earning the profits *Rajalu Iyer & Co v Commissioner of Income-tax, Madras, 1937 ITR 727*

In *Alagannan Chetti v Commissioner of Income-tax*, 3 ITC 44, 55 MLJ 66, AIR 1928 Mad 902 the Madras High Court held, following *City of London Contract Corporation v Styles*, 2 Tax Cases 239, 4 TLR 51 and *John Smith & Sons v Moore*, (1921) 2 AC 13, 12 Tax Cases 266 that a lump sum paid to a rival in order to induce him to abstain from competition (bidding for certain contracts) is capital expenditure, and therefore not deductible from the profits. See, however, *Guest Keen and Nettlefolds v Fowler* 5 Tax Cas 511, referred to later under "Trade Associations payments to". Following the above it was held in *R S Murshid Gulab Singh & Sons v Commissioner of Income-tax, Punjab, 1946 ITR 66* that payments made to competitors, from time to time, of a share of estimated profits in each contract irrespective of actual profit or loss (in return for the competitors agreeing to tender at the same rates as the assessee) were revenue expenditure. Such payments were neither capital expenditure nor a share of profits but expenditure incurred for earning the profits. So also subscriptions paid to schools which agreed to prescribe books printed by the assessee (*ibid*)

See however *Anglo Persian Oil Co v Commissioners of Inland Revenue*, 16 Tax Cases 253, 145 LT 529 and *Van Den Berghs, Ltd v Clark* 19 Tax Cases 390, (1935) AC 431. The former is referred to *infra* in the group of cases relating to compensation to employees on termination of employment. In the latter case, in which a pooling arrangement was closed and compensation paid, it was held by the House of Lords that the payment related to the entire structure of the assessee's profit making apparatus and was therefore of the nature of capital.

In a case in which the assessee paid a lump sum to his agent on the termination of his agency who *inter alia* agreed not to compete for some time the payment was held by the Calcutta High Court to be deductible from the assessee's profits. In *re Imperial Chemical Industries, Ltd*, 1935 ITR 21. The payment did not create a new asset or add to fixed capital but merely secured facilities for the future. See also *Anglo Persian Oil Co v Inland Revenue*, 16 Tax Cas 253.

Buying shares in allied concerns—If a company, substantially a holding company, acquires control over another by purchasing blocks of its shares, what it acquires is a capital asset, especially if it is in the line of business of the 'acquiring' company to secure such capital assets and the 'acquired' company is one which but for the control might be a competitor with other 'held' companies of the holding company. It is immaterial for this purpose that the shares are not paid for in cash but by a guarantee from the purchasing company to pay certain dividends on some of the shares of the other company, *Trenchard, [as Liquidator of the National United Loan*

dries (Greater London), Ltd., v Bennet, 12 A.T.C. 1, 17 Tax Cases 420, 49 T.L.R. 226

Loss from embezzlements.—Where the loss from embezzlement is allowed as an expense, any subsequent recoveries in respect of the embezzlement should be brought in as taxable revenue. In *re Union Bank of Bijapur & Sholapur*, 1942 I.T.R. 21 (Bom.)

The Managing Director of a Company was for many years, up to his death, in sole control of the Company's business. An investigation after his death showed that many payments and some receipts not relating to the Company's business but to his private affairs, had been passed through the Company's books, and it was calculated that some £14000 was due from his estate to the Company. The debt was valueless, and was written off as bad in the Company's accounts for the sixteen months to the 30th June, 1920. The General Commissioners, on appeal, allowed the Company's claim to deduct the amount in question in computing its profits for assessment to income tax, holding that the loss was a bad debt that had arisen in the course of the Company's trading. *Held*, that there was no evidence to support the Commissioner's findings, that the loss was not a trading loss and that it was not an admissible deduction from the Company's profits for income tax purposes.

Per Rowlatt, J.—"When the Rule speaks of a bad debt, it means a debt which is a debt that would have come into the balance sheet as a trading debt in the trade that is in question and that it is bad. It does not really mean any bad debt which, when it was a good debt, would not have come in to swell the profits. What the Commissioners have been misled by, in my judgment, quite clearly is this. They have allowed themselves to act under the impression that they were taxing the Company on what the Company, in a loose way, had made and secured. In point of law, they were engaged in assessing the profits of the Company's trade, not of the Company itself but of the Company's trade, and I have to consider whether there is the least ground for supposing that losses of these sums, resulting in this bad debt, were losses in the trade. I quite think, with Mr. Lattar, that if you have a business (which for the purposes of to-day at any rate I will assume) in the course of which you have to employ subordinates and owing to the negligence or the dishonesty of the subordinates, some of the receipts of the business do not find their way into the till, or some of the bills are not collected at all, or something of that sort, that may be an expense connected with and arising out of the trade, in the most complete sense of the word. But here that is not the case at all. This gentleman was the Managing Director of the Company, and he was in charge of the whole thing, and all we know is that in the books of the Company, which do exist, it is found that moneys went through the books into his pocket. I do not see that there is any evidence at all that there was a loss in the trade in that respect. It simply means that the assets of the Company, moneys which the Company had got and which had got home to the Company, got into the control of the Managing Director of the Company, and he took them out. It seems to me that what has happened is that he has made away with receipts of the Company *dehors* the trade altogether in virtue of his position as Managing Director in the office, and being in a position to do exactly what he likes," *Curtis v J & G Doldfield, Ltd.*, 9 Tax Cases 319, 41 T.L.R. 373.

A payment made by a director of a company to the Official Liquidator thereof in settlement of misfeasance proceedings started against the former is capital expenditure and also not laid out for the business, etc., of the director. *In re Executors of Sardar Naram Singh*, 1913 ITR. 478 (Lah)

Loss through embezzlement by an employee was held not to be a loss in the nature of capital expenditure but a loss incidental to the conduct of the business and allowance was made on this account *Babu Jagannath Therasi v Commissioner of Income tax, Bihar and Orissa*, 2 ITC 1. But this judgment was dissented from by the same High Court in a later case *Mulchand Hirral v Commissioner of Income tax, B & O* 1938 ITR 151 and it was held that a theft by a cooly who stole money from an employee of the assessee that was taking the money to the Bank was not an admissible deduction not being incurred for the purpose of earning the profits.

Whether loss of valuables by theft can be allowed as a deduction depends according to another ruling on whether the loss was incidental to the business. If a person receives his profits and is robbed on his way home or after he has placed the profits in his strong room or some other place of safety such a loss is not incidental to business. If on the other hand the nature of the business requires the handling of valuables by servants and such servants misappropriated what was entrusted to them or were robbed the loss would be incidental to the business. The proper test to apply is whether in view of the nature of the business there is a reasonable likelihood of the loss in the ordinary course of business (*S P S Ramaswami Chettiar v Commissioner of Income tax, Madras* 53 Mad. 904 59 MLJ 403 AIR. 1930 Mad 808) *Anantakrishna Iyer, J.* dissented and held that all losses due to theft in business premises should be allowed.

An assessee who carried on business in piece goods accepted deposits for that purpose and paid interest thereon. He was not a banker or money lender and cash was not part of his stock in trade. There was a dacoity and the cash in the shop was looted. *Held*, that the loss was of capital. *In re Gadodia & Co* 1934 ITR 322. The correctness of this ruling was doubted in *Commissioner of Income tax, Burma v Haji Abdul Gany Hyub*, 1941 ITR. 339 where it was held that the loss of a business man's money in his current account at his bank, as a result of the bankers' insolvency is a deductible loss.

It has also been held that shortage found in cash when making up the accounts of a money lending business is not a capital loss. *Bansilal Abir Chand v Commissioner of Income tax CP* 6 ITC 318.

Director—Overpayment to—Whether the overpayment of commission to a Managing Director who subsequently became bankrupt and could not repay the advance was a trading loss or a capital loss was considered in *Roebank Printing Co v Commissioners of Inland Revenue* 7 ATC 406 13 Tax Cases 864. It was held that it was a question of fact to be determined by the Commissioners on the evidence before them.

Cost of alteration of capital—The premia received by a company on issue of shares are capital receipts and as such not chargeable to tax. In the same way the cost of issuing shares is capital expenditure and cannot be allowed as a deduction for income tax purposes (*Income tax Manual*). As to premia of the nature of interest, see notes under section 10 (2) (iii).

In *Montreal Coke, etc Co v Minister of National Revenue*, 1945 1 T R (Sup) 1 (P.C.) the company had incurred certain expenses in replacing debentures on onerous terms (including *inter alia* payment in gold) by debentures on less onerous terms and spread this expenditure over several years in the accounts. The Supreme Court of Canada held (two Judges dissenting) that the expenditure was neither for earning the profits nor of a revenue nature. In confirming the judgment the Privy Council remarked as follows: The justification for upholding the deductions claimed could not be more attractively presented than it is in the (dissenting) judgment of Rinfret J—there are two ways of increasing the profits either by increasing the earnings while the expenses remain the same or by decreasing the expenses while the earnings remain the same. Of course if the expenses diminish at the same time as the gross earnings are increased the profits will be correspondingly larger and the proposition just mentioned is only made more evident.

In order to pay a lower interest and to get rid of the exchange rates it was necessary to redeem the old bonds and therefore the expenses required to achieve the result were wholly exclusively and necessarily laid out or expended for the purpose of decreasing the fixed interest and exchange charges and accordingly for the purpose of earning the income. Down to the last nine words the statement is unexceptionable but their Lordships are unable to accompany him in leaping the last fence. If the statute permitted the deduction of expenditure incurred for the purpose of increasing income the appellants might well have prevailed. But such criterion would have opened a very wide door. It is obvious that there can be many forms of expenditure designed to increase income which would not be appropriate deductions in ascertaining annual net profit or gain. The statutory criterion is a much narrower one. Expenditure to be deductible must be directly related to the earning of income. The earnings of a trader are the product of the trading operation which he conducts. These operations involve outgoings as well as receipts and the net profit or gain which the trader earns is the balance of his trade receipts over his trade outgoings. It is not the business of either of the appellants to engage in financial operations. The nature of their businesses is sufficiently indicated by their titles. It is to these businesses that they look for their earnings. Of course like other business people they must have capital to enable them to conduct their enterprises but their financial arrangements are quite distinct from the activities by which they earn their income.

Expenditure incurred in relation to the financing of their business is not in their Lordships' opinion expenditure incurred in the earning of their income within the statutory meaning it was conceded and it is clear that the expenses incurred in originally borrowing the money represented by the bonds were properly chargeable to capital and so were not incurred in earning income. If the bonds have subsisted to maturity the premiums and expenses then payable on redemption would plainly also have been on capital account. Why then should the outlays in connection with the present transactions also not fall within that category?

Where a Joint Stock Company increases its capital by the issue of new shares for which it pays commission to the underwriters of the shares, the commission so paid cannot be allowed as a deduction. In *re Texas Iron and Steel Company* 1 T.C. 125 (*The Texas Land and Mortgage Company v Holttham* 3 Tax Cases 255 and *Royal Insurance Company v Hutton* 1897 A.C. 1, 3 Tax Cases 500, followed.)

A mortgage Company raised money by the issue of debentures, and lent it at a higher rate of interest. *Held*, that the commission paid to brokers, and the other expenses incurred in raising the money cannot be deducted, *Texas Land and Mortgage Company v Holtham*, 3 Tax Cases 255. Even if the money raised by debentures is used in the assessee's own business the brokerage and legal charges in raising debentures are capital expenditure *Nagpur Electric Lighting, etc Co v Commissioner of Income-tax*, 6 ITC 28.

A Company had made losses in trading, and carried forward a debit balance from year to year in its balance sheet. The existence of this debit balance stood in the way of the payment of dividends when the Company entered on a period of profit earning. To enable dividends to be paid the Company applied to the Court to have its capital reduced and for the purpose incurred legal and other expenses. The Company claimed to deduct these expenses in computing the balance of profits and gains for the assessment to income tax. *Held* that the expenditure in question was not expenditure for the purposes of the trade of the Company, but for the purposes of distributing the profits of its trade and was not a proper deduction in computing the profits for the purposes of assessment to income-tax *Archibald Thompson Black & Co Ltd v Barty*, 7 Tax Cases 158.

The sole proprietor of a business also owned the premises in which it was carried on, but the premises were subject to certain mortgages. One of the mortgagees died and his executors called up the money due. A part was repaid and one of the beneficiaries took over the balance of the bond. The mortgagor incurred legal expenses in connection with the transfer of the bond. *Held* (*Lord Salvesen dissenting*), distinguishing *Usher's case* 6 Tax Cases 399 and following *S'rong v Woodfield*, 5 Tax Cases 215 (1906) AC 448 and similar cases, that the legal expenses were capital expenditure and not deductible from profits, *Small v Easson*, 12 Tax Cases 351.

Legal expenses—Expenses incurred in connection with litigation relating to the partition of a Hindu undivided family cannot be allowed as a deduction from the taxable income of the members *Jagmohandas Rastogi v Commissioner of Income Tax, Oudh* 3 ITC 274 AIR 1929 Oudh 125, 112 IC. 201 nor evidently from that of the family.

Expenses of a law suit in connection with the purchase of a house by a professional person are clearly not deductible *Smith v Eden* 13 A.T.C. 623 (KBD) 19 Tax Cases 110. Expenses incurred by a purchaser of property in completing his title and entering into possession is not deductible. In *re Lakkhmandas Bryballabhdas* 1942 ITR 186 (All). It follows that if the purchaser knowingly buys property with defective title and makes a further payment to perfect the title the payment is capital expenditure. If the property was the stock in trade of the purchaser i.e., if he is a dealer in property or a money lender who frequently takes over property in settlement of debts and then sells the property the expenditure would be deductible.

Legal expenses incurred in presenting the assessee's case to the Revenue authorities are not deductible since the profits are not altered by this expenditure, *Allen v Farquharson Bros*, 17 Tax Cases 59, *Board of Revenue v Munisami Chetty* 1 ITC. 227 but fees paid to Accountants for preparing accounts in the ordinary course of business and not specifically for contesting liability or conducting proceedings before tax authorities

are an ordinary business expense and allowable as such, *Worsely Brewery, Ltd v Inland Revenue*, (C.A.) 17 Tax Cases 349. The point is that expenditure antecedent to the ascertainment of profits is allowed, not that relating to the appropriation of profits, by the Crown. In practice however, Accountants and lawyer's fees are allowed for appearance before the Income tax Officer, but not on appeal or revision.

Legal expenditure incurred in order to avoid a business liability is revenue expenditure and will be allowed in the year in which it is incurred, *Commissioner of Income-tax, C.P v Mathradas Mannalal*, 1942 ITR. 95.

A landholder, carrying on, *inter alia*, a money lending business lent Rs 10 lakhs to a cotton mill company, the shareholders of which at a later stage, sued him for a large sum, alleging that he had agreed to finance the mill and broken the contract. He died when the suit was pending and his son was substituted in his place. Eventually the suit was dismissed, and the son (the assessee) claimed that the cost of defending the suit should be deducted from his profits from money lending. The Income-tax authorities refused the claim on the ground that the suit did not relate to the money lending or other business of the assessee but was a suit for damages against the father personally and that the son defended the suit merely to save the reputation of the father who, according to the department, was liable to attack with a view to "relieve him of his surplus cash". This view was not accepted by the High Court. There was no essential difference between a money lender's taking over a debtor's property for the purpose of preventing the loss of the sums advanced (as in fact the assessee's father had done in several cases) and his taking over the management of the debtor's business for the same purpose, and therefore the transaction with the mill was not foreign to the money-lending business. If expenditure incurred for securing the assessee against possible loss of his stock in trade (in this case loans, the trade being money lending) is allowable, expenditure incurred for repelling an actual attack on such stock ought to be allowable, for otherwise while a trader could deduct premia paid for fire insurance, he could not deduct the cost of actually fighting a fire. The decision was confirmed by the Privy Council, *Commissioner of Income-tax B & O v Maharajahdiraj of Darbhanga*, 1942 ITR. 214 (P.C.).

Expenditure incurred to protect the good name of a person is not necessarily incurred for the purpose of his business, nor is it a loss, especially if he succeeds in vindicating himself. *A fortiori* a firm cannot deduct expenses in defending its partners from criminal charges against them, even though the charges may be connected with the business of the firm, e.g., Excise offences against liquor merchants *Gasper & Co v. Commissioner of Income tax, Burma* 1940 ITR 100.

Expenditure incurred in defending a suit for payment of rent and royalties as assignees of the original grantees of certain mining leases was held not to be deductible in *In re Magnum Bungar & Co*, 1941 ITR. 573 (Cal). The facts of the case were peculiar and showed that the object of the expenditure was merely to protect the assessee from future losses. See also *Scammell and Nephew v Roules* (C.A.), 22 Tax Cases 479 in which legal expenses were allowed in respect of a compromise between the assessee and certain others, the assessee company having been allowed to pay the legal costs to the other party as compensation and debit the expenditure to revenue account. As for the facts of the case, see *post* under the heading 'employee's compensation'.

Following the observations of Lord Dunedin in the *Vallambrosa Rubber Co., case*, 5 Tax Cases 529, the Lahore High Court have held that the expenses incurred in defending an action brought against a company questioning the monopoly held by it in respect of quarrying in an area was capital expenditure because it was spent once and for all, *Kangra Valley State Co., Ltd v Commissioner of Income tax*, 7 ITC 375. This ruling, however, is against the trend of authority.

Costs incurred in defending the title to land held for the purpose of a business are revenue expenditure for the expenditure does not create a new asset but only maintains an existing one. The fact that it maintains only the title and not the value makes no difference *Southern v Borax Ltd* 1942 ITR (Sup) 1 (KBD). Following this ruling it was held in *Central India Spinning and Weaving Co v Commissioner of Income tax*, CP 1943 ITR. 266 that the expenditure incurred in restraining the infringement of a trade mark belonging exclusively to the assessee is revenue expenditure. In *Jatharam Jankidas v Commissioner of Income tax*, B & O 1944 ITR 344 it was held that litigation expenses incurred to recover capital and profits due from a partner in a discontinued business (for which the new financing partner of that partner had held himself responsible) were deductible the *ratio decidendi* being that the assessee's business was that of money lending and that the discontinuation of the old partnership business made no difference. In *Mahabir Prasad & Sons v Commissioner of Income tax Punjab*, 1945 ITR 340 the Lahore High Court did not follow *Kangra Valley State Co v Commissioner of Income tax*, 1935 ITR 324 and decided that expenditure incurred in defending a suit for pre-emption of a property purchased and used by him for the business was allowable as revenue expenditure. It is as necessary for a businessman to protect his fixed capital as to protect his circulating capital and in neither case does the protection create a new asset. Sale J distinguished the *Kangra Valley case*.

Where an action to recover remuneration was compromised on the footing that no part of the payment was to be allocated to costs it was held that the whole of the payment was remuneration and that costs paid by the plaintiff (assessee) could not be deducted from his remuneration for the purpose of tax *Eagles v Sir Albert Levy*, 19 Tax Cases 23.

Damages—A Brewing Company which also owned licensed houses in which it carried on the business of inn keepers incurred damages and costs on account of injuries caused to a visitor staying at one of its houses by the falling in of a chimney. Held, that the damages and costs were not allowable as a deduction in computing the Company's profits for income tax purposes.

Per the Lord Chancellor—“

It does not follow that if a loss is in any sense connected with the trade it must always be allowed as a deduction for it may be only remotely connected with the trade or it may be connected with something else quite as much as or even more than with the trade. I think only such losses can be deducted as are connected with it in the sense that they are really incidental to the trade itself. They cannot be deducted if they are mainly incidental to some other vocation or fall on the trader in some character other than that of trader. The nature of the trade is to be considered. To give an illustration losses sustained by a railway company in compensating passengers for accident in travelling might be deducted. On the other hand, if a man kept a grocer's shop for

keeping which a house is necessary, and one of the window shutters fell upon and injured a man walking in the street the loss arising thereby to the grocer ought not to be deducted. Many cases might be put near the line, and no degree of ingenuity can frame a formula so precise and comprehensive as to solve at sight all the cases that may arise. In the present case I think that the loss sustained by the appellants, was not really incidental to their trade as inn keepers, and fell upon them in their character not of traders but of householders "

Per Lord Davey.— It is not enough that the disbursement is made in the course of, arises out of, or is connected with the trade or is made out of the profits of the trade. It must be made for the purpose of earning the profits. " *Strong and Company, Ltd v Woodfield*, 5 Tax Cases 215 (1906) A C 448

On the other hand, there is little doubt that damages which really represent the sharing of profits with others, e.g., paid for the infringement of patents or trade marks are deductible. Such damages would also be undoubtedly taxable in the hands of the recipients. See *Constantinesco v R*, 11 Tax Cases 730, 43 T L R 727 and *Short Bros. v Commissioners of Inland Revenue*, 12 Tax Cases 955, set out under section 3.

Expenses paid, voluntarily and without any legal obligation by the proprietor of a newspaper to his Editor and Printer, reimbursing them their expenses in defending themselves in proceedings against them for contempt of Court have been disallowed. It is not enough that expenditure is incurred in the course of, or arises out of, business and is met out of the profits. It must be incurred for the purpose of earning the profits, if it is to be allowed, and it could not be said in this case that the expenditure was incurred with a view to increase the profits of the proprietor. In *re Amrita Bazaar Patrika*, 1937 I T R. 648 (Cal)

In *Mask & Co v Commissioner of Income tax, Madras*, 1943 I T R 454, the High Court disallowed the deduction of damages paid for breach of contract, on the ground that the breach was not an act of negligence but one of dishonesty, and it was not necessary for the purpose of the trade so to be dishonest.

On the other hand, where an assessee compromised litigation against him for infringement of trade mark, his own legal expenses and what he paid to the other party under the compromise were allowed as revenue deductions. *Appellate Tribunal v Chhaganmal Mangtal*, 1946 I T R 206 (Nag). The correctness of the decision in *Gasper & Co's Case*, 1940 I T R 100 was doubted.

Penalties—Penalties levied for the infringement of customs or any other laws cannot be allowed as deductions from profits nor the costs incurred in defending proceedings started by the Crown in regard to such penalties. *Commissioners of Inland Revenue v Warnes & Co*, (1919) 2 K B 444; 12 Tax Cases 227, *Commissioners of Inland Revenue v Von Glehn*, (1920) 2 K B 553 (C.A.); 12 Tax Cases 232. The point is that sums in question are not a 'trading loss' and are not spent in order to enable the assessee to 'earn the profits'. The Income tax Act however is not necessarily restricted to lawful business, only. Reference may also be made to the observations of Scrutton L.J., that he reserved his opinion as to the deductibility of damages given in civil proceedings arising out of negligence, etc.

In *Spofforth and Prince v Golder*, 1915 K.B.D. where the Revenue authorities wished to interview certain employees of a firm of Chartered Accountants in order to ascertain whether an offence had been committed and the firm took legal advice the cost of such advice was allowed as a deduction from the profits of the firm but when one of the partners was prosecuted the cost of his defence and the cost incurred by his partner to watch his interests were both disallowed on the ground that the cost was not incurred for the purpose of the firm's business or profession. See also *Canadian Minister of Finance v Smith* (1927) A.C. 193 and other cases set out under sections 3 and 4 (3) (vi).

Propaganda—Anti prohibition—By Brewer.—In *Ward & Company v Commissioners of Taxes* (1923) A.C. 145, the expenditure incurred by a brewer on an anti prohibition campaign was disallowed. The relevant statute (in New Zealand) was no deduction is to be made in respect of expenditure not exclusively incurred in the production of the assessable income and the argument that the expenditure was incurred to keep alive the profit making business was not accepted.

Letting house—Profits from.—A person assessed in respect of the profits derived from letting her house furnished claimed to be allowed as a deduction the amount of rent paid by her for another furnished house in which she lived while her own was let. *Held*, that the deduction claimed was inadmissible.

Per the Lord President.—This particular expenditure on a house elsewhere has nothing necessarily to do with the letting of her own house. It only represents the necessity of her living somewhere. So far as letting her house is concerned no doubt it is a necessity that she should go out but it is not a necessity of the situation that she should take a house elsewhere. She might get put up by friends. She might go to a hotel. *Wylie v Eccott*, 6 Tax Cases 128, 50 Sc.L.R. 26.

Tied houses.—A brewer claimed to deduct from his profits the excess of the cost of the repairs of a tied house over the one sixth allowed under Schedule A i.e., in respect of the value of the building. *Held*, that the deduction was inadmissible.

Per Smith L.J.—It is impossible to allege that the whole of this money for repairs of this public house was laid out exclusively for the trade of the brewer it was laid out for many other things too. *Brickwood & Company v Reynolds* 3 Tax Cases 600 (1898) 1 Q.B. 95. But this was overruled—see decisions below.

Magistrates licensing public houses required the surrender of 1 cence before granting new licences for new houses and brewers claimed to deduct sums paid for call of licences and other expenses of unsuccessful applications for new licences in arriving at profits for assessment. *Held*, that such deductions were not admissible.

Per Phillimore J.—(Counsel for the Company) says in fact they are none of them in respect of successful applications but are wholly in respect of unsuccessful ones. They are not to be supposed in respect of successful applications because they are not part of the annual expenditure of the brewer in the course of the year, they are sums which either out of capital or out of savings or realised profits he applies in extending his business. Why is it not the same thing if he applies those sums in attempts to extend his business and fails?

That money is spent before the licensing day comes round. At that moment, after it has been paid and before the licensing day comes round, where is it to go? If it succeeds, it is to go into the expenditure of capital but if it fails it is to go to some other way. I want to know, in between, where it is to stand. It can only stand in between as it will at the end, and if it may not at the end stand as an ordinary deduction from the annual profits as an annual trade expense, neither can it so stand at the moment when the option is on it. It seems to me that this sum is—perhaps it is not right in one sense to say—an expenditure of capital in the sense of the original capital of the concern, but it is an expense out of savings or realised profits. *Southwell v Savill Brothers, Limited*, 4 Tax Cases 430, (1901) 2 KB 349.

This decision was approved by *L. C. Cave* in *Atherton v British Insulated and Helsby Cables*, 10 Tax Cases 155.

When the principle of the above decision was applied by the General Commissioners on the understanding that there was no difference between a 'removed' licence and a new licence, *Roulatt, J.*, declined to interfere on the ground that the question was one of fact, *Morse v Stedford*, 13 A.T.C. 68, 18 Tax Cases 457.

A Brewery Company were the owners or lessees of a number of licensed premises which they had acquired as part of their business as brewers and as a necessary incident of its profitable exploitation. The licensed premises were let to tenants, who were 'tied' to purchase their beer from the Company. Under the Licensing Act, Compensation Fund Charges were levied in respect of the Excise 'on' licences held by the tenants who paid the charges and recouped themselves by deduction from the rents which they paid to the Brewery. It was claimed by the Company that in computing its profits for assesment to Income tax, it should be allowed to deduct the amounts ultimately borne by it in respect of the Compensation Fund Charges. *Held*, in the King's Bench Division that the deduction claimed was inadmissible. This decision was, however, reversed in the Court of Appeal (*Kennedy, L.J.*, dissenting), and the opinions in the House of Lords being equally divided, the judgment of the Court of Appeal was sustained.

Per Channel, J.—"If a brewer sets up a depot at a distance from his main brewery, for the purpose of increasing his sales, the annual expense of that depot is to my mind clearly an expense deductible as exclusively incurred for the purpose of his business of selling beer. Then again if in order to sell his beer he has to employ an agent and pay the agent, the payment of that agent is an expense of selling the beer."

Per Lord Atkinson—"Again it is urged that the landlord pays his contribution as landlord, and because of his proprietary interest in the premises, and not as trader, since he would be equally liable to it whether he traded or not. That, no doubt, is so but in the present case the Company have become landlords and thus liable to pay the charge for the purpose solely and exclusively of setting up the tied house system of trading. If the Company took under lease a plot of land to enlarge their brewery, or took similarly premises in which to establish a depot to sell their beer through an agent, the same criticism might be applied with equal force to the payment of the rent reserved by the lease. They would pay it as lessees; not as brewer. They would pay it whether

they continued to brew or not. Yet under the provisions of the very rule relied upon in this case, they would be entitled to deduct the rent from the profits earned and that too, utterly irrespective of whether the receiver of the rent used it to pay for his support or for his pleasure, or even to set up a rival brewery.

Indeed, even in a contract made for the purchase of material, such as hops or malt, the Company would have to pay for the commodity supplied not because they are brewers, but because they were contracting parties, utterly irrespective of whether they carried on their trade or had abandoned it. Yet it can hardly be suggested that the price paid for the hops or malt under the contract should not be deducted from the receipts. There is, therefore, in my opinion nothing in this objection.

* * * *

Lastly, it was objected that the licence, which draws after it the liability to pay the compensation contribution, authorises trading in several articles in addition to beer, and that the payment of the compensation or any part of it could not be held to be made wholly and exclusively for or in the interest of the trade in beer alone, and no doubt as far as the publican is concerned that possibly may be so, but as far as the respondents are concerned, they deliberately set up, wholly and exclusively for the purposes of their trade in beer, a system which necessarily subjects them to a liability for the share of the compensation contribution they claim to deduct. It matters not to them in respect to what trading, in addition to the trading in beer, the liability for the entire contribution is incurred. They deliberately assume the liability for the landlord's share of it solely to get a market for their beer, and therefore the payment of it is a disbursement made wholly and exclusively for the purposes of their trade as vendors of beer."

* * * *

On the other hand,

Per Lord Shaw of Dunfermline—" . . . this appears to me to demonstrate that a payment made by an owner, irrespective of whether he is in trade or is dealing as a trader with the premises, is a payment for the purpose of preserving the owner's rights as such and cannot be said to be exclusively devoted to the purpose of some business in which the owner happens to be engaged. In short, it seems to be difficult logically to affirm, and were it not for the opinion of some of your Lordships and some of their Lordships in the Court below I should deem it impossible to affirm that a payment is exclusively devoted to the purpose of the wholesale brewing trade carried on by the owners of premises when the same payment to the same amount, and in respect of the same premises, would fall upon the owners, although they stopped the brewing business to-morrow, or although they had never at any time been engaged in any business transactions with the licensee. I have, as I say, difficulty in seeing how an owner's payments can be said to be exclusively for the purpose of a brewer's trade when the payment would fall upon the owner, whether he was a brewer or not.

"While the payment is not in my opinion, 'exclusively' for the brewing trade purpose, it appears also to be equally clear to me that it is not 'wholly' for such a purpose. I may point out that even if it were maintained that the payment was to secure the continuing value of a

brewery asset still that asset was a value in a licence which was for wine, beer and spirits. The payment undoubtedly was for the continuance of that licence as a whole although the trading interest of the appellants with the premises had no reference to anything but beer. It is not difficult to figure cases in which if an on licence in the full sense were reduced to a beer house licence the value of the premises would be greatly reduced while the trade in beer thereon with the wholesale brewer might not be reduced but increased. It is to my mind fairly plain therefore that the payment by the owner who happens to be a brewer is a payment not exclusively devoted to the purposes of his brewing trade but devoted to the purposes of a trade in wine and spirits as well as beer and the deduction under the statute cannot accordingly apply. *Smith v Lion Brewery Co Ltd* 5 Tax Cases 568, (1911) A C 150.

A Brewery Company were the owners or lessees of a number of licensed premises which they had acquired solely in the course of and for the purpose of their business as brewers and as a necessary incident to the more profitable carrying on of their business. The licensed premises were let to tenants who were tied to purchase their beer etc. from the Company alone. The Company claimed that in the computation of their profits for assessment the following expenses incurred in connection with these tied houses should be allowed —

(a) Repairs to tied houses (b) differences between rents of leasehold houses or assessment of property of freehold houses on the one hand and the rents received from the tied tenants on the other (c) fire and licence insurance premiums (d) rates and taxes (e) legal and other costs.

Held that all the expenses claimed were admissible as being money wholly and exclusively laid out or expended for the purpose of the trade of the Brewery Company.

Per Lord Loreburn — In my opinion this point was practically decided by the *Lion Brewery Company case* (5 Tax Cases 568) *supra*.

The brewers were there allowed to enter upon the debit side an allowance which they had to make for their share of the compensation charge in respect of their tied houses. That compensation levy became payable by them because it was necessary for the levy to be paid in order to save the licences which were in the names of their tenants. It was held to be a proper debit because it was paid to keep going another business the success of which was essential to their own. That was the principle of the decision and not the narrow point that the compensation was payable by statute.

On ordinary principles of commercial trading such loss arising from letting tied houses at reduced rents is obviously a sound commercial outlay. Therefore the item (difference between the rent paid by the landlord and the rent recovered from the tenants) must be deducted.

Per Lord Atkinson — I think that the doctrine (i.e. in the *Lion Brewery case*) amounts to this that where a trader *bona fide* creates in himself or acquires a particular estate or interest in premises wholly and exclusively for the purpose of using that interest to secure a better market for the commodities which is a part of his trade to vend the money devoted by him to discharge a liability imposed by statute on

that estate or interest or upon him as the owner of it should be taken to have been expended by him wholly and exclusively for the purpose of his trade. I use the word creates advisedly in order to meet the case of a trader who lets premises he has for instance, inherited, to a tenant who covenants to vend his goods in them and buy from him and none other the goods vendd

The trader in such a case by the letting creates in himself the estate or interest of a lessor wholly and entirely for the purpose of his trade *viz* to promote a better market for his goods. I am bound to say that I cannot see any difference in principle between a liability imposed on such a lessor by statute and a liability imposed on him by the reasonable requirements of his trade

I now turn to the case of *Brickwood & Co v Reynolds* 3 Tax Cases 600 (1898) 1 Q B 95. The decision is based upon two propositions that a trade of a publican in a tied house is altogether independent of the trade of the brewer and therefore the entire expenditure of money on the repairs of the (tied) house could not be held to be expenditure wholly and exclusively for the purposes of the brewer's trade since it was in addition expended for the trade of the publican

With infinite respect for the Lord Justice (A. L. Smith) I think the publican's trade is the vending of the landlord's beer and none other. The brewer takes the house ties it to his brewery and puts the publican into it for the very purpose of having his beer sold through the efforts of this salesman the tied tenant. The two trades are almost if not altogether the same enterprise seen from different sides and I confess I am unable to see upon what principle money designedly spent by the brewer with the sole and exclusive object of maintaining the market for his own goods and promoting through the action of this salesman the sale of those goods therein ceases to be an expenditure wholly and exclusively for his (the brewer's) trade because incidentally it may benefit the salesman. *Usher's Wiltshire Brewery Ltd v Bruce* 6 Tax Cases 399

A Brewery Company in the course of and for the purpose of their business acquired licensed houses which were let to tenants subject to the usual tie terms. The Company claimed that in reckoning their profits as brewers the following expenses incurred in connection with these tied houses should be allowed—(1) Compensation Levy on tied houses (2) Premiums paid by the Company for insuring tied houses against fire (3) The difference between the assessment to Income tax Schedule A in respect of freehold tied houses or rents of leasehold houses on the one hand and the rents received from the tied tenants on the other (4) Replacement of fixtures and fittings of tied houses (5) Repairs to tied houses. Having regard to the findings in the case Counsel for the Crown consented to an order reducing the assessment by the amount of the deductions claimed. *Youngs Crawshay and Youngs Ltd v Brooke* 6 Tax Cases 393

In computing (3) above each tied house should be considered separately and the premium if any received from the tenant should also be taken into account the premium being spread over the period of the lease. *Collyer v Hoare & Co Ltd* 17 Tax Cases 169 (1932) A.C. 407 (H.L.) This principle was extended in a later case *Lucas v Charles Hammerton & Co* 1945 K.B.D. so as to apply even when the tied house is sold the successor being deemed to receive every year during the currency of the

lease, the part of the premium allocable to that year though the premium had been received by the predecessor. On the other hand while premia paid by tenants should be spread over in order to reduce the deficiency in rent premia paid by the brewer (and other capital expenditure e.g., cost of alterations to premises cost of purchase of previous leases or debts foregone from previous tenants) cannot be spread over to increase the deficiency. *Collyer v Hoare & Co, Ltd*, 16 A T C 289. This follows from the position that its acquiring such premises is of a capital nature while its letting them out is a part of the trade of brewers.

A payment in respect of the monopoly value (fixed by the Licensing Justices) is capital, even if paid in instalments. Such a payment is like a premium on a lease or the cost of structural alterations imposed as a condition precedent to the grant of a licence. *Henrikson v Grafton Hotel Ltd (CA)* 1943 I T R (Sup) 10.

Advertisements—Some trades possibly may be founded very much upon advertisements and there may be a trade of advertising which is founded upon the value of such advertisements. It is a question of degree and I do not at present go the length of saying that in no case can advertisements ever be deducted. But there must be a limit to the principle and I do not think that a person who has made a bad bargain and has given a sum utterly disproportioned to the value of the thing as the original premium is to be entitled to deduct it as an annual expenditure. —Per *Grove J* in *Gillatt and Watts v Colquhoun* 2 Tax Cas 76.

See, however the dictum of *Kelly C.B.* in *Watney v Musgrave* 1 Tax Cases 272 5 Ex D 241. Broadly speaking ordinary advertisements would be allowed as expenses by the Income tax Officer but special advertisements e.g. in connection with the increase of capital or reconstructing a company etc., would not be allowed.

In *Southern v Aldwych Property Trust Ltd* (1940) K B D the cost of advertisement was allowed as a necessary expense of managing the property. It may be taken broadly that if the profits arising out of the advertisement are taxable the cost of the advertisement is admissible.

Pension—Employees—Commuted value of—A Company sought to charge as a trade expense a lump sum which it had paid for the purchase, for the benefit of a former actuary and secretary of the Company of an annuity equal in amount to the pension which had been awarded to him by resolution of the Company. Held that the lump sum paid to purchase the annuity was an expense incurred in the business not in the nature of capital expenditure and was an admissible expense in computing the Company's profits assessable to income tax.

'In *Royal Insurance Co v Watson* (1897) A C. 1 3 Tax Cases 500 the Company took over the business of another insurance company, and it was a term of the agreement that they should take the manager of that other company into their service at his existing salary with power to commute such annual payment by payment of a certain gross sum. They took him into their service but subsequently dismissed him paying him the agreed sum. The Court of Appeal held that money so expended not being expended as remuneration for services rendered, could not be treated as money expended for purposes of the trade or business. The decision was affirmed in the House of Lords, but on an entirely different ground. The ground there was that the bargain between the parties necessarily involved the

expenditure which was part of the consideration for the transfer of the business part of the purchase money for the concern as Lord Halsbury said and that therefore it was a capital expenditure. Having regard to that decision and to the observations of the learned Law Lords particularly Lord Shand it is impossible to regard the decision of the Court of Appeal as a binding authority in support of the view that unless money is expended as remuneration for services rendered in the trading year it cannot be an expense incurred for the purposes of the trade. I do not think that the Court of Appeal intended to lay down such a proposition as of universal application. The Court was dealing with the facts of that particular case. The contrary principle has frequently been acted on. The facts in *Usher's Wiltshire Brewery Ltd v Bruce* (1915) A C 433 6 Tax Cases 399 are no doubt very different from those in the present case but the decision and the grounds on which it was based appear to me to be inconsistent with any such view. In *Smith v Incorporated Council of Law Reporting* (1914) 3 K B 674 6 Tax Cases 477 Lord Justice Scrutton when a Judge of first instance held that the Commissioners were justified in treating a lump sum of £1 500 paid to a gentleman on their staff of Law Reporting on his retirement as an expense incurred in the business carried on and a such an admissible deduction. In *Ounsworth v Vickers Ltd* (1915) 3 K B 267 6 Tax Cases 671 Mr Justice Rowlatt following a judgment of the Lord President in *Vallambrosa Rubber Company v Farmer* 5 Tax Cases 529 47 Sc L R 488 said that the proper test to apply is this: was the expenditure incurred in order to meet a continuing business demand in which case it should be treated as an ordinary business expense and an admissible deduction or was it an expenditure incurred once for all in which case it should be treated as capital outlay? I agree with that view and applying that test I think that it necessarily follows on the facts found by the Commissioners that the £4 994 should be treated as the pension was treated as an ordinary business expenditure and that the deduction should be allowed. It is the pension in another form it is actuarially equivalent in value and it is identical in character. It was paid to meet a continuing demand which was itself an ordinary business expense as the Surveyor had treated it. It was no part of the bargain between the two companies that it should be paid as in *Watson's case* (supra). It was paid as the Commissioners state entirely as a matter of domestic arrangement. It seems to me as impossible to hold that the fact that a lump sum was paid instead of a recurring series of annual payment alters the character of the expenditure as it would be to hold that if an employer were under a voluntary arrangement with his servant to pay the servant a year's salary in advance instead of paying each year's salary as it fell due he would be making a capital outlay. *Hancock v General Reversionary and Investment Co Ltd* 7 Tax Cases 358 (1919) 1 K B 25.

Pension—Employees—Contribution for—Lump payment—A Company claimed as a deduction in computing its profits for income-tax purposes a lump sum of £50 000 which it had set aside in the hands of trustees as a fund for the relief out of the income therefrom of invalidity etc amongst its employees. *Held* that the sum in question was not an admissible deduction in arriving at the Company's profits for assessment.

40 Income-tax, *Hancock v. General Reversionary and Investment Co., Ltd* (*supra*), distinguished.

Per Pollock, M. R.—" . . . it is clear that in order to justify a deduction being made from what I will call the gross profits, it has to be shown—and I think, on this the onus lies upon the subject—that what is sought to be deducted is money wholly and exclusively laid out or expended for the purposes of the trade, that is, for the purpose of earning the profits

Now, that being the rule, there are a number of cases which illustrate that (*Refers to the Vallambrosa Rubber Co., Ltd v Farmer*, 5 Tax Cases 529 and *Ounsworth v Vickers, Limited*, 6 Tax Cases 671) There are many other illustrations which may be given indicating, that you are not to pay meticulous attention to what has happened in the particular period of charge. What you really have to attempt to ascertain is whether or not from the business point of view the expenditure has been wholly and exclusively laid out in the earning of the profits

Then we come to another class of cases, cases in which an expenditure is made on business grounds of a sum, apparently a capital sum but really to comprise and compress what is an annual charge. Where you find that there is a continuous business demand you may on business principles summarise that continuous demand and on prudent grounds you may make a payment which covers more than the particular year, and you may be able to show that that sum has been spent prudently in order to obviate the continuous business demand, and, hence, that is a sum wholly and exclusively laid out in the earning of the profits

The case that perhaps illustrates that as well as any is the case of *Hancock v General Reversionary and Investment Society, Ltd*, 7 Tax Cases 358, which we have been discussing. Upon the facts found Mr. Justice Lush determined that in paying down the actual actuarial value of the annuity to which Mr Hancock was entitled, the Company were doing no more than making a payment in order to save themselves the continuous demand which would otherwise fall upon them, and that therefore it was a sum wholly and exclusively laid out in the earning of profits, although no doubt the effect was to cover more than the period of charge under the Income tax Act. I think that that case must be treated as one which depends to some extent upon the actual facts found. It might have been possible to deal with it from a different point of view if there had not been the definite and clear facts found as they were.

On the other hand, and taking the illustration on the other side, it has sometimes been attempted to say that what is really a capital outlay ought to be treated on the same principle; and I can give an illustration of a claim which could be made which could not be allowed. Take the case of where a company had certain premises for which they had to pay rent. If they expend a certain amount of their capital in the purchase of the freehold of those premises, then the expenditure is not an expenditure to be deducted from their profits as having been wholly and exclusively laid out for that purpose, but it is to be a capital charge, and it falls on the other side of the rule, and cannot be treated as a proper deduction. That again is illustrated by the actual decision in *Ounsworth v. Vickers, Limited*, 6 Tax Cases 671; (1915) 3

K.B 267, where it was held that what had been done in that case in securing a better channel and a better berth alongside the premises of the Respondents was capital expenditure, and that the Respondents in that case were not entitled to deduct it from their gross profits for ascertaining their taxable profits

Now I have indicated under the Income-tax Statute what is the rule, and I have indicated, by two illustrations which I have given, what may be taken to be, I will not say definitions, but illustrations of the sort of cases which fall on the one side or the other. And now I come to the present case and I confess that I have found it a difficult one and my mind has fluctuated in the course of the case very considerably. The Commissioners have found, and it is for them to find the facts, that the payments for the maintenance of their work people during invalidity constitute a continuous business demand upon Messrs Rowntree and Company's business, having regard to the manner in which that business is conducted. So far they have found therefore a fact which justifies Messrs Rowntree in dealing with this matter which is *prima facie* a business demand upon them. Then they held that the primary object of this payment of £50 000 to trustees was to establish a fund by setting aside a capital sum, the income of which would be available to meet this demand, and perhaps some emphasis ought to be put upon the fact that they believed that the income would be available. I have pointed out that although in certain special circumstances an inroad could be made upon the capital, the original intention was that the income alone should first of all be used to meet this continuous demand upon them. Then, thirdly, the Commissioners found that the actual amounts paid away for invalidity had not been ascertained at the time the payment was made, and were contingent and not capable of ascertainment. Now I think that is a very important finding of fact which is binding upon us. It cannot be said that the matter then could be dealt with actuarially, or that it was a clear business proposition as to whether or not they would continue to pay the sums as and when the demand was made upon them or whether they would meet that ascertainable and ascertained demand by an immediate payment as was done in the case of *Hancock*. In *Hancock v General Reversionary and Investment Society Ltd*, 7 Tax Cases 358 at p 372 Mr Justice Lush said 'It seems to me as impossible to hold that the fact that a lump sum was paid instead of a recurring series of annual payments alters the character of the expenditure, as it would be to hold that if an employer were under a voluntary arrangement with his servant to pay the servant a year's salary in advance instead of paying each year's salary as it fell due, he would be making a capital outlay'. In this particular case those attributes cannot be given to this particular payment. It is wholly uncertain what claims for invalidity would be made upon Messrs Rowntree. No business proposition of the same nature as in *Hancock's case* would be proposed to them by any insurance office and the provision they have made may be wise or may not but it is not a business proposition in the narrower sense that the proposition in *Hancock's case* was. The Commissioners came to the conclusion in applying the law that it was impossible to say that this was invalidity in another form in the sense in which Mr Justice Lush had described the actuarial payment made in *Hancock's case*, as a pension

in another form I think it more closely approximates to the case of the purchase of a freehold in order no longer to have the demand for rent than it does to a prudent business payment in order to be rid of what was an ascertained demand likely to continue over a series of years

Lord Parker states the principle in the case of *Usher's Wiltshire Brewery, Limited v Bruce*, 6 Tax Cases 399 at p 429 He states the principle as to deductions in this way "The better view, however, appears to be that, where a deduction is proper and necessary to be made in order to ascertain the balance of profits and gains it ought to be allowed Now it seems to me upon the findings of fact before us that it is impossible to determine that this deduction was proper and necessary to be made in order to ascertain the balance of profits and gains It may prove to be good business, the payment was certainly dictated by charitable motives and in the best interest of their employees but whether or not it could be said to be proper and necessary is quite another question

On the whole I have come to the conclusion that this payment does not satisfy the Rules, and cannot be said to have been made as wholly and exclusively laid out or expended for the purposes of the trade," *Rowntree & Co, Ltd v Curtis* 8 Tax Cases 678 40 TLR 363

Pension fund—Initial lump contribution—A company established a Pension Fund—under a trust deed—for its employees to which both the company and the employees subscribed every month In addition the company paid as a lump contribution to the fund a sum—actuarially determined—to provide pensions for the previous service of the employees It was held by *Roulatt, J*, that the lump sum contribution was an admissible deduction in computing the company's profits, *Atherton v British Insulated and Helsby Cables*, 10 Tax Cases 155

Per Roulatt, J—"It is clear that expenditure which in its nature is a Revenue expenditure does not cease to be deductible because it is not made strictly annually

It was conceded that dredging a water passage which is continually silting up is an income expense, and does not cease to be deductible

because you may dredge very efficiently in one year and thereby save yourself from having to dredge in the next two years

On the other hand, I suppose if the (owners) were minded by concreting the bottom of their water passage to make it a channel that never required dredging I apprehend it would not be argued that was income expenditure "

This was however upset by the Court of Appeal which distinguished the case from *Hancock's case* on the ground that in the latter there was a pre-existing liability That is to say there were two elements in *Hancock's case*, (1) a pre existing liability and (2) an actuarial calculation (1) was absent in this case and (2) was absent in the *Rowntree case* The Court of Appeal also suggested that if the Commissioners had found as a fact that this expenditure on account of the contribution was a necessary expenditure of the business, the expenditure would have been admissible on the analogy of *Usher's Wiltshire Brewery v Bruce*, 6 Tax Cases 399 But as a matter of fact the Commissioners merely held the item to be an admissible deduction *ie*, decided on a point of law on the facts before them

The case went to the House of Lords who by a majority of three to two affirmed the decision of the Court of Appeal, (1926) A.C. 205

Lord Cave approved of the *Hancock case*, but thought that in this case a capital asset had been created and that the *Hancock case* did not apply. *Lord Atkinson* agreed that the expenditure created a capital asset but did not approve of the *Hancock* decision. *Lord Buckmaster* offered no opinion as to the correctness of the *Hancock* decision, and rested his judgment on the ground that the payment was not a proper trading expense i.e. not a proper debit in the Profit and Loss Account. *Lord Carson* approved of the *Hancock case* and thought that the case exactly covered the present case also. *Lord Blanesburgh* not only approved of the *Hancock case* but would have allowed this claim to deduct from profits even if the *Hancock case* had been decided otherwise.

The following extracts are from the judgments in the House of Lords

Per *Lord Chancellor* — But there remains the question whether it is in substance a revenue or a capital expenditure. This appears to me to be a question of fact which is proper to be decided by the Commissioners upon the evidence brought before them in each case but where as in the present case there is no express finding by the Commissioners upon the point it must be determined by the Courts upon the materials which are available and with due regard to the principles which have been laid down in the authorities.

When an expenditure is made not only once and for all but with a view to bringing into existence an asset or an advantage for the enduring benefit of a trade I think that there is very good reason (in the absence of special circumstances leading to an opposite conclusion) for treating such an expenditure as properly attributable not to revenue but to capital. For this view there is already considerable authority. The object and effect of the payment of this large sum was to enable the Company to establish the Pension Fund and to offer to all its existing and future employees a sure provision for their old age and so to obtain for the Company the substantial and lasting advantage of being in a position throughout its business life to secure and retain the services of a contented and efficient staff.

(It should be noted that in the above judgment the word 'enduring' is used in the sense that fixed capital endures not in the sense that a benefit endures for some years by relieving the trade of a revenue payment. See per *Rowlatt J* and *Romer LJ* in *Anglo Persian Oil Co v Commissioners of Inland Revenue* 16 Tax Cases 253.)

Per *Lord Carson* — Indeed it is under modern views and conditions not only a proper but essential expenditure for carrying on any properly organized business.

It is clear from the terms of the trust deed as already pointed out, that in no sense was the sum an investment that it would be eventually exhausted in payment of the pensions and that in the event of a winding up of the Company it could never form any part of the assets of the Company. I cannot under these circumstances conceive any system of commercial accountancy under which this sum could ever appear in the capital accounts of the Company. Nor is it capital withdrawn from the business as it was admittedly paid out of the earnings of the year. It is not disputed that an annual sum contributed to the Pension

Fund on an actuarial basis for the purposes of making the Fund solvent for paying the pensions of the older members of the staff would be a proper deduction in arriving at the balance of profits and gains it would be an ordinary business expense. Nor I think, can it be disputed that if at any time the Fund threatened to become insolvent after it was started, a sum paid to prevent such insolvency would be a proper disbursement in arriving at the balance of profits and gains. Why, therefore, should the payment of the sum in question which by an actuarial calculation represents the sum equal to the annual payments which would be necessary to be considered as in the same position?

I notice that my noble friend on the Woolsack agrees with the decision in *Hancock's case* as I also do but I fail as Mr Justice Rowlatt failed to see how it can in principle be distinguished from the present case

Per Lord Blanesburgh— It is I apprehend now well settled that in the Income-tax Act unless the context requires a different meaning to be placed upon them such words as profits gains 'capital' are to be construed according to their ordinary signification in commerce or accountancy. It will accordingly not be amiss if remembering the nature of the present controversy, an attempt be made to ascertain from the statements or accepted implications of the stated case but in the first instance merely as a business proposition what was the precise nature and purpose of the payment now in question and as consequent thereon its proper place in this Company's accounts

I do not myself see how any of these payments could properly be charged to Capital Account by any company which keeps its accounts on the double account system. And as the Income tax Acts contemplate that accounts will be so kept no other system need here be considered. Under that system as is well known the two accounts Capital and Revenue or Trading Accounts as in business language it is usually termed are separate accounts. The Capital Account is concerned with the Company's fixed capital and its applications. The Revenue Accounts is concerned with the Company's trading or circulating capital and its application. Dividend may lawfully be paid although it may be the whole of the company's fixed capital has disappeared. No profits available for dividend are however existent unless the Company's trading capital would remain intact after they had been distributed as such. If what I have so far said be correct it follows that for this Company to have charged any of these payments to Capital Account would have thrown on that account a revenue charge would have enabled the Company to ascertain profits and distribute dividends without taking it into account would have introduced a system of facilitating in the case of a company, less prosperous, the concealment more or less successful of the truth that the dividends declared during a period of depression were in whole or in part being paid out of capital.

'My Lords on the facts of this case there were as it seems to me only three funds from which any of these payments could, by such a company as this legitimately have been taken. The first was its undistributed profits—the payments if thence derived, being no more than a series of bonuses to its employees out of the realised profits of good years. The second was its gross receipts before profits were struck. The third,

merely another aspect of the second, and not applicable to this prosperous Company, was working capital to which recourse might properly be had on any occasion when the gross receipts after these payments had been charged against them were less than the outgoings by at least an equivalent amount

"Applied to this Company, on the facts found, there is, as to the first of these, no suggestion of any intention on its part to make these payments out of realised profits. The unqualified covenant into which it entered with regard to them would have effectively disposed of such a suggestion had it been made.

"As to the third the gross receipts as I have indicated, were more than adequate to meet the payments and still leave a large surplus

The Revenue Account therefore, strictly so called, alone remains as the place in which they can properly appear. In no sense of the word 'capital, circulating, working or fixed, did this expenditure involve any withdrawal. It was made out of gross receipts in a year in which working capital and, *a fortiori*, fixed capital remaining intact a large surplus still emerged. Nor, in my judgment, did the expenditure in any relevant sense create a new asset of the Company of the nature of a fixed capital asset or any other. The learned Lord Justice does not more closely describe this so called asset nor, fixed though it was, did he attach it to a name by which it could be recognised. He did not suggest that it resulted in an enhanced goodwill. He could not, in my judgment, have done so with reason, because it has never, I think even been suggested that a contented personnel, is an element in goodwill whatever else it may be. In that state of things, it has occurred to me, my Lords, that the existence or non existence of this so-called asset might fairly be submitted to the prosaic test of asking what in a liquidation would be forthcoming in respect of it when a liquidator essayed his statutory duty to realise the Company's assets and divide the proceeds amongst his constituents. Certainly no part of the Fund. That, in its entirety, is completely alienated. And I can myself think of nothing else. Moreover, my Lords a reference to the authorities shows it seems to me, clearly that it is by reference to no such shadowy conceptions that the words of the statute 'employed as capital' have to be interpreted. Such things as a purchase of goodwill involving a capital expenditure might come within them, *Smith v Moore*, (1921) 2 A C 13, 12 Tax Cases 266. The expense of making a new channel to the sea essential or convenient for approach to a shipyard would be such expenditure notwithstanding that the channel when constructed would not be the property of the trader and that others jointly with himself would have the right to use it on their lawful occasions. *Ounsworth v Vickers, Ltd*, (1915) 3 K B 267, 276. The expenses incurred in the promotion of a private Bill, the capital object of which was ultimately obtained by agreement, *Moore & Co v Hare*, 6 Tax Cases 572 52 Sc L R 59. These advantages are real and definite. I can see nothing comparable here. Moreover, in this connection also the observation already made is true that the principle expounded by the Lord Justice would equally apply to the annual payments to be made by the Company and admittedly properly chargeable to revenue.

I think with the Lord Chancellor that the *Hancock case* was correctly decided but I should myself have been prepared to decide this case as I do even if I were of opinion that the *Hancock case*,

could not be supported—so much more compelling in a relevant respect are the facts and circumstances here *British Insulated and Helsby Cables Ltd v Atherton* 10 Tax Cases 155 (1926) A.C. 205

Rowntree's case 8 Tax Cases 678 related to a Provident (not a Super annuation) Fund and *Atherton's case* to a period before 1921 before Rules had been made in the United Kingdom Act in regard to such funds

The lump sum cost of a policy of insurance to cover pensions payable to servants who had no right to them and were no party to the purchase of the policy was disallowed by *Rowlatt J* in *Morgan Crucible Co v Commissioners of Inland Revenue* 1933 I.T.R. 26. The *Hancock case*, 7 Tax Cases 358 (1919) 1 K.B. 25 was distinguished on the ground that in that case an annual expense was liquidated by a lump sum payment while in this case the annual liability (such as there was) was not got rid of though the payments from the insurance company would counterbalance future pensions to be paid. The employer had merely acquired a capital asset in the contract with the insurance company. It belonged to him and not to the employees for he could surrender the policy and at the same time not pay pensions to the employees

Employees—Compensation—The following dicta may be noted—

The point as to the deductibility of a payment made upon the termination of a person's employment was glanced at in the House of Lords in *Royal Insurance v Watson* 3 Tax Cases 500 (1897) A.C. 1. Lord Herschell reserved his opinion upon it without expressing any view. Lord Shand said that he thought damages paid to a dismissed servant—dismissed I suppose in the interests of the company or the supposed interests of the company and I also suppose he would include a sum paid by way of agreement to get rid of the claim for damages—might be (and I think it was said with a good deal of force in the argument that that would be) a deductible expense. I think that in the ordinary case a payment to get rid of a servant when it is not expedient in the interests of the trade to keep him, would be a deductible expense. a person has to employ an efficient staff and also to cease from employing an inefficient staff and if he has to pay for that cessation there is no reason why that should not be an expense incurred for the purposes of the trade. He has to facilitate people going when they reach the age of retirement in their own interests and in the interests of their employer at least he has to deal with the situation and provide in some way as Lord Cave says on grounds of commercial expediency for people who leave his employment. —Per *Rowlatt J* in *Noble v Mitchell* 11 Tax Cases 372 (1927) 1 K.B. 719

Rowlatt J also distinguished *Strong & Co v Woodfield* 5 Tax Cases 215 (1906) A.C. 448 on the ground that in that case the expense was only collateral to the actual trade that in any case it was a case near the line that Lord James of Hereford thought so and that it could not apply to expenses incurred on a staff who earn the profits of the trade

As regards the Revenue nature of the expenditure *Rowlatt J* said—

This gentleman being there as an unsatisfactory servant was not a permanency. He was no doubt there for his life but I do not think you can say By the expenditure of capital I will get rid of this nuisance affecting my business and have his room rather than his company by making this capital expenditure. although the largeness of

the figures and the peculiar nature of the circumstances perplex one
 this is simply a payment to get rid of a servant in the course
 of business and in the year in which the trouble comes

The expenditure was incurred not to secure an asset but merely to enable the business to continue its course as before,—only to remove a difficulty in carrying on the business as before

Roulatt J's judgment was approved on both points by the Court of Appeal though *Lawrence J J* felt doubts whether the expenditure was not capital

Following *Mallett v Staveley Coal & Iron Co* 13 Tax Cases 772 (1928) 2 K B 405 *Hancock's case* 7 Tax Cases 358 and *Noble v Mitchell* 11 Tax Cases 372 (1927) 1 K B 719 it was held that the compensation paid by an oil company to its agents for the termination of their agency is revenue expenditure. The test is whether the transaction relates to fixed or to circulating capital. An oil company's concessions constitute its fixed capital while its contracts for delivery are its circulating capital. Contracts with selling agents are not fixed capital in any sense. Expenditure in terminating an agency merely brings back into the hands of the principal a necessary ingredient of the existing business and is therefore debitable to circulating capital. The resumption of the agent's work by the principal does not create a new asset even though the agent may agree not to compete with the principal afterwards. The re-organisation of methods of business does not create a new asset merely because it may lead to economies and the termination of agency is only a method of re-organisation. Further the compression of revenue payments of several years into a single year does not alter the nature of the payment. *Anglo Persian Oil Co v Commissioners of Inland Revenue* 16 Tax Cases 253. The fact that a certain expenditure is incurred in order to obtain an enduring benefit will not by itself make the expenditure capital expenditure. The true test is whether the enduring benefit is of a capital nature.

On the other hand where a private company composed of three persons decided to transfer its control to another concern and in doing so voted a substantial sum to the old directors as compensation for loss of office it was held that the compensation could not be deducted from the taxable profits of the company. *Noble's case* was distinguished on the ground that in that case the company had an inducement to get rid of the retiring director while there was no such inducement in this case. *Overy v Ashwood Dunn Ltd*, 12 A.T.C. 102, 17 Tax Cases 497.

Where a business consists merely of agency work for others the whole scheme of the business, i.e., the organisation for buying and selling might well be the fixed capital of the business. Cf *Venden Berghs Ltd v Clark* 19 Tax Cas 390 (H.L.) referred to under section 3 and compensation for the loss of the agency would be a capital receipt while payment for acquiring the agency would be capital expenditure.

There were two companies with close trading relationship and a largely common directorate. Disputes arose among the directors resulting among other things in an action for slander by a director against some of his colleagues. The quarrels were eventually terminated by one of the companies surrendering its holdings in the other to one of the non common directors of the latter in return for cash but one of the directors of the first company refused to agree to the arrangement unless he was paid £7,500 by the first company in consideration of his agreeing to withdraw the

slander action against the director of the second company. The first company claimed to deduct the £7,500 from its profits and was allowed to do so on the ground that the payment was made in order to avoid future losses—whether pecuniary losses or commercial inconveniences—and that, therefore, it was incurred as much for the purpose of the trade as the making or carrying out of a trading agreement. The mere fact that something is paid for terminating a trading arrangement will not by itself make the payment capital expenditure. *Scammell & Nephew, Ltd v Rowles*, 18 A.T.C. 10 (C.A.), [following *Noble v Mitchell*, 11 Tax Cases 372 and *Anglo Persian Oil Co v Commissioners of Inland Revenue*, 16 Tax Cases 253].

A Company which used to grant voluntary pensions to its employees on retirement decided to close down and when doing so provided *ex gratia* annuities and compensation for loss of office to the employees. Held, that the expenditure on the annuities, etc., was not a business expense as it was not required for keeping the trade going nor was it a contractual obligation previously incurred. *Commissioners of Inland Revenue v The Anglo Brewing Company Ltd*, 12 Tax Cases 803. Further, in this case, the payments were made after the accounting year in respect of which the deductions were claimed for Excess Profits Duty.

In *Lowe v Peter Walker (Warringtons) Ltd*, 20 Tax Cases 25 the company had created a trust for an employee's benefit fund and set aside some of its own shares for the purpose. The trust was revocable. The Revenue authorities did not 'approve' the fund. Later on the company revoked the trust and transferred the sale proceeds of the assets of the old fund to a new fund which was 'approved'. On this occasion the company also made a substantial addition to the fund. The Revenue disallowed both the amounts, but the Court of Appeal allowed both of them. It should be noted that there is no provision in the United Kingdom laws corresponding to section 58 K of the Indian Act. Section 58 K, however applies to provident funds only.

Miscellaneous business deductions—The following executive instructions in the Income-tax Manual may be noted—

(a) contributions to private provident funds by an employer are allowable if the fund is constituted as an irrevocable trust, and if no part of the employers' contributions can be recovered by him. If the fund remains in the hands or under the control of the employer no contributions by him would be allowed as a deduction, but actual payments made to employees leaving the service would be allowed in the year in which such payments are made, so far as such payments relate to the employees' contributions only.

(b) Contributions to private superannuation funds by an employer are also allowable if the fund is constituted as an irrevocable trust and if no part of the employer's contribution can be recovered by him. If such a fund remains in the hands of, or under the control of, the employer, no contributions by him will be allowed as a deduction but actual payments of pension to ex employees or to their widows or children should be allowed as a deduction where the pensionary payment is a fixed or recurring one. No claims on account of 'pensions' will, however, be entertained where the "pensions" are paid to persons who have or who at any time had a share or interest in the business, profession or vocation.

(c) Premia paid by an employer to cover the risk of liability to compensate any of his employees for injuries under the Workmen's Compensation or Accident Insurance Act (VIII of 1923) are allowable under section 10 (2) (xi) [now (xv)]

(d) *Bona fide* expenditure of a revenue character is allowable for the welfare of employees

(e) Indian traders and business men charge their customers or clients a small fee on each transaction—for example so many pies per bag of some commodity sold—the proceeds of which are supposed to be devoted to various religious charitable or educational purposes. Such *customary* receipts and the corresponding expenditure should be left out of account altogether for income tax purposes

(f) Audit and other accountancy expenses incurred annually including the expenses of settling the income tax liability of an assessee will ordinarily be allowed. But expenses connected with subsequent proceedings before the higher authorities in appeal revision or before the Courts will not be allowed

(g) The premiums received by a company on issue of shares are capital receipts and the cost of issuing shares is capital expenditure

Provident Funds—Those governed by the Provident Funds Act or recognised under Chapter IX A of the Income tax Act are necessarily irrevocable trusts and contributions made to them by employers from year to year are allowable deductions from the employer's profits. By a special provision—section 58 K—where a new fund is created and the employer transfers accumulated funds to it such transfers are deemed to be capital expenditure and allowances are given as employees leave service and receive payment

In the *Nedungadi Bank v Commissioner of Income tax Madras* 49 Mad 910 2 ITC 243, it was held that no deductions were admissible on account of contributions made by the Bank to the provident fund of the employees. The case of the Commissioner was that the Bank which credited the accounts of the employees with the contribution still retained some control over the money which it could resume in certain circumstances. The liability of the Bank to its employees therefore was not unconditional

In *Burma Corporation Ltd v Commissioner of Income tax*, 7 Rang 608, A.I.R. 1929 Rang 193, 4 ITC 49, it was held that the employer is entitled to deduct from his profits the contributions made by him to his employees' provident fund when he has parted with the money or lost control over it. The fact that according to the deed of trust of the provident fund and the rules of the fund it is open to the employer to recover certain amounts in certain eventualities does not affect the above claim to deduction. When money is recovered from the fund by the employer, such recovery will go to swell his income

In the case of *The Bombay Burma Trading Corporation*, 1933 ITR. 152, 11 Rang 172, A.I.R. 1933 Rang 45 in which the employer had power to employ the monies of the provident fund in his own business and, or invest them it was suggested by the High Court that the employer's contributions could be deducted from his taxable profits only when he paid them over to the employees

It has been held in the United Kingdom that when a balance is transferred from an unapproved superannuation fund to an approved one, the balance is deductible from the employer's profits, *Lowe v. Peter Walker (Warrington)*, etc., 20 Tax Cases 25 already referred to. As regards the position in India, see sections 58-K and 58-R respectively.

Future Losses.—The prices at which an assessee had entered into contracts to purchase esparto and pulp had proved to be much higher than the prices ruling in the market at the end of the accounting period in question. The assessee wanted to provide for the losses involved in the fall in prices, and accordingly placed to reserve a part of the profits earned during the accounting period. *Held*, that he could not deduct the amount so taken to reserve in computing his profits. Though, if goods are actually received into stock and then fall in value, loss is allowed to enter into the year's account (even if the loss has not been actually realised in the year by sale) no loss can be allowed in respect of stock not received, even though the assessee may be under obligation to buy it at prices above the market-value at the close of the year and even though the goods may be reserved for him, and further, even if invoiced to him before the close of the year.

Per the Lord President (Clyde).—"It is a general principle in the computation of the annual profits of a trade or business under the Income-tax Acts, that those elements of profit or gain, and those only enter into the computation, which are earned or ascertained in the year to which the inquiry refers; and in like manner, only those elements of loss or expense enter into the computation which are suffered or incurred during that year. . . . It is a common place that, subject always to the observance of the rules and general principles of the Income-tax Acts, no particular method of computing profits is a part of the law universal. . . . The appellants drew our attention to a recent decision in the House of Lords, *Sun Insurance Office v. Clark*, 6 Tax Cases 59; (1912) A.C. 443. It seems obvious that the character and position of a fire insurance business—depending as it does on the character of accidents, and involving payment of the annual premiums in advance—are different from the character and position of an ordinary commercial business. . . .", *Collins & Sons v. Commissioners of Inland Revenue*, 12 Tax Cases 773.

On the other hand, where an assessee, at a time when prices were falling, declined to take delivery of goods contracted for and there was litigation, a settlement being arrived at eventually under which the assessee took delivery at lower prices but still involving him in a loss, the question arose as to when the loss arose. There was difference of opinion in the King's Bench and the judgment of the lower tribunal that the loss occurred at the time of refusal to take delivery stood. *Commissioners of Inland Revenue v. Barrie, Ltd.*, 12 Tax Cases 1223.

A Company whose business consisted of hiring on time charters and carrying goods and merchandise as they offered, and whose charters extended beyond the accounting period, claimed to debit the account with the rates payable for the unexpired portion of the charters and credit *per contra* with the probable rate for hire for new charters in the next year. That is, in view of probable reduction in freights, the company attempted to write down the future losses. *Held*, that such writing down was not admissible.

Per the Lord President (Clyde)—"They (appellants) figured the time charters as being part of the trading capital of the company

But it is not really possible to regard the time charters as stock-in-trade for in point of fact the company never dealt with them as such. They did not deal in time charters and neither bought nor sold them. All they did was to hire the services of a ship at so much a month for so many months and use them for a profit, much as a man might hire omnibuses and horses or motor conveyances and either himself employ them in carrying passengers at a profit or sub let them to others. In all such cases the periodical payment of hire is just one of the incidents inevitable to the marking of profits.

although a balance sheet and profit and loss account may show favourable results at their date, the trader may be aware of circumstances affecting his line of trade, which make the outlook for the immediate future pregnant with loss. The circumstances may be in anticipation only or they may have already occurred, but their marketable effect has not had time to reflect itself in the returns of his business.

He may, for instance prefer to carry his profits forward or put them to reserve rather than consume or divide them. But they are none the less profits of the year or accounting period to which the accounts relate. After all it is inevitable that profits should be ascertained at intervals of time more or less fixed. *Whimster & Co v Commissioners of Inland Revenue* 12 Tax Cases 813

A firm of muslim manufacturers bought yarn from the spinners on forward contracts. The price of the undelivered yarn to be delivered after the close of the accounting period was £9 000, but owing to fall in prices its value would not be more than £3 000. The firm accordingly arranged that the difference of £6 000 should be treated as a debt due to the spinners, and that the undelivered yarn should be subject to a new contract at the prices prevailing, the debt being cleared generally as deliveries were made. *Held*, that the £6 000 could not be deducted from the profits.

Per the Lord President—"Anticipated loss in a future year or period—however inevitable it may be thought to be—is not, and cannot be a loss on the trading of the present year upon which it has not in fact fallen. If the appellants had found themselves unable to complete the forward contracts and had had to pay a sum of damages to the spinners in order to get quit of their obligations under them the case might possibly have been different." *J H Young & Co v Commissioners of Inland Revenue* 12 Tax Cases 827

In the *Naval Collieries Case*, 12 Tax Cases 1017, already referred to under 'Accumulated Repairs' the cost of reconditioning a coal mine consequent on a prolonged strike and complete stoppage of work was held to be capital expenditure. The expenditure was not actually incurred in the accounting year in which it was claimed though it was inevitable soon after, and could be foreseen at the time of closing the accounts. *Sargant, LJ* (dissenting) considered that the accrued liability for repair should be treated like liability for unpaid surface rent, and that the crucial date was the date of incurring the liability and not that of incurring the expenditure. The House of Lords considered the analogy to be wrong since while in the case of rent there is a real accruing liability, in this case if the owner had been a free holder, there would have been no real liability at all.

ing on its business, and that the payment in question was therefore not admissible as a deduction in arriving at the profits of the Company for the purpose of assessment under Case I of Schedule D *Dow v Merchiston Castle School* 8 Tax Cases 149 58 SLR 585

Travelling expenses—Clerk to Justices—A solicitor residing and carrying on his profession at Worcester was Clerk to the Justices at Bromyard. *Held*, that he was not entitled to deduct from the emoluments of his office the cost of travelling between Worcester and Bromyard as the expenses were not incurred in the performance of the duties of the office as solicitor *Cook v Knott* 2 Tax Cases 246 4 TLR 164

Travelling expenses—Directors of a Company—The Directors of a Company had to travel from their residence to the place of meeting of the Company. *Held*, that the travelling expenses were not an allowable deduction from their income *Retell v Directors of Elworthy Brothers & Co Ltd* 3 Tax Cases 12. See also *Ricketts v Colquhoun* 10 Tax Cases 118 (HL) and other cases set out under section 4 (3) (vi)

Motor car—Lawyer—Expenditure incurred by a lawyer in maintaining a motor car is not an admissible deduction from his professional earnings unless he can show that the car was required solely for his professional purposes. *Sir Hari Singh Gour v Commissioner of Income tax CP*, 3 ITC 333

Voluntary payments to subordinates—Voluntary contributions made by a minister towards the stipend of his assistant minister were held to be not an allowable deduction. The Court considered though there were no words in the English Act to this effect that the deduction was allowed for expenditure incurred by the personal performance of the duty and not for getting help to relieve him of this personal duty. *Lothian v Macrae*, 2 Tax Cases 65

Subscriptions to professional societies—Subscriptions to professional societies or purchasing professional journals are not wholly or necessarily incurred for the performance of the office or exercise of the profession—in the case of a doctor for instance

Per Rowlatt J—He does not belong to the society in order that he may get the journals and read them to the patients. He is (only) qualifying himself in order that he may continue to hold his office. *Simpson v Tate* 9 Tax Cases 314

Money advanced to clients—Money advanced by a law agent to a client and lost will be deductible from the law agent's profits only if the making of loans of the kind is an ordinary incident in the law agent's professional work or business. Loans which are bald advances to comparatively new clients would therefore not be deductible. Lending money to clients may often be done by solicitors but it is not an essential and ordinary part of their profession. The law is not concerned with the motives for such transactions and no custom can rest on what an individual solicitor does. *Hagart & Burn Murdoch v Commissioners of Inland Revenue* 45 TLR 338 (1929) AC 386

Notional deductions—Not permissible—An inventor and consulting engineer earned fees as a Consulting Engineer and royalties as an Inventor. In addition he obtained orders for machinery and supplied them at his own cost making a profit. In connection with Excess Profits Duty the question

arose whether a deduction could be made from these profits on account of (1) the royalties—which he would have got if others had made the machines (2) the work done by him as Engineer in drawing up specifications etc. *Held* that the case could be distinguished from *Commissioners of Inland Revenue v Marxe* (1919) 1 K.B. 647 12 Tax Cases 41 and that it was impossible to deduct a notional sum to represent the skill contributed by the owner of the business or to allow royalties which were in fact not paid to any one. *Commissioners of Inland Revenue v Marx* 4 A.T.C. 467

Dual capacity—If a professional man e.g., solicitor receives income in that capacity from a firm in which he is a partner in another capacity the whole of the income is taxable. No deduction can be made on the ground that since under the law a person cannot sue himself the portion payable to himself is not income. *Watson and Eweritt v Blunden* 18 Tax Cases 402 12 A.T.C. 496 (C.A.). This question cannot arise in the Indian Law which expressly provides for the method of taxation of partners in firms according as whether they are registered or unregistered.

Special allowances—See section 4 (3) (vi). A profession or vocation though not an office is certainly an employment of profit and out of pocket expenses received by professional men from their clients are to be excluded from the income as being expenses wholly and necessarily incurred in the performance of the duties of the profession. But even if that section does not cover such expenses clause (x) of sub-section (2) will cover such expenses being set off against the receipts.

Trade Associations—Payments to—A Company claimed that levies paid to a Trade Association of which they were members should be allowed as a deduction in the computation of their profits. The objects of the Association were to raise and keep up prices and thus enable its members to earn larger profits. The Company's appeal was heard by the Special Commissioners who required the production of the Association's accounts for the three years forming the basis of the Company's assessment in order to see how the sums received by the Association had been spent. The Company did not produce these accounts alleging that the said accounts were not in their possession or under their control. In the absence of this evidence the Commissioners refused to admit the Company's claim. *Held* that the Commissioners were entitled to require the production of the accounts of the Association without which the Company's claim could not be properly determined and could not therefore be admitted and that the case be remitted to the Commissioners to consider the same with such evidence as might be obtained from the accounts. *Grahamston Iron Company v Crawford* 7 Tax Cases 25 52 Sc.L.R. 385.

A similar course was adopted also in *Adam Steamship Co v Matheison*, 12 Tax Cases 399 58 Sc.L.R. 168. In that case the Company not only pleaded inability to produce the evidence but contended that it was irrelevant a the subscription paid by them was really for insuring the Company's ships. The argument of the Crown was that the Association had other objects than the mere insurance of ships belonging to its members and that it was necessary for the Commissioners to be satisfied that the subscriptions paid to the Association were spent on objects the expenditure on which would have been allowed as a deduction if spent directly by the individual member. This is an important criterion.

A Company who were members of a Coal-owners Association claimed to deduct certain contributions representing levies made by the Association and expended (1) in defraying expenses of the Conciliation Board in Scotland (2) in paying subscriptions to the Mining Association of Great Britain and (3) in experimenting with coal dust. *Held* that so far as applied in defraying the expenses of the Conciliation Board the levies were an admissible deduction in arriving at the liability of the Company but that, so far as applied to the other two purposes they were not admissible.

Per the Lord President—The Conciliation Board is a machinery by which disputes between the workmen and the employer may be settled and by that means expenses kept down and more profits earned and although of course there may not be in any one particular year work for the Conciliation Board to do it was a machinery which the Coal-owners were entitled to keep just as one might as proper expenses have a legal Secretary although fortunate in having no law expenses or litigation in a particular year. The next item is subscription to the Mining Association.

That I think is an expense that cannot be deducted because the Mining Association is an Association of a particular definite character to keep a watchful eye on the proceedings no doubt in the interest of mining interests generally but without that character of particular service which I think is prominent in a Conciliation Board. Last of all there comes £59 which was expended in experiments in coal dust. It is explained that the experiments were made on the explosive properties of coal dust at the instigation of the Home Secretary who wished certain experiments made before embarking on new legislation. It was a voluntary and very proper act of the Company to help him in the matter but not an expense they undertook for the purpose of earning more profits than of any other year—just a helping hand to the legislature of the country. It was paid out of profits and not with a view to earning profits. *Lochelly Iron and Coal Co Ltd v Crawford* 6 Tax Cases 267 50 Sc L R 597.

The rulings as regards (1) and (2) in this case were reaffirmed in *Thomas Merthyr Colliery Co v Davis* 17 Tax Cases 519.

A Company who were colliery owners were members of an Association which consisted of coal owners and the object of which was to indemnify the members against claims under the Workmen's Compensation Act. The Association consisted of twenty members. It made calls on members based on the amount of wages paid by them and also had a reserve fund. The risks were partly reinsured. Members could retire from the Association after giving six months' notice and a member who retired was entitled to his proportion of the reserve fund minus his proportion of the expenses and liabilities of the Association up to the date of his retirement. The question arose whether the amounts paid by the assessee Company to the Association could be deducted from the assessable profits of the Company having regard to the fact that a part of the money was eventually returnable to the Company. *Held* that the expenditure was an admissible deduction. *Thomas v Richard Evans & Co* 11 Tax Cases 790 (1927) 1 K B 33 (H L).

A Colliery Company were members of a Coal-owners' Association to which they paid a subscription based on their output of coal. The object of the Association was to pay its members an indemnity in the event of

deficiency or stoppage of output being caused by strikes, etc. *Held*, that the subscription was not money laid out for the purposes of the trade, and was therefore not admissible as a deduction in arriving at the profits assessable, *Rhymney Iron Company, Ltd v Fowler*, 3 Tax Cases 476, (1896) 2 Q B 79

The question whether the *Rhymney case*, was not superseded by later rulings and more particularly by *Thomas v Richard Evans & Co*, 11 Tax Cases 790 *supra* was considered by the Court of Appeal and answered in the negative, in *Thomas Merthyr Colliery Co v Davis* 17 Tax Cases 519 (1933) 1 KB 349 In the last mentioned case the payments were deductible solely because they were for insurance and such insurance was part of the system of carrying on business Payments on the other hand to secure indemnity against loss of profits in the event of stoppage of work or reduction of output are not wholly and exclusively laid out or expended for the purposes of the trade being in relation to the absence of the trade rather than to its presence The Court also suggested that the indemnity when received would not be taxable as profits of the trade *Romer, LJ*, while agreeing that the *Rhymney case* was rightly decided could not agree to certain suggestions in it, for example, disallowing the cost of preventing the deterioration of a mine when not worked or the cost of maintenance of machinery when the business is in abeyance

A Company was a member of the Steel Hoop Manufacturers Association which was mainly formed for the purpose of keeping up prices Under the rules and pooling arrangements of the Association, the members were entitled to certain proportions of the orders received by the pool as a whole A member invoicing more than his proportion of orders had to pay 10s per ton on the excess, to the Pool Account which was distributed among those members who had invoiced less than their proportions *Held*, that the net payments made by the Company to the Association in excess of those received from the Association by the Company were an admissible deduction for the purpose of arriving at the Company's assessable profits

Per Bray J — "The trade includes not only the manufacture but the selling, and indeed the selling is very often the most important part, the whole of the profits depends upon the price What does the selling consist of? It consists of two things the finding of the customer and making a bargain with the customer as to the price, the object being, of course, to get the highest possible price I do not think this arrangement that is made between the three firms has anything to do with finding the customer I think it all relates to the fixing of the price, and it is obvious that if the appellants can make an arrangement with their competitors that their competitors will not sell below a certain price they will be able, or may be able at all events, to get that price or a higher price for their goods That is part of the business, part of the trade they are carrying on, to get the highest price they can for their goods."

Guest, Keen and Nettlesolds Ltd v Fowler, 5 Tax Cases 511, (1910) 1 KB 713

Payments of two kinds were made by a member firm to a trade protection association of boiler makers (formed for keeping up prices) (a) to extinguish a possible competitor, and (b) to bring into the association another competitor, and both payments were held to be of a capital nature, following *Atherton's case*, 10 Tax Cases 155 Even if the advantage secured is "unpalpable, intangible and incalculable" and is not represented by

any special asset the expenditure is still of a capital nature if it is intended to secure an enduring advantage and even if the result was unsuccessful, it would still be capital expenditure, since productivity is not an essential element in such expenditure (cf *Southwell v Sackville Bros* 4 Tax Cases 430) In *Noble v Mitchell* 11 Tax Cases 372 the problem was one of getting rid of a bad servant which is an ordinary incident in a business while in this case the problem was one of extinguishing or conciliating competitors which was not such an incident *Collins v Joseph Adamson & Co*, 16 A T C 355 (K.B.D.)

A Trade Association purchased on behalf of its members certain goods which it sold to them at a profit The 'profit' was held at the credit of the common fund of the Association The question arose in assessing one of the member companies whether the full cost of the goods purchased by it from the Association should be debited in its accounts or only the net cost after deducting the Company's share of profit in the Association Held that inasmuch as the profit retained by the Association in the common fund could not be considered to belong to individual members until actually distributed the full cost of the goods should be debited in the member company's accounts *Charles Clifford and Son v Puttick* 14 Tax Cases 189

See, however *Westcombe v Hadnock quarries* 16 Tax Cases 137 in which a rebate received on railway freight was deducted from the freight and only the net freight allowed to be treated as expenditure

(3) Where any building, machinery, plant or furniture in respect of which any allowance is due under clause (iv), clause (v), clause (vi) or clause (vii) of sub section (2) is not wholly used for the purposes of the business profession or vocation, the allowance shall be restricted to the fair proportional part of the amount which would be allowable if such building, machinery, plant or furniture was wholly so used

Notes—This sub section inserted in 1939 makes it clear that building machinery etc used only partly for the business etc, under taxation is entitled to a proportion of the allowances under clauses (iv) to (vii) of sub section (2) What is a fair proportional part must obviously be a question of fact depending on the circumstances of each case See also notes under clauses (iv) to (vii) of sub-section (2)

It was held in *Commissioner of Income tax B & O v Dalma Cement Co*, 1945 I T R. 415 and *Commissioner of Income tax Madras v Motors and General Stores*, 1946 I T R. 31 that not wholly used in this sub section does not refer to time but to the purpose consequently even if the machinery is idle for a part of the year (following *Viswanath Bhaskar Sathe v Commissioner of Income tax Bombay* 1937 I T R. 621) depreciation allowance for the whole year is admissible Similarly where an assessee ceases to own the assets in the middle of a year he is entitled to allowance for the whole year *Commissioner of Income tax, B & O v S K Sahana & Sons*, 1946 I T R. 106

(4) Nothing in clause (ix) or clause (xii) of sub-section (2) shall be deemed to authorise the allowance of any sum paid

on account of any cess, rate or tax levied on the profits or gains of any business, profession or vocation or assessed at a proportion of or otherwise on the basis of any such profits or gains; and nothing in clause (xii) of sub-section (2) shall be deemed to authorise—

(a) any allowance in respect of a payment which is chargeable under the head 'Salaries' if it is payable without British India and tax has not been paid thereon nor deducted therefrom under section 18; or

(b) any allowance in respect of any payment by way of interest, salary, commission or remuneration made by a firm to any partner of the firm; or

(c) any allowance in respect of a payment to a provident or other fund established for the benefit of employees unless the employer has made effective arrangements to secure that tax shall be deducted at source from any payments made from the fund which are taxable under the head 'Salaries'

History—This sub section, which was inserted in 1939 incorporates the proviso to old sub section (2) and further prohibits three specific deductions, viz

(a) salaries payable without British India unless tax has been deducted at source,

(b) payments to partners of firms, and

(c) payments to employees' provident funds unless effective arrangements have been made to deduct tax at source

Consequent on the amendments in 1946, the references to clause (xii) should read as references to clause (xv)

Cesses and taxes on income—See notes under clause (ix) of sub-section (2) If a Provincial Government levies such a tax, whether rightly or wrongly, no deduction can be claimed on that account in respect of income tax, and if the assessee feels that the levy by the Provincial Government is wrong, he should seek relief from that Government and not by deduction of the tax from the taxable income for income-tax purposes See *Province of Bihar v Dalip Narayan Singh*, 1945 ITR 37

Excess Profits Tax—Section 12 of the Excess Profits Tax Act 1940 provides that Excess Profits Tax shall be deducted from taxable profits for the purpose of income tax and super-tax It would have been more appropriate if this provision had been included in the Income tax Act

Foreign taxes—As to prohibition of deduction of such taxes from total income see sections 49, 49-A, and 49-D

Payments abroad—Clause (iii) of sub-section (2) and clause (a) taken together prohibit the deduction of certain items which are chargeable under sections 4 and 42 in the hands of the recipient

Cases of royalties, rent or guarantee for overdraft may not sometimes be covered by section 42 and so long as these items are not chargeable under section 4 allowances of the items must be permitted if they satisfy the other conditions

Payments to partners—It should be noted that the bar against deduction of payments to partners of firms does not apply to similar payments if any to members of other associations of persons. Such payments are admissible deductions if *bona fide* and reasonable. *Commissioner of Income tax, B & O v Jainaram Jagannath*, 1945 ITR 410

Effective arrangements—The Income tax authorities are evidently to be the judges of the effectiveness of the arrangements. Apparently however, they should exercise their judgment with reference to the fund as a whole and not with reference to each item of payment though it would be open to them with reference to varying circumstances from time to time to change their opinion in regard to the fund as a whole. At the same time it would seem that the question is a mixed one of law and fact and that the opinion of the Income tax authorities can be challenged before the High Court.

Provident or other fund—Other must be read *ejusdem generis*, so as to include similar funds though not called by that name.

As regards payments from these funds see explanation to section 7 (1)

(5) In sub section (2), "paid" means actually paid or incurred according to the method of accounting upon the basis of which the profits or gains are computed under this section,

History—The above part of the sub-section comes on from 1922 the rest of the sub section which defines plant and written down value has been set out under clause (vi) of sub-section (2) and discussed in connection with clauses (iv) to (vii) of that sub section.

References—See section 13 and notes thereunder as to methods of accounting see also notes under sub section (1) of section 10.

(6) A trade, professional or similar association performing specific services for its members for remuneration definitely related to those services shall be deemed for the purposes of this section to carry on business in respect of those services, and the profits and gains therefrom shall be liable to tax accordingly.

History—This sub section was inserted in 1939. Its object is to make liable to tax the profits of a trade professional or similar association performing services for its members for remuneration. The rulings referred to in the notes under clause (xv) of sub section (2) deal with the deductibility of payments to trade associations from a member's taxable profits while this sub section deals with the taxability of the association.

'Or similar'—These words clearly exclude social clubs which are not 'similar' to trade or professional associations.

Specific services—The services should be (1) specific and (2) for remuneration definitely related to them then to the extent of these services the association will be deemed to carry on business.

For the purposes of this section—It will be seen that section 2 (6-C) refers to profits of a mutual insurance association but not to this sub section.

Section 10 being a rule of computation, and not a charging section, a more appropriate place for sub-section (6) would have been section 2 (definitions) or section 3 (charge to tax).

See, however, *Commissioners of Inland Revenue v Cornish Mutual Assurance Co.*, (1926) A.C. 281, 12 Tax Cases 841 (H.L.), according to which business may be carried on by a mutual concern without there being any income. If so, the fact that the earlier part of the sub-section deems business to be carried on will not in itself avail the Crown unless the latter part is read as equivalent to "shall be deemed to be income and liable to tax accordingly." Section 6, however, to which the Privy Council on one occasion referred as the charging section (*Barua* case 57 I.A. 228) refers to 'business' and it may therefore be held that if something is deemed to be 'business', income therefrom is necessarily taxable unless expressly exempted under section 4 (3) or some other provision.

It will thus be seen that to the extent that this sub-section aims at taxing what is essentially not of a mutual nature ('specific services, etc'), it is unnecessary, while in attempting to tax what is mutual, it gives rise to certain difficulties.

(7) Notwithstanding anything to the contrary contained in section 8, 9, 10, 12 or 18, the profits and gains of any business of insurance and the tax payable thereon shall be computed in accordance with the rules contained in the Schedule to this Act.

THE SCHEDULE.

[See section 10 (7).]

RULES FOR THE COMPUTATION OF THE PROFITS AND GAINS OF INSURANCE BUSINESS.

1. In the case of any person who carries on, or at any time in the preceding year carried on, life insurance business, the profits and gains of such person from that business shall be computed separately from his income, profits or gains from any other business.

2. The profits and gains of life insurance business shall be taken to be either—

(a) the gross external incomings of the preceding year from that business less the management expenses of that year, or

(b) the annual average of the surplus arrived at by adjusting the surplus or deficit disclosed by the actuarial valuation made for the last inter-valuation period ending before the year for which the assessment is to be made, so as to exclude from it any surplus or deficit included therein which was made in any earlier inter-valuation period and any expenditure other than expenditure which may under the provisions of section 10 of this Act be allowed for in computing the profits and gains of a business, whichever is the greater:

Provided that the amount to be allowed as management expenses shall not exceed—

(a) $7\frac{1}{2}$ per cent of the premiums received during the preceding year in respect of single premium life insurance policies, *plus*

(b) in respect of the first year's premiums received in respect of other life insurance policies for which the number of annual premiums payable is less than twelve, or for which the number of years during which premiums are payable is less than twelve, for each such premium or each such year $7\frac{1}{2}$ per cent. of such first year's premiums received during the preceding year, *plus*

(c) 90 per cent. of the first year's premiums received during the preceding year in respect of all other life insurance policies *plus*

(d) 12 per cent of all renewal premiums received during the preceding year.

3. In computing the surplus for the purpose of rule 2,—

(a) one-half of the amounts paid to or reserved for or expended on behalf of policy-holders shall be allowed as a deduction:

Provided that in the first such computation made under this rule of any such surplus no account shall be taken of any such amounts to the extent to which they are paid out of or in respect of any surplus brought forward from a previous intervaluation period:

Provided further that if any amount so reserved for policy-holders ceases to be so reserved, and is not paid to or expended on behalf of policy-holders, one-half of such amount, if it has been previously allowed as a deduction, shall be treated as part of the surplus for the period in which the said amount ceased to be so reserved;

(b) any amount either written off or reserved in the accounts or through the actuarial valuation balance-sheet to meet depreciation of or loss on the realisation of securities or other assets, shall be allowed as a deduction, and any sums taken on account of appreciation of or gains on the realisation of the securities or other assets shall be included in the surplus:

Provided that if upon investigation it appears to the Income-tax Officer after consultation with the Superintendent of Insurance that, having due regard to the necessity for making reasonable provision for bonuses to participating policy-holders and for contingencies, the rate of interest or other factor employed in determining the liability in respect of outstanding policies is materially inconsistent with the valuation of securities and other assets so as artificially to reduce the surplus, such adjustment shall be made to the allowance for depreciation of, or to the amount to be included in the surplus in respect of appreciation of, such securities and other assets, as shall increase the surplus for the purposes of these rules to a figure which is fair and just;

(c) interest received in respect of any securities of the Central Government which have been issued or declared to be income-tax free shall not be excluded but the whole amount of such interest received during the inter-valuation period shall be exempt from income-tax under the second proviso to section 8 though not from super-tax.

4. Where for any year an assessment is made in accordance with the annual average of a surplus disclosed by a valuation for an inter-valuation period exceeding twelve months, then, in computing the tax payable for that year, credit shall not be given in accordance with sub-section (5) of section 18 for the tax paid in the preceding year, but credit shall be given for the annual average of the Income-tax paid by deduction at source from interest on securities or otherwise during such period.

5. For the purposes of these rules—

(i) "preceding year" means that year for which annual accounts are required to be prepared under the Insurance Act, 1938, immediately preceding the year for which the assessment is to be made or until the commencement of the Insurance Act, 1938, the previous year as defined in section 2 of this Act;

(ii) "gross external incomings" means the full amount of incomings from interest, dividends, fines and fees and all other incomings from whatever source derived (except premiums received from policy-holders and interest and dividends on any annuity fund) and includes also profits from reversions and on the sale or the granting of annuities, but excludes profits on the realisation of securities or other assets:

Provided that incomings, including the annual value of the property occupied by the assessee, which but for the provisions of sub-section (7) of section 10 would have been assessable under section 9 shall be computed upon the basis laid down in the last named section, and that there shall be allowed from such gross incomings such deductions as are permissible under that section;

(iii) "management expenses" means the full amount of expenses (including commissions) incurred exclusively in the management of the business of life insurance, and in the case of a company carrying on other classes of business as well as the business of life insurance in addition thereto a fair proportion of the expenses incurred in the general management of the whole business. Bonuses or other sums paid to or reserved on behalf of policy-holders, depreciation of, and losses on the realisation of, securities or other assets and any expenditure other than expenditure which may under the provisions of section 10 of this Act be allowed for in computing the profits and gains of a business are not management expenses for the purposes of these rules;

(iv) "life insurance business" means life insurance business as defined in clause (11) of section 2 of the Insurance Act, 1938;

(v) "securities" includes stocks and shares.

6. The profits and gains of any business of insurance other than life insurance shall be taken to be the balance of the profits disclosed by the annual accounts, copies of which are required under the Insurance Act, 1938, to be furnished to the Superintendent of Insurance, after adjusting such balance so as to exclude from it any expenditure other than expenditure which may under the provisions of section 10 of this Act be allowed for in computing the profits and gains of a business. Profits and losses on the realisation of investments, and depreciation and appreciation of the value of investments shall be dealt with as provided in rule 3 for the business of life insurance.

7. The profits and gains of companies carrying on dividing society or assessment business shall be taken to be 15 per cent. of the premium income of the previous year, or in the case of non-resident companies 15 per cent. of the British Indian premium income of the previous year.

8 The profits and gains of the British Indian branches of an insurance company not resident in British India, in the absence of more reliable data may be deemed to be the proportion of the total world income of the company corresponding to the proportion which its British Indian premium income bears to its total premium income. For the purpose of this rule, the total world income of life insurance companies not resident in British India whose profits are periodically ascertained by actuarial valuation shall be computed in the manner laid down in these rules for the computation of the profits and gains of life insurance business carried on in British India.

9 These rules apply to the assessment of the profits of any business of insurance carried on by a mutual insurance association.

History—This sub section and its schedule which were both inserted in 1939 substantially modify, and include in the Act itself provisions which were formerly contained in Rules made under section 59. Several minor changes have been made since 1939. The schedule covers all kinds of insurance business.

Scope—The schedule applies only in so far as it overrides the general provisions of the Act and the latter apply in full vigour to profits from insurance in so far as there is nothing to the contrary in the schedule.

Rules 1 to 5 deal with life insurance. Rule 6 with all other insurance (except 'dividing' or assessment). Rule 7 with 'dividing' and assessment. Rule 8 with non resident concerns both life and non life and Rule 9 with mutual insurance both life and non life.

As regards the limited exemption from tax to certain Provident Insurance Societies dating on from before 1924 see notes under sect on 4 (3) (iv).

Rule 1—Preceding year—See Rule 5 (i).

Life Insurance business—See Rule 5 (iv) —

'Person' i.e. as defined in the General Clauses Act.

Rule 2—(a) Gross external incomings—See Rule 5 (ii) management expenses—See Rule 5 (iii).

(b) A part of this rule counteracts the ruling of the Calcutta High Court in *In re Himalaya Assurance Co Ltd* 1938 I.T.R. 277 (confirmed by the Privy Council 1939 I.T.R. 402) which is of little interest now. The rest of the rule corresponds to old Rules 25 and 26 but there is a material change—See Rule 3—as to deduction of half the profits paid to or reserved for policy holders.

The words 'last inter valuation period ending before the year for which assessment is to be made' avoid the difficulty which arose with reference to 'the last preceding valuation' in the *Andhra Insurance Case*, 1937 I.T.R. 697.

Proviso—(a) "Premiums" are evidently gross premiums.

If the number of years is twelve, the case will fall under (c).

Premia payable throughout life will presumably be considered as payable for not less than twelve years

(c) and (d) These two clauses cover all cases in which the number of annual premia is twelve or more or premia are payable throughout life.

Annuity policies are evidently to be dealt with on the same footing as ordinary insurance policies i.e. if the consideration is paid in lump sum as a single premium policy, if payable for less than twelve years, under clause (b) otherwise under clause (c) or (d)

In so far as annuity capital redemption or reversion business involves transactions contingent on human life, they would be of the nature of 'life' insurance, otherwise the profits therefrom should be dealt with under Rule 6 dealing with other insurance, or under the other sub sections of section 10

Rule 3—(a) Paid to' 'Reserved for' and 'Expended on behalf of' cover the different possibilities of disposal

The first proviso is consequential on the exclusion in Rule 2 of carry forwards from earlier periods

The second proviso cancels the concession in the main part of this clause when the conditions cease to be operative

(b) The main part of this clause corresponds to old Rule 30

A figure which is fair and just would be a question of fact, and it would be open to the Court to examine whether there are materials for the Income tax Officer's finding. It would therefore be necessary for him to disclose in his order the nature and result of his consultation with the Superintendent of Insurance. The responsibility for the estimate however would be primarily that of the Income tax Officer

(c) This clause incorporates the ruling of the Calcutta High Court in *In re North British and Mercantile Insurance Company, Limited*, 1937 ITR 349 and in *In re Phoenix Insurance Co*, 1937 ITR 397

Rule 4—This rule applies only when assessment is made on basis (b) of Rule 2 not when made on basis (a) of that Rule or when the inter valuation period does not exceed twelve months. In the latter events the case is covered by the provisions of the Act i.e., by sections 18 (5) and 48

This Rule renders obsolete a part of the decision in *In re North British and Mercantile Insurance Co*, *supra*

Rule 5—(1) This rule gets over the difficulties that arose with reference to preceding valuation under old Rule 25—See *Andhra Insurance Co v Commissioner of Income tax, Madras* 1937 ITR 697

(ii) Gross external incomes include all items (not of a capital nature) including profits from reversions and annuities but excepting (a) premia received from policy holders (b) interest and dividends on annuity funds and (c) profits on realisation of securities or other assets (which expression under clause (v) includes also stocks and shares). Losses on realisation of securities or other assets are evidently also to be excluded i.e., not deducted

Property—It will be noted that the notional value of an assessee's property including that occupied by him is to be taxed on the basis of section 9, therefore the annual value of the part of the property occupied for the assessee's business will not be taxed and consequently no deduction is to be made of the notional rent for the property occupied by him for the business see definition of 'management expenses' in clause (iii)

(iii) Management expenses—Barring the prohibited items all items of a revenue nature incurred exclusively for the business including a share of overheads incurred in composite business are allowable. Items that cannot be allowed under section (2) of section 10 cannot be allowed here

(iv) The definition in the Insurance Act (IV of 1938) is as follows —

Life insurance business includes annuity business that is to say, the business of effecting contracts of insurance for the granting of annuities on human life and if so provided in the contract of insurance disability and double indemnity accident benefits

(v) See notes under section 8 as to the meaning of the word securities. In addition to this meaning for the purpose of these Rules, the word includes stocks and shares

Rule 6—This Rule corresponds to old Rules 28 and 29. The differences are as follows —

(a) The annual accounts submitted to the Superintendent of Insurance are now to be taken as the starting point and can be departed from only to the extent that items not admissible under section 10 can be added back. Profits and losses from fluctuations in the value of investments have to be consistently treated the one being taken into account if the other is

(b) Old Rule 29 left it to the assessee to decide the proportion to be taken to reserve. No express provision has now been made for amounts taken to reserve evidently in the belief that such provision is not necessary the deductions being admissible on the authority of *Sun Life Insurance Co v Clark* 6 Tax Cases 59 (H.L.). It would appear at first sight that to the extent that the items validly appear in the annual accounts submitted to the Superintendent and are not questioned by the latter they are apparently allowable but the more correct view would seem to be that the estimation of proper allocation to reserves is a question of fact to be determined by the Income tax Officer on evidence including if necessary the opinion of the Superintendent of Insurance

The following executive instructions are found in the Income tax Manual—In dealing with non life insurance business (fire marine motor car burglary etc.) a fair and proper reserve for unexpired risks are to be allowed with proper safeguard to prevent manipulation of accounts. And where as not infrequently occurs the reserve is divided into two parts the first of which is intended to cover normal unexpired risks and is generally reckoned at a fixed percentage of the premiums and the second is intended to cover exceptional losses from widespread calamities such a reserve may also be allowed. The following points have to be borne in mind —

(1) All sums on account of unexpired risks which a company wishes to have treated as expenditure for income-tax or super tax purposes must actually be credited to a fund in the accounts of the company

(2) They must also be specifically appropriated to meet liabilities under existing contracts and

(3) The contracts must be with policy holders.

This rule gives no clear indication as to whether the profits and gains are to be based with reference to the preceding year as defined in Rule 5 (1) or with reference to the previous year as defined in section 2 (11)

Rule 7—Same as old Rule 31

It should be observed that, while under Rule 5 (1) the expression "preceding year" has been specially defined, Rule 7 refers to the "previous year," which has to be construed with reference to section 2 (11)

"Dividing society" obviously refers to dividing insurance societies in which the sum payable as benefit is not fixed beforehand but depends on the division of actual results during a period of account *Commissioner of Income tax, Sind v Central Popular Assurance Co, Ltd*, 1939 ITR 293

The following note is from the Income tax Manual —

'Companies carrying on Dividing Society or assessment business are in a different position from these of insurance companies proper in that they have not to build up funds similar to the Life assurance fund of ordinary Life assurance business, and their profits are not ordinarily ascertainable by actuarial valuations. Some arbitrary method of determining the taxable income companies transacting these kinds of business has been fixed and under Rule 7 of this Schedule this is done by taking 15 per cent of the premium income in the previous year'

Rule 8—Corresponds to old Rule 35, the oversight, in the old rule, of the use of the word 'Indian' instead of the word 'British India,' having been corrected. It was unsuccessfully contended by the Crown in *Commissioner of Income tax Bombay v Great Eastern Life Insurance Co*, 1945 ITR 141, that Rule 2 was the paramount rule and that Rule 8 could be applied only if there were no data to enable an assessment under Rule 2. Rules 1 to 6 it will be noted deal with methods of computation while Rules 7 to 9 deal with status and applies to particular classes of assesseees viz, Rule 7 to companies, Rule 8 to branches of non resident companies and Rule 9 to mutual associations. Rule 8 therefore overrides Rule 2, *et seq* and the more 'reliable data' referred to in Rule 8 is the data necessary to assess the profits and gains of a branch business by some recognised business methods appropriate to the case, *e.g.*, separate actuarial statement for the Indian business or the consolidated statement of the Indian Fund.

It is a question of fact whether other data are more reliable or Rule 8 should be applied. The Income tax Officer should apply Rule 8 only if other more reliable data are not available. He cannot however apply Rule 8 to one or more items in the profit and loss account and resort to other data in respect of the remaining items, *Motor Union Insurance Co v Commissioner of Income tax, Bombay*, 1945 ITR. 272

This rule cannot be applied for the first time by the Appellate Tribunal of its own motion without any appeal from the Commissioner or the assessee (*ibid*)

Rule 9—This should be read along with section 2 (6 C) which deems such profits of mutual concerns to be income. In 1940 the word 'association' was substituted for 'company'

Decisions in India under old rules—All the Indian rulings referred to below were given under the pre 1939 law

Even though the rules may have statutory authority, they are governed by the provisions in the statute itself and a privilege or exemption conferred by the Act cannot be ignored, irrespective of the part of the Act under which tax is assessed. (The rules are now part of the statute itself) So when an assessment is made under Rule 25 (or Rule 35 where it applies) the company is entitled to credit under section 18 (5) for the tax

deducted on securities at source, and also entitled to deduct from its assessable income interest on tax free securities, In re *North British and Mercantile Insurance Co.*, 1937 I.T.R. 349 (Cal.) (Present Rule 3 (c) and Rule 4 have partly codified this ruling and partly modified it.) Further where Rule 35 (now Rule 8) applies, the company can deduct from its taxable income the same proportion of its income from tax free securities (free under section 8) as the Indian premia bear to the world premia, In re *Phoenix Insurance Co.*, 1937 I.T.R. 397 (Cal.) In a case under Rule 35, *Manufacturers' Life Insurance Co v Commissioner of Income tax, Bombay*, 1938 I.T.R. 321, the Bombay High Court however while doubting the correctness of the decision in the *North British and Mercantile case*, 1937 I.T.R. 349 (Cal.), followed it for the sake of uniformity and excluded from the world income interest on tax free securities. The average annual profits should be calculated with reference to the particular period of valuation by itself and without reference to the unappropriated surplus or unadjusted deficiencies brought forward from previous periods. In re *Himalaya Assurance Co.*, 1938 I.T.R. 227 (Cal.) (This has been nullified by present Rule 2 (b).)

In applying Rule 35 (now Rule 8) in ascertaining the world income you should include not merely the Indian income-tax but all income-tax payable by the company, *Manufacturers' Life Insurance Co v Commissioner of Income tax, Bombay*, 1938 I.T.R. 321.

The word 'may' in Rule 30 [corresponding to new Rule 3 (b)] was construed to give the option to the assessee and not to the Income tax Officer. The question does not arise now, the corresponding word being 'shall'. There is also nothing in it to compel an assessee, who has exercised the option to bring back, in a later year, when assets appreciate, sums properly set aside to credit of Reserve funds or written off to cover depreciation in the earlier year, In re *Western India Life Insurance Co.*, 1938 I.T.R. 44. While the total income of a non resident life insurance company is to be worked out under Rule 25 (corresponding to Rules 1 to 5 now), the proportion locally attributable is to be worked out, not with reference to the premium income of the period to which the actuarial valuation relates, but to the premium income of the 'previous year', *Commissioner of Income tax, Burma v Lakshmi Insurance Co.*, 1941 I.T.R. 517.

On the following grounds, viz, (a) the law distinguishes chargeability to tax and assessability, the latter requiring machinery which is absent until the first actuarial valuation has been made, and (b) having made a mandatory rule under section 59 the Crown cannot use the ordinary provisions of the Act as an alternative, it was held by the Lahore High Court that no assessment can be made on an insurance company until the first valuation has been made, *Lakshmi Insurance Co v Commissioner of Income tax*, 12 Lah 757; A.I.R. 1931 Lah 441 F.T.R. 24. According to the Rangoon High Court, however *Commissioner of Income tax, Burma v Lakshmi Insurance Co.*, 1941 I.T.R. 517, the company would not be immune from tax till its first valuation has been made. Till then the return of income made by the company must necessarily be incomplete, and the Income-tax Officer would doubtless extend the time for the delivery of such returns under the proviso to section 22 till the first valuation has been made.

The position under the present law is as follows. Under Rule 1 the assessee is taxable on the higher of the two alternatives set out in it. Till an actuarial valuation is made, only one basis is operative and when the valuation has been made, the assessee, if in time, can claim refund under section 48.

The assessment of the company must, however be completed under section 34 within the time limit referred to there

The last preceding valuation in Rule 25 refers to the last valuation made before the date of the return and not to the valuation relating to the last accounting period ending before the financial year of assessment *Andhra Insurance Co v Commissioner of Income tax, Madras*, 1937 ITR 697 Present Rule 2 (b) is clear on this point

Since the Income tax Officer can resort to Rule 35 (now Rule 8) only in the absence of more reliable data, it follows that (a) the data supplied by the assessee should be examined, and (b) the reliability of the data should be considered with reference to section 13. A mere return of British Indian income with a revenue account and a balance sheet, even if coupled with the actuarial valuation of the whole business, does not give more reliable data than the method laid down in Rule 35. The interest on investments though an element in the ascertainment of profits, is not in itself a reliable data for such ascertainment and the periodical actuarial valuation is the most reliable method of computation in the case of life insurance companies *National Mutual Life Association of Australasia v Commissioner of Income tax, Bombay* 1936 ITR 44 (PC)

Which of two (or more) sets of data is more (or most) reliable is a question of law. A Profit and Loss Account in the form of the usual Revenue Account of a Life Insurance Company, even if giving actuarial estimates of the liabilities at the beginning and end of the year but without giving details of the Insurance Fund is not more reliable data than the formula in Rule 35 *Manufacturers' Life Insurance Co v Commissioner of Income tax Bombay* 1938 ITR 321

The word 'data' in Rule 35 (now Rule 8) refers to facts and materials from which conclusions have to be drawn and not to the assumptions from which inferences are to be drawn. Where a non resident life insurance company has a separate actuarial valuation for its British Indian business even if any of the items in the accounts be wrong, the Income tax Officer has ample materials before him on which to rest an assessment and he is not justified in resorting to an assessment on the basis of proportion of premium income. *In re Royal Insurance Co* 1941 ITR 589 (Cal)

Deductibility of bonuses in India—The Privy Council who followed the *Last case* and held that bonuses cannot be deducted in ascertaining actuarially the profits of an insurance company, said that even if the *Last case* was not available as a precedent their own ruling in the *Pondicherry Railway case*, 54 Mad. 691, was decisive of this case the profits allotted to policy holders standing on the same footing as the half of the profits of the railway company payable to the French Colony *Bharat Insurance Co, Ltd v Commissioner of Income tax, Punjab*, AIR 1934 Pat 46 1934 ITR 63. The law was changed radically in 1939 and under Rule 2 now alternative bases are allowed and under one of them Rule 3 allows half the bonus to be deducted

In England—The history has been as follows

The position regarding bonuses given to policy holders was considered in *Last v London Assurance Corporation* 2 Tax Cases 100 16 App Cas 438 the leading case on the subject. The London Assurance Corporation was a Proprietary life office in which a proportion of the life profits was allocated to the participating policy holders. The following questions arose viz (1) whether the bonuses in question were 'profits' at all i.e. whether it was

not a case of setting aside a necessary expense of making the income, (2) whether the whole expenses were deductible from the profits, (3) how the life profits were to be determined and (4) whether the business should be assessed as a whole i.e. including participating and non participating policies. The Commissioners held (1) that the bonuses were not profits (2) that the whole expenses should be deducted (3) that the profits should be ascertained actuarially (the law in the United Kingdom did not contain any special rules for the ascertainment of profits of Life Assurance Companies as the law in India now does) and (4) that the business should be assessed as a whole and not in parts. The case which eventually went up to the House of Lords elicited considerable difference of opinion and was finally decided in favour of the Crown the bonuses being considered to be profits i.e. the grant of bonuses being considered to be appropriation of profits and not a necessary expenditure for earning the profits.

This decision was followed in *Equitable Life Assurance Society of United States v Bishop* 4 Tax Cases 147 (1900) 1 Q B 177.

The *London Assurance* case 2 Tax Cases 100 was the subject of discussion again when the *Styles v New York Life Assurance Co* 2 Tax Cases 460 (cited under section 3) was decided. In this case again which went up to the House of Lords there was a sharp difference of opinion as to whether the case was distinguishable at all from the *London Assurance* case. The majority in the House of Lords distinguished the case and in doing so reaffirmed the *London Assurance* decision. The point of the distinction was that the New York company was mutual whereas the London one was proprietary.

The *London Assurance* decision however was not of much consequence to Insurance Companies in the United Kingdom. As under the United Kingdom law the Crown has the option to tax either the interest on investments (less expenses of management) or the profits and in this respect Insurance Companies stand in the same position as other businesses—the decision did not place the Crown at any real advantage except in respect of Industrial companies. In ordinary Life Insurance Companies the profits i.e. actuarially determined are not except during the infancy of the companies likely to be greater than the interest on investments. On the other hand in Insurance Companies operating amongst the poorer classes the cost of collection and management is quite heavy and the profits of the business are taxed. On the recommendation of the Royal Commission of 1920 the law was altered in 1923 in order to assist these Industrial companies and bonuses allocated to policy holders are by statute now deducted from the profits. The new arrangement does not in practice affect the majority of the regular Insurance Companies i.e. those not doing Industrial business.

The decisions in the United Kingdom as to what do or do not constitute 'expenses of management' in respect of which a repayment of tax is allowed when the company is taxed on the interest on investments and not on its actuarial profits furnish no guidance in interpreting the Indian law. Any way clause (1 a) of present Rule 5 clearly defines management expenses.

United Kingdom rulings—Profits—How computed—A Company carried on the business of fire insurance and life insurance. *Held* (1) that the net profits of the two branches were assessable as one undivided income and (2) in the life branch the excess of the receipts of any year

over the payments and expenses of that year, affords no criterion of the amount of profit. This can only be ascertained by actuarial calculation.

Per Inglis, L P—

Life policies are contracts of most variable endurance and the premiums are in many cases not annual payments. The contracts may endure for the policy-holder's life, or for a certain number of years stated, or till the holder attains a certain age, and the company may be bound on the expiry of a fixed number of years, or on the attainment of a certain age by the policy holder, either to pay a lump sum or an annuity for the remainder of the policy holder's life. The premiums paid for such insurance may be paid all in one sum or by instalments within a fixed number of years, or annually during the holder's life, or during the subsistence of his policy. The premiums, therefore, do in no sense represent the annual profits and gains of the company. In like manner, the amount of claims in one year arising on the death of persons insured, or as a deduction from the company's receipts for the year cannot afford any criterion for the ascertainment of profits. A recently established company will receive a large amount of premiums, and have few or no claims to meet. The profits and gains can be ascertained only by actuarial calculations and this actuarial calculation may be obtained by taking the result of the quinquennial investigation prescribed by statute, or the periodical investigation in use in companies established before the statute or by an investigation covering the three years prescribed by Schedule D of the Income tax Acts. *Scottish Union and National Insurance Company v Smiles*, 2 Tax Cases 551 26 Sc L R 330.

Annuities—A life insurance society in the course of its business sold annuities, covenanting that its capital stock, funds and property shall be liable in respect of the payment of such annuities. *Held*, unanimously reversing the decisions of the Divisional Court and the Court of Appeal that the annuities were not payable out of profits and gains of the society, and that the amount of the annuities paid may be taken into account as a disbursement in computing the taxable profits.

Per Halsbury L C—"You can no more refuse to take that cost (the payment of annuities) into your consideration when ascertaining the balance of profits and gains than you could the cost of the coals or the corn to the coal merchant and to the corn merchant, in ascertaining what are the profits from his trade", *Gresham Life Assurance Society v Styles* 3 Tax Cases 185, (1892) A C. 309.

This point, however, will not arise under the Indian law for there is no prohibition against the deduction of annuities as in the United Kingdom.

Insurance—Fire—Reserves—In the *Imperial Fire Insurance Company v William Wilson*, 1 Tax Cases 71, 35 L T 271, it was held that in computing the profits of a Fire Insurance Company, no deduction could be made from profits on account of 'unearned premiums'.

A Company carrying on the business of fire insurance, used to carry forward annually in its published accounts as a reserve, 40 per cent of the yearly premium receipts, representing estimated losses on unexpired risks and claimed to be assessed on this basis. It was found, as a fact, by the Commissioners that 40 per cent was a reasonable and proper allowance, and the Company's claim was admitted. The Crown contended that the

Company was not legally entitled to the allowance. *Held*, that there is no rule of law as to the admissibility of an allowance for unexpired risks in estimating profits but the question is one to be decided by reference to the facts in each case, and that, on the facts found in this case, the allowance claimed was a proper allowance to be made. The previous cases were reviewed, and it was held that they laid down no principle of law though in many cases the Courts (including the House of Lords in *General Accident, etc., Co v M'Gowan*, 5 Tax Cases 308, (1908) A C 207) had declined to interfere, when the Commissioners had refused to allow any deduction for unexpired risks.

Per Lord Alverstone — "The question of what are profits or gains within the meaning of the Income tax Act, is *prima facie* a question of fact, and if the cases from *The Imperial Life Insurance Company v Wilson*, 35 L T 271, 1 Tax Cases 71 in the year 1876, down to *The General Accident Insurance Company v M'Gowan*, 5 Tax Cases 308, (1908) A C. 207 in the year 1908, be examined, it will be found that in every case the Courts have treated the question as one of fact and have merely decided whether upon the facts before them the claim of the tax payer to make a deduction in a particular way, was justified."

Per Loreburn, LC — I am equally anxious that your Lordships should not be supposed to have laid down that the method applied by the Commissioners in the present case has any universal application. If the Crown wishes in any future instance to dispute it they can do so by evidence, and it is not to be presumed that it is either right or wrong. A rule of thumb may be very desirable, but cannot be substituted for the only Rule of Law that I know of, *viz.*, that the true gains are to be ascertained as nearly as it can be done. There is no rule of law as to the proper way of making an estimate. There is no way of estimating which is right or wrong in itself. It is a question of fact and figure whether the way of making the estimate in any case is the best way for that case."

Per Lord Haldane — "It is plain that the question of what is or is not profit or gain must primarily be one of fact, and of fact to be ascertained by the tests applied in ordinary business. Questions of law can only arise when (as was not the case here) some express statutory direction applies, and excludes ordinary commercial practice, or where, by reason of its being impracticable to ascertain the facts sufficiently, some presumption has to be invoked to fill the gap," *The Sun Insurance Office v Clark*, 6 Tax Cases 59.

[Section 11 has been omitted by Act of 1939 having been embodied in section 10.]

12. (1) The tax shall be payable by an assessee under the head "Income from other sources" in respect of income, profits and gains of every kind which may be included in his total income (if not included under any of the preceding heads)

(2) Such income, profits and gains shall be computed after making allowance for any expenditure (not being in the nature of capital expenditure) incurred solely for the purpose of

making or earning such income, profits or gains, provided that no allowance shall be made on account of—

(a) any personal expenses of the assessee, or

(b) any interest chargeable under this Act which is payable without British India, not being interest on a loan issued for public subscription before the 1st day of April, 1938, or not being interest on which tax has been paid or from which tax has been deducted under section 18, or

(c) any payment which is chargeable under the head 'Salaries', if it is payable without British India and the tax has not been paid thereon nor deducted therefrom under section 18

(3) Where an assessee lets on hire machinery, plant or furniture belonging to him he shall be entitled to allowances in accordance with the provisions of clauses (iv), (v), (vi) and (vii) of sub section (2) of section 10

(4) Where an assessee lets on hire machinery, plant or furniture belonging to him and also buildings, and the letting of the buildings is inseparable from the letting of the said machinery, plant or furniture, he shall be entitled to allowances in accordance with the provisions of clauses (v), (vi) and (vii) of sub section (2) of section 10 in respect of such buildings

History—In the 1886 Act there was no similar provision. The section first appeared in 1918 and was amended in 1922 and again in 1939

The following changes were made in 1939. In sub-section (1) the words 'income from' were put in before 'other source' and the words 'which may be included in his total income for and from every source to which the Act applies' in sub-section (2) items (b) and (c) were added. Sub section (3) was also added. Sub section (4) was added in 1941.

The changes in sub section (1) which are primarily drafting improvements are consequential on the changes in sections 2 (15), 4 and 6. Items (b) and (c) are new provisions on the lines of amended proviso to section 8 and provisos to sections 9 (1), 10 (2) (iii) and section 10 (4) (a). Note however that there is no reference in item (b) of sub section (2) to an agent who can be assessed under section 42 unlike the corresponding provisions in sections 8, 9 and 10 and also that till 1946 there was no reference in sub section (4) to clause (vii) of sub section (2) of section 10 viz., loss on sale or discarding of machinery etc.

United Kingdom Law—This section corresponds very roughly to Case VI of Schedule D of the English Act which is so to speak a residuary section. In computing income under Case VI no deductions can be claimed expressly under the law but it appears that deductions are allowed in practice for example if a person lets his house furnished he is allowed to deduct from his profits of letting the rent of the house rates wages

depreciation etc on furniture repairs agent's fees and advertising charges Similarly a person earning fees from lectures would be allowed travelling expenses to and from the place of his lectures

Method of accounting—As to how profits should be computed *see* section 13

Deductions—*See notes under section 10 (2) (ix)*—Taxes and Cesses also about Capital expenditure and laid out or expended for the purpose of the business etc under clause (xv) of sub section (2) of that section

It should be noted that while under (xv) of sub section (2) of section 10 the words used are laid out or expended wholly and exclusively for the purpose of such business etc the words used in this section are incurred solely for the purpose of making or earning such income profit or gains. It will be seen however from the notes under the former clause that there is not as material a difference between the two phrases as might seem at first sight. It may be assumed generally that the test of deductibility under section 12 is the same as under section 10 except where special provisions have been made under section 10. In fact most of the items referred to under section 10 are incurred solely to earn the profits. In order to claim a deduction it is not necessary that the whole of a particular item of expenditure should be incurred solely to earn the profits a part of the item can be considered so to be solely incurred. *Sachindra Mohan Ghosh v Commissioner of Income tax Bihar and Orissa* 11 Pat. 47 A.I.R. 1936 I.T.R. 164 (Cal)

Nature of income included under other sources—Income derived by an assessee from dividends of a company or from his share in a firm or from royalties minerals or other natural deposits would all fall under income from other sources so far as he is individually concerned. It is not possible to exhaust by enumeration the categories of income that can fall under this head. As examples however may be given income from royalties and rents. In *re Jyoti Prasad Singh Deo* A.I.R. 1921 Pat 81 1 I.T.C. 103 interest on Bank deposits or loans illegal cesses levied by land lords income from fisheries market places (other than property under sect on 9) etc Examiner's fees, rewards and director's fees would more often fall under salaries or professional earnings than under other sources. Most agricultural income will fall under this head though *qua* agricultural income it is exempt from tax by section 4 (3) (viii)

Capital expenditure—It is not merely sufficient that there is an intention to provide a sum expressed as a capital sum and then to pay it in instalments. There should be a real existing capital sum not necessarily pre-existing but existing in the sum that it represents some kind of capital obligation. Therefore where an assessee undertook to pay to another person without consideration a certain sum by instalments and later on covenanted to pay in instalments the balance of the sum due on the earlier undertaking it was held that the payments by instalments were capital payments and therefore not deductible from the payer's income. *Inland Revenue v Mallaby Duley* 17 A.T.C. 503 55 T.L.R. 293 (C.A.) *See also* notes under section 3 Capital and income and under section 10 (2) (xi) 'capital expenditure'

Interest on borrowings—It should also be noted that unlike section 9 (1) (i) which permits the deduction of interest on mortgages and charges on property irrespective of the purpose of borrowing this section

does not permit such deduction unless the purpose of the borrowing is to earn the profits under assessment, *In re Amulyadhan Addy and others*, 1936 ITR 164 (Cal)

Where money is borrowed for purposes of investment in 'securities'—as defined in section 8—interest on such borrowings may be deducted from taxable income subject to the conditions laid down in that section, if borrowed for a business interest may be similarly deducted subject to the conditions in section 10 (2) (iii), and if for investing in house property subject to those in section 9 (1) (iv). In all other cases, e.g., investment in shares interest on borrowings can be deducted only if it is incurred 'solely for the purpose of making or earning the income that is being taxed and subject to the conditions in section 12 (2)'. Ordinarily the Income tax Officer before giving the allowance will require proof that the money borrowed was for the purpose of the particular investment.

Land Revenue—Where non agricultural income from land, e.g., coal royalties is taxed, an allowance should be given for the land revenue on the land. The ascertainment of this allowance is a question of fact. Tax under section 12 it should be noted, is not on gross receipts. See *Emperor v Prokhat Chandra Barua*, (1930) 57 IA 228, 58 Cal 443, and *Commissioner of Income tax B and O v Raja Sri Sri Kalyani Prasad Singh*, 1945 ITR 17 (Pat).

Interest on outstandings after business is wound up.—When a trader or a professional man dies or stops his business or profession, and outstandings have to be collected in respect of goods supplied or services rendered during the life of the business or profession, such receipts are not ordinarily assessable. They represent money earned during the life of the business or profession and are covered by the assessments made during the life of the business or profession. It is immaterial for this purpose whether the assessment were made on the basis of bookings or on the basis of receipts. But interest stands on a special footing. It is payment by time for the use of money. Though when a business lasts interest may be a part of trade receipts, it does not follow that interest ceases to be earned after the ending of the trade. The interest bearing debts which remain produce an income which is liable to tax see dicta of *Korvatt J*, in *Bennett v Ogston*, 15 Tax Cases 374, 9 ATC 182.

Annuities—A clergyman received an annuity from a Charitable Fund on retiring through ill health. The annuity was conditional on his completely resigning the parish. The income of the Fund as a charitable fund was exempt from tax. *Held*, that the annuity was taxable not as profits of office but as annual profits under Schedule D, *Duncan's Executors v Farmer*, 5 Tax Cases 417, (1909) Sess Cas 1212, 46 ScLR 857. In 1922 the law in United Kingdom was altered bringing such income under Schedule E.

(In India also this would be taxable not as profits of office, i.e., salaries under section 7 or professional earnings under section 10 but under 'income from other sources'—section 12.)

A payment by a former employer to an ex employee at a certain percentage over a basic minimum of receipts from a particular source with which the employee had been connected is not a receipt from the profession or employment of the ex employee, even though the agreement to pay the percentage was by way of *quid pro quo* for the termination of the employment. The employment having expired, the income is from 'other

sources', *Asher v London Film Productions*, 1945 I T.R. (Sup) 6 (C.A.) The point may be of importance in India because when rates of tax are changed by the Finance Act the rate on Salaries lags behind by a year.

Annuities—Annuities not of the nature described in section 7 *ie.*, annuities not paid by Government, etc. or by an employer fall under this section.

An annuity is taxable in full although capital may have been sunk in purchasing it nor is any difference made between terminable and perpetual annuities. *Coltress Iron Company v Black*, 1 Tax Cases 287 6 App Cases 315.

To ascertain whether a so called annuity is really an annuity for income-tax purposes the substance of the transaction must be looked to and not merely the name. *Nizam's Guaranteed Railway v Wyatt*, 2 Tax Cases 584, 24 Q.B.D. 548, *Scoble v Secretary of State*, 4 Tax Cases 618, (1903) A.C. 299.

Deed of separation—Payment to wife—In *Dalrymple v Dalrymple*, (1902) 4 F. 545 it was held that a payment made to a wife under a deed of separation was taxable as it was payable as a personal debt or obligation, in virtue of a contract as distinguished from a gift and that the husband was entitled to deduct tax. In India, the tax could not be deducted at source on such payments as they are not annuities paid by employers but such payments are evidently taxable in the hands of the recipient as income from other sources under section 12.

Trustee—Income of—The remuneration of a Trustee would be income from other sources. A trustee has no employer and his income cannot be 'salary'. Nor can it be income from a 'profession or vocation'. See *Baxendale v Murphy*, 9 Tax Cases 76, (1924) 2 K.B. 494.

Depreciation—No allowance can be claimed on account of depreciation except in cases falling under section 10 or under section 12 (3) or (4). See dicta in *In re Gophtu Estates, Ltd., Calcutta*, 4 I.T.C. 146, 57 Cal 910, A.I.R. 1930 Cal 1. Sub-sections (3) and (4) apply to cases not constituting a business of letting. In such cases clauses (iv) *et seq.* of sub-section (2) of section 10 will apply directly. In the United Kingdom the law is more complicated, and difficult questions arise as to the liabilities to keep the asset in repair, see *Union Cold Storage Co v Simpson*, (1939) 2 All E.R. 44 (C.A.).

Hire purchase—Where the true nature of a hire purchase agreement is that of a sale or of an agreement to sell, with an extended period of instalments for payment of the price, there is no letting on hire and sub-section (3) of section 12 does not apply, *Shamsher Ali Abdul Hussain v Commissioner of Income-tax, C.P.*, 1945 I.T.R. 240.

Impartible Hindu family—The question has been raised but not decided whether income derived by the holder of an impartible Hindu estate from house property belonging to the family can be taxed as the income of the holder as an individual under 'other sources', even though with reference to section 9 the tax could be levied only on the owner, *viz.*, the family. *Commissioner of Income tax, Punjab v Dyeon Kishan Kishore*, 1941 I.T.R. 695 (P.C.).

Expenses incurred in purchasing mortgaged property—The mere giving of security by a mortgagee-purchaser of property in a Court auction is not deductible expenditure. When eventually the security is forfeited or the indemnity paid—assuming the accounts to be on a cash basis—the

payment might be deductible. So also probably, the interest on borrowing if the security money is borrowed. Expenses incurred by the purchaser over Mutation fees and the like when taking possession are not deductible. In bidding for the property the purchaser must be presumed to have anticipated such expenses. Payment in satisfaction of a decree in favour of a prior creditor cannot be deducted especially if at the time of bidding the possibility of such a claim is known to the bidder. *Raja Raghunandant Prasad Singh and another v Commissioner of Income tax Bihar and Orissa* 12 Pat 305 64 MLJ 544 AIR. 1933 PC 101 1933 ITR 144 (P.C.) Loss incurred in selling such property (bought by mortgagee) afterwards is a capital loss. *Himat Lal Motilal v Commissioner of Income tax Bombay*, 76 ITC 159

Cost of probate and sadh and funeral expenses—Such costs cannot be deducted from the taxable income of executors even though the will expressly directs them to meet such costs from the income of the estate. These are not cases of a portion of the income being diverted by an overriding title from the person who would otherwise enjoy it (as in the *Dudhuria* case) but cases of expenditure by persons who having received the whole income spend a part of it in accordance with the wishes of the testator in whose shoes they stand. In re *P C Mallick and another*, 1938 ITR. 206 (P.C.)

Buildings etc, leased—Income to a lessee from property which will revert to the lessor is taxable under this section. The Allahabad High Court allowed a deduction to be spread over some years to represent the cost of erection of buildings which would be lost to the lessee. But this was overruled by the Privy Council on the ground that expenditure not actually incurred during the year of assessment could not be allowed. *Commissioner of Income tax UP v Basantrao Takhat Singh* 1933 ITR. 197 60 IA 307 55 All 452 AIR 1933 PC. 180

Where an assessee purchased a decree carrying interest (by assignment) and paid for it by a usufructuary lease of certain immovable properties for a term of years the term being so fixed that the principal and interest on the purchase money would be wiped off during the period by the enjoyment of rent and profits and claimed that the interest on the purchase money should be set-off against the interest accruing on the decree the claim was disallowed. The assessee was not legally liable to pay interest on the purchase money and there was in fact no payment of interest. All that he had done was to purchase the assignment (decree) with a taxable income and had parted in return with a source of untaxable income. *Commissioner of Income tax B and O v Raja Dhakeshwar Prasad Narain Singh* 1938 ITR 476

Firms—There is no specific disallowance in this section as in section 10 of payments made to partners of firms because the income of firms can only arise from business profession or vocation. See the Indian Partnership Act 1932

Provident Funds—Payments from.—Before section 7 was amended in 1939 (see Explanation 2 to that section) so as to make receipts from provident funds salaries under section 7 where a trust had been created in respect of a Provident Fund and the employer paid his contributions into the Trust Funds the contributions actually received by the employee were taxable under section 12 and not under section 7 as salaries since the trust was not his employer. Tax on all payments under section 7 is

deductible at source under section 18 whereas payments taxable under section 12 could only be taxed after assessment under section 23 (and section 34). These remarks do not apply to recognised provident funds as to which see section 58 H.

12-A Where a managing agent of a company is liable under an agreement made for adequate consideration to share managing agency commission with a third party or parties the said agent and the said party or parties shall file a declaration showing the proportion in which such commission is shared between them and on proof to the satisfaction of the Income tax Officer of the facts contained in such declaration such agent and each such party shall be chargeable only on the share to which such agent or party is entitled under the agreement.

History—This section was inserted in 1939. To quote the Select Committee this introduces into the Act a new provision for the special case in which managing agency commission is shared among two or more recipients and provides a means by which each of the recipients may be charged only on the share which he is actually entitled to receive.

This section partly counteracts the decision of the Privy Council in *Tata Hydro Electric Agencies v Commissioner of Income tax Bombay*, 64 I.A. 215 (1937) A.C. 212 1937 I.T.R. 202 (P.C.) and also seeks to remove doubts for as will be seen from the rulings referred to under section 10 (2) (xv) it is often difficult to determine whether a payment represented by a share of profits is made in order to earn such profits or is only a distribution thereof.

It will be noted that the section applies only to managing agents of companies. There must be an agreement to share the commission with a third party or parties and there should be adequate consideration for the agreement. The agent should file a declaration showing the details of sharing and the Income tax Officer should be satisfied of the facts in such declaration.

There is no penalty under section 52 apart from that under the Indian Penal Code for a wrong declaration.

Adequate consideration—In the context the words will presumably not cover affection or love. The consideration however need not be cash consideration. Adequacy of consideration is evidently a question of fact, being a question of degree.

Other cases—Cases not covered by this section will have to be dealt with in accordance with the principles expounded by the Privy Council in the *Pondicherry Railway Case*, 58 I.A. 239 54 Mad 641 and in the *Indian Radio and Cable Case*, I.L.R. 1937 Bom 591 1937 I.T.R. 270 by the Court of Appeal in *British Sugar Manufacturing Co v Harris* 16 A.T.C. 421 and by other Courts in the several rulings referred to under section 10 (2) (xv) as to the deductibility of payments represented by a share of profits.

13 Income, profits and gains shall be computed, for the purposes of sections 10 and 12, in accordance with the method of accounting regularly employed by the assessee.

Method of accounting
 Provided that, if no method of accounting has been regularly employed, or if the method employed is such that, in the opinion of the Income tax Officer, the income, profits and gains cannot properly be deduced therefrom, then the computation shall be made upon such basis and in such manner as the Income tax Officer may determine

History—Difficulties had been experienced in regard to the assessment of business profits under the Act of 1918, owing to the ruling of the Madras High Court in *Board of Revenue v Arunachalam Chetti* 1 I.T.C. 75, 44 Mad 65 AIR 1921 Mad 427 that the word 'income' in section 3 of that Act [corresponding to section 4 (1) of the present Act] meant 'income actually or constructively received' and that the use of the word in that sense in section 3 restricted and limited any interpretation to be placed upon the following sections of the Act which specified the income liable to tax. Had this interpretation been strictly followed considerable inconvenience would have been caused to assesseees who kept their accounts not on the basis of sums actually received and sums actually paid out, but on the principles of mercantile accountancy by the preparation of a Profit and Loss Account and the comparison of the value of the stock in hand at the beginning and end of each year, since such assesseees would have been required to recast the whole of their accounts on a cash basis for income tax returns. The provisions of sections 3, 4 and 6 to 12 of the Act were therefore re worded in order to make it clear that the tax is chargeable not on income calculated on actual receipts and expenditure, but on the 'profits and gains' as set out and defined in those sections, while section 13 makes it clear that no uniform method of accounting is prescribed for all tax payers and that every tax payer may, so far as possible, adopt such form and system of accounting as is best suited for his purposes. The word 'in respect of sums paid or in the case of depreciation debited', which occurred in section 9 (2) of the Act of 1918, were also omitted and sub section (3) of section 10 of the new Act was inserted, so that there may be no doubt that the assessee may adopt either a cash basis or a mercantile accountancy basis as his regular system of keeping accounts. It should be particularly noted that these provisions apply under section 13 of the Act only to the income, profits and gains mentioned in sections 10 and 12 of the Act. Under section 9 the income is notional based on the 'annual value' of the property, under section 7 tax is payable when salaries are due and under section 8 tax is on interest receivable. Both under section 7 and under section 8, tax is deducted at the time of payment.

The reference to section 11 in this section was omitted in 1939 as a consequence of the deletion of section 11 and its merging in section 10.

In the Madras case, *Board of Revenue v Arunachalam Chetti* 44 Mad. 65, 1 I.T.C. 75, AIR. 1921 Mad 427, which gave rise to this section, the point in issue was whether interest that had accrued in the year, but never been received nor adjusted in the accounts, could be

taxed. A Full Bench of the Madras High Court decided against the Crown, Sadasiva Aiyar, J., dissenting. Sadasiva Aiyar J. held that the interest would be taxable though not realized if it came so completely under the assessee's control that by an act of his will he could receive it in cash without greater trouble than is involved in drawing money from his bankers.

Method of accounting 'regularly employed' —The following executive instructions have been issued:

It is the practice amongst certain merchants to prepare their accounts on the basis of the mercantile accountancy system in respect of transactions between themselves and members of their own community but on a cash basis in the case of transactions with their other customers. If the same system is continuously employed and if taking one year with another the full income is shown on a consistent basis it may be followed for income tax purposes.

Scope of section —Broadly speaking the law is as below —If the assessee files a proper return of his income he will be assessed on his income computed (with or without examination of his accounts according to circumstances) according to the method of accounting that he has regularly employed. If he regularly employs the cash method of accounting his income will be computed on the cash basis. If he regularly employs the mercantile system his income will be computed according to the mercantile system. If he regularly employs some reasonable and consistent combination of the cash and mercantile systems for example following the one system for some kinds of transactions and the other for other kinds of transactions his income will be computed accordingly. It must not be forgotten however, that if an assessee has not produced his accounts regularly before the Income tax authorities it may be difficult or impossible for him to prove that he has *regularly* employed any method of accounting. If he has not regularly employed any method of accounting, the Income-tax Officer has to determine upon what basis and in what manner the income shall be computed. The Income tax Officer has the same discretion if in his opinion the method regularly employed is such that the income cannot properly be deducted therefrom.

Where an assessee closes his accounts whether in part or as a whole only periodically, i.e., once in a few years the proviso to the section comes automatically into operation and it is for the Income tax Officer to make the best estimate he can on the materials before him as to the profits of each year. Common cases of this kind are contracts requiring several years to complete and accounts of branches when branch managers who are given shares of profits are appointed for a term of years.

If an assessee has not made a return substantially fulfilling or purporting to fulfil the requirements of section 22 of the Act and Rule 19 of the Rules under the Act, it is the duty of the Income-tax Officer under section 23 (4) to determine the income to the best of his judgment. He is then not bound to call for the assessee's accounts. If he does call for them he has full discretion as to the use that he should make of them and whether he calls for them or not the assessee has no appeal against his decision.

See Rule 33 and Rule 8 of Schedule, regarding special methods of estimation of income in certain cases

United Kingdom Practice—The principle of section 13, (*viz*, that the assessee is bound by his own acts of book keeping,—unless the book keeping itself is at variance with facts, about which see *Craig v Commissioners of Inland Revenue*, (1914) Sess Cases 338, 51 ScLR 321,) has been laid down in various English rulings. On the other hand, an assessee cannot reduce his liability merely by juggling with his books.

The law in the United Kingdom merely says that the tax shall 'be computed on the full amount of the balance of profits or gains', and it is for the commissioners to decide in each case whether the accounts do disclose the full amount of profits, but there is a reluctance, especially in cases of trade to accept accounts on a cash basis, and the Courts have generally thrown their weight against accounts on a cash basis. Also, the words used for example in Schedule D are 'accruing or arising', and the word 'received' is not used at all, and emphasis has been laid on this omission in *In re Kamdar*, 1941 ITR 10 (Bom), which seeks to compare Indian and English law in this respect.

"The balance sheets, of course, do not serve to alter the liabilities of the tax payer, they are not used for the purpose of constituting some admission of liability or something which would stop them from having the Act properly administered, but they are of some use as showing what, as a matter of fact, is the true and proper way of dealing with these receipts", Per *Hamilton, J*, in *Liverpool and London and Globe Insurance Co v Bennett*, 6 Tax Cases 327, (1913) A C 610

"One of the learned Judges in the Court of Appeal seems to have thought that the case might have been different if the County Council had made some appropriation of their funds, though it is difficult to see how any account keeping by the debtor could alter the rights of the Crown" Per *Lord Davey* in *Attorney General v London County Council*, 4 Tax Cases 265, (1901) A C 26

'This argument would seem to make the rights of the Crown depend on the book keeping of the company, but this cannot be, nor do I think the liabilities of the company can be made to depend on their system of accounts", Per *Lord Gorell* in *Edinburgh Life Assurance Co v Lord Advocate*, 5 Tax Cases 472, (1910) A C 143

"But the mode of book-keeping followed by the company is not conclusive of the true character of the expenditure", *Glenboig Union Fireclay Co v Commissioners of Inland Revenue*, 12 Tax Cases 427, (1922) Sess Cas 141, 58 ScLR 168

"I cannot think that income tax is due or not according to the manner in which the person making the profit pleases to deal with it. Suppose for example, a seller made profit on a trade transaction but leaves the price (including the profit) in the hands of the buyer at so much per cent interest. That he so deals with it, rather than take the cash into his own pocket, would not affect the claim of the Revenue for the tax payable on the profits" Per *Lord Trayner* in *Californian Copper Syndicate v Harris*, 5 Tax Cases 159

Basis of accounting—Each year is a self contained period and profits earned or losses sustained before it or after it are not relevant *Commissioner of Income tax C P v Sir S Chinnars* 59 I.A. 290 63 MLJ 361

As to receipts' not being confined to cash receipts see *Hall & Co v Commissioners of Inland Revenue* 12 Tax Cases 382 (1921) 3 K.B. 152 (C.A.) the dictum from the judgment of *Esher M.R.* in *City of London Corporation v Styles* 2 Tax Cases 239 4 T.L.R. 51 and *Sterndale M.R.*'s comments thereon—see notes under section 10 Tax is leviable on receipts but on profits *Commissioner of Income-tax Burma v Thava Bros* 1934 I.T.R. 230

As to how far accounts should represent facts it is obviously not possible to lay down any general principles. Like all questions of fact such questions depend for their answers partly on the facts of each case and partly on commercial usage and the practice of the assessee. Difficult questions may arise in respect of which the law furnishes little guidance and in many cases an equitable solution is likely to rest on what is logically a compromise. So long as the same income is not taxed twice over and so long as income is not taxed before it arises except with the consent either express or implied the latter often resting on the method of accountancy regularly employed of the assessee it is presumed that no Court will interfere. These are all questions about which the law is silent and the courts will presumably apply 'equity justice and good conscience' in settling them.

As Lord Loreburn said in *Sun Insurance Office v Clark* 6 Tax Cases 59 (1912) A.C. 443

A rule of thumb may be very desirable but cannot be substituted for the only rule of law that I know of viz that the true gains are to be ascertained as nearly as it can be done.

First as regards stock which also includes in this connection consumable stores *George Thompson Ltd v Commissioners of Inland Revenue* 12 Tax Cases 1091. The closing balance (both quantity and value) of the previous year must agree with the opening balance of the year under consideration. In the face of this *Commissioner of Income tax v Chengalraya Chetti* 2 I.T.C. 14 48 Mad 836 A.I.R. 1925 Mad 1242 the assessee claimed to value the stock in the closing balance of the previous year at the market price and in the opening balance of the current year at cost price which was much higher. Needless to say the claim was not allowed by the High Court. As *Coutts Trotter, C.J.* put it—

The question is not so much of law but of business commonsense. And as *Krishnan J.* put it—

Having been allowed to treat his loss as one on the stock in hand in the previous year he cannot be allowed again to treat it as a loss on the sales in respect of the same stock next year.

The next point is whether an assessee should take his closing stock at market value or cost price and if the former whether he is entitled to estimate it as he likes. As regards the first part of the question, there would apparently be nothing wrong in the assessee choosing whichever alternative he prefers, provided always of course that the next year's opening balance is taken at the same value. Actual commercial practice varies and it is most common to follow the practice of valuing on which ever is the lower basis. It is also not uncommon to value at the same

point of time certain item of stock at market value and others at cost price, it is all a question of custom and usage. But it would not be open to the concern to under estimate the market value. Whether all items or groups of items forming 'stocks' should be valued on an identical basis—all at cost or all at market value, or on different bases some at cost and some at market value would seem to be a matter of business usage rather than of law and the only essential condition would seem to be that in respect of the same items, the same basis should be adopted every year, and that the closing balance of each item should be identical with the opening balance of that item next year. The question however, has not yet been before the Courts either in India or in the United Kingdom.

'Market value' is a matter of *fact*, and like all other questions of fact it is entirely for the Income tax Officer to decide what is a fair market value. In deciding this question of fact, the relevant evidence would be (1) Invoices (2) Sales (3) Transactions of other assesseees doing similar business, (4) Government statistics, etc.

It is usual to value stock of half finished or finished goods at raw material *plus* labour, but this is not necessary when finished goods can be valued with reference to the market. The 'cost' price of raw materials would be valued so as to include freight, etc., when the 'cost price' basis of valuation is adopted in respect of the closing stocks. Whether the valuation is on a cost price basis or on the 'market value' basis, an assessee cannot put any valuation he likes on the stock. In either case the valuation should accord with facts.

Perishable goods and goods that improve in value with age and rare things like curios, gems, collections, etc. require special treatment, so also stocks and shares in the case of a stockjobber in respect of which the usual stock exchange quotations do not necessarily offer reliable guidance when large blocks of shares are involved. In *Craddock v Zero Finance, Ltd*, 1943 C.A., the courts declined to interfere with a finding of the commissioners (against the Crown) that there was nothing unreasonable or suspicious in a large block of shares being bought at a price much higher than the Stock Exchange quotations. The stock exchange quotation itself may be more or less than the real value of a share and where there is a voluntary sale or purchase and the purchaser is willing to pay an extravagant price, the transaction cannot be questioned except on grounds of fraud or collusion. The valuation is a question of fact and not of law.

Where an assessee keeps his stock in different places *e.g.*, partly in his factory and partly with agents at the nearest port of export and issues his stock at the market price at the port, it is not open to him to deduct from the value of his stock freight and other charges not actually paid by him and his agents. *Balakram v Commissioner of Income tax, Punjab*, AIR 1931 Lah 759, 135 IC 597.

It is obvious that when the accounts do not show the opening and closing stock balances the profit or loss account cannot be ascertained from the books whether the accounts are on a cash or on an accrued basis. See also *Radhakissan Ramnarain's case* 3 ITC 366.

The United Kingdom Finance Act of 1938 specially provides broadly speaking that, where a business, etc. is discontinued the closing stocks shall be taken at sale value if the business, etc., is sold, and otherwise *ad hoc* expert valuation shall be made. There are no similar provisions

written down, because the supplier was bound to replace the goods *Rou-latt, J.*, confirmed the action of the Special Commissioners, *Brigg Neumann & Co v Commissioners of Inland Revenue*, 7 A T C 269, 12 Tax Cases 1191

Property taken over by a money-lender in settlement of debts is not part of his stock-in-trade, and he cannot therefore value the property at the end of each year to ascertain his profits, *Commissioner of Income tax, Burma v P L S M Concern*, 1934 I T R. 417. In that case, the valuation had no reference to a real market value and was merely an estimate made by the money lender himself. The Court considered that the account should be adjusted when the property was sold. Where such property is valued for the purpose of reconstituting the money-lending partnership the valuation cannot be used for the purpose of adjusting taxable profits, such adjustment can be permitted only when the property is finally disposed of, *Commissioner of Income tax, Burma v K A R K Firm*, 1934 I T R. 183. The facts in the above cases were peculiar, and it cannot be said that in no case will such property be the stock in trade of the money lender.

Running contracts—If the accounts are so kept that the profits in any given period can be ascertained, naturally the Income-tax Officer will accept such accounts, otherwise he will assess under sections 23 (3) and 13 unless owing to some default of the assessee, the assessment is made under section 23 (4).

"It would be wrong to carry into the accounts as profits of one year the estimated profits which would accrue in subsequent years that might perhaps never be made at all"—Per *M R Sterndale in Hall & Co v Commissioners of Inland Revenue*, 1 A T C 271, 12 Tax Cases 382, (1921) 3 K B 152.

"No person would dream of including profits in his yearly balance-sheet, which would not be made until the goods had been actually delivered in respect of some contract which was to run over a period of two years and possibly more"—Per *Atkin, L J (Ibid)*.

The only proper way in which the profits arising from the working out of this contract ought to be brought into account, is to ascertain them as and when realised, as if they were not preceded by any contract at all"—Per *Younger, L J, (Ibid)*.

"Realised" here does not mean realised in cash or by set-off, in this case the lower Court held that the profits on the running contract should be brought into account when the contracts are made, and this judgment was overruled by the Court of Appeal.

Contractors and stock jobbers and the like may have accounts running into several years, Profit and Loss not being struck every year but only finally after the completion of a group of transactions, see *Commissioner of Income tax, C P v Bansilal Abhirchand*, 3 I T C 57, A I R 1928 Nag 102, 108 I C. 805 and *Gour's case*, 3 I T C 333. At the same time where, as among stock brokers and jobbers, there are periodical settlements—with actual payments, the possibility of further settlements within the lifetime of the contracts would not justify the exclusion of already accrued profits until the contracts had run their course. The profits should be taxed as adjusted at the settlements, losses being dealt with similarly, *Ballabdas & Son v Commissioner of Income tax, C P*, 5 I T C 371.

Consignment accounts—If the assessee keeps suspense accounts for each consignment or 'venture' till it is closed, it follows that until the profit

is transferred from 'suspense' to profit and loss, no income arises for taxation. Otherwise the Income tax Officer would have no option except to take into account the net balance of the consignment account or estimate as best as he can under section 23 (3) and section 13, or as a result of some default on the part of the assessee under section 23 (4).

Debits and credits—When to be entered—Under the mercantile system of accounting, when a debit note is presented the debt should appear in the accounts. A debit note means a debt *in praesenti*. Similarly if a contract is cancelled and compensation received for the breach in instalments the compensation should appear as a receipt when the compensation is settled. *Robinson & Sons v Commissioners of Inland Revenue*, 8 A T C 125 12 Tax Cases 1241. In Excess Profits Tax cases the date on which an item should be brought into account is a matter of great importance, and many of the English rulings referred to on this point relate to the old Excess Profits Duty. It is not open to an assessee to bring into account stocks not received by him and reduce his profits for the accounting period by debiting himself with the cost of stocks ordered at high prices but not received by him and writing down the value of stock to current market value, *Commissioners of Inland Revenue v Huntley and Palmers, Ltd*, 12 Tax Cases 1209.

Where an assessee, into whose account at a Bank a sum of money had been paid by a lessee on account of mining royalty and who had a dispute as regards the quantum of royalty and sought to recover more from him did not decline the receipt of nor refund the money but retained it and used it, while crediting it, however, to a 'suspense' head in his own accounts it was held that the receipt became his income in the year of receipt by the bank and not when the 'suspense' was cleared after settlement of the dispute, *Maharaja Kamakshya Narayan Singh v Commissioner of Income tax, B and O*, 1942 ITR 177.

Stock values—Alteration of—It is a cardinal rule of book keeping—whatever the method adopted—that the opening balances of stock in one year should be the same as the closing balances of the preceding year, *Commissioner of Income tax v Chengalvaraya Chetti*, 2 ITC 14, 48 Mad 836, A.I.R. 1925 Mad. 1242.

At the same time if the opening and closing stocks of a business in a given year are both undervalued, the real profits of the business in that year cannot be ascertained by merely raising the valuation of the closing stock, without taking into consideration the similar undervaluation of the opening stock. The method of introducing stock into each side of a profit and loss account for the purpose of determining the annual profits does not necessarily depend upon exact trade valuations being given to each article of stock that is so introduced. The one thing that is essential is that there should be a definite method of valuation adopted which should be carried through from year to year, so that in case of any deviation from strict market values in the entry of the stock at the close of one year it will be rectified by the accounts in the next year. It may, of course be that in so adjusting the figures of stock there may be special cases in which the valuation is so treated as justly to cause it to be open to dispute. But whatever the correct position about such cases, it is clear that if the method of altering both valuations is not adopted the profit which is brought forward is not the real one, *Commissioner of Income tax, Bombay v The Ahmedabad New Cotton Mills Company, Ltd*, 57 I.A. 21; 54 B 213, 58 M.L.J.

204 (P.C.) So, where an assessee, a firm dealing in shares, had shown certain shares at cost price in their accounts for some years and when the firm was dissolved the shares were allotted to the partners at a reduced valuation (alleged to be the market price) and the difference between the cost price and the alleged market price was claimed as a loss during the accounting year of partition the claim was disallowed. The partition did not amount to a sale of the shares and if shares were put into the accounts at cost, they must be taken out of them at cost. Every year is a self contained period and the profits or losses in other periods are irrelevant. There was nothing in this case to show that the loss occurred during the year of partition. In re *Messrs Chouthmal Golapchand* 1938 I.T.R. 733 (Cal). An assessee can not, however argue that the Income tax Officer should not have accepted the return of income without examination because if he had examined it he would have detected a mistake in the method of stock valuation which resulted in overstating the income. *Asoka Mills, Ltd v Commissioner of Income tax, Bombay* 6 I.T.C. 339.

Where a German Jew who desired to remove his property outside Germany formed a company in England and exported goods to it at prices lower than market value but not so low as to be detected by the Nazi authorities and claimed later on for income tax purposes in England that the profits of the English company should be computed as if the goods had been imported at true market value it was held that there had been no error in invoicing and that as in fact the English company had received the goods at invoiced prices it was liable to pay tax on that footing. *Julus Bendit Ltd v Inland Revenue* 1945 K.B.D.

The view that if there is a regular method of accounting employed by the assessee the Income tax Officer is entitled *prima facie* to accept the profits as shown in the accounts is not correct. It is the duty of the Income tax Officer even if there is a regular method of accounting to consider whether the true income can be deduced therefrom and then to proceed according to his judgment. The method of accounting referred to in this section relates to the method used by the assessee for his own purposes and not to that of making the return of income. Even though the profit as shown in the accounts is not true profit for income tax purposes it may be possible to deduce it from the accounts and the judgment of the Income-tax Officer must therefore be properly exercised under the proviso. It is misleading to describe it as discretionary power. Where therefore an assessee had built up a secret reserve by systematic under valuation of stocks over a period of years and the Income-tax Officer instead of examining whether the true profits for income-tax purposes could be deduced from the accounts deliberately shut his eyes to the under valuation both in the opening and in the closing stocks and merely took the profit as shown in the assessee company's profit and loss account and balance sheet by which he held it to be bound the Income tax Officer was directed by the Privy Council to make a re assessment. Obviously he could not conclude that the true profits could be ascertained on the basis of a gross undervaluation. *Commissioner of Income-tax Bombay v Sarangpur Cotton Co* 1938 I.T.R. 36 (P.C.) Following this ruling in a case in which there was a regular method of accounting but closing stocks had been undervalued and the Income-tax Officer merely acted under section 23 (3) without applying the proviso to section 13 the Nagpur High Court directed the Income-tax Officer to apply his mind with reference to that proviso. *Commissioner of Income tax, C.P. v Achralal* 1938 I.T.R.

255 An assessee in a particular accounting year valued his opening balance at cost price and the closing one at market price. The Income tax Officer overlooked this change but in the next accounting year assessed him on the basis of cost price both for opening and closing balance but at the same time agreed to revise the assessment of the preceding year on the basis of cost price for the closing balance (so as to benefit the assessed). His action was supported, *Commissioner of Income tax, Madras v. Sri Visweswara Das Gokuldas*, 1946 ITR 110 (Mad.)

Opening balances—Three banks went into liquidation and three companies were formed to realise and distribute the respective assets. Later on a new company took over, to nurse, develop and realise the assets of these three companies who were paid for in the shape of debenture stock and paid up shares in the new Company. The amounts allotted to each company were in accordance with the book values of the assets of each company. The new company sold the assets gradually, and bought off or paid off the debentures. It also declared a bonus on the shares and gave debenture stock as bonus. Under the articles of association no dividend could be paid except out of profits. *Held*, by the Privy Council that (1) the profits of the company were taxable, (2) the company was entitled to hold in suspense some reserve to meet losses, (3) the profits were earned when distributed to shareholders.

Per Lord Dunedin—It does not seem to their Lordships that the mere fact that an investment standing in the books at x pounds realises on sale x plus y pounds settles that a profit of y pounds has been made. It is not that their Lordships doubt that the initial figure in the books may be taken. These figures represent in their Lordships' view, real values, for so the parties have treated them. It was argued that they were mere valuations. In one sense that is true, for, not being put to the test of the market at the moment, the only way to affix a value was by valuation. But that they represent real value seems certain because unless they did it would have been impossible to regulate justly the share which each member of the three assets companies was to get in the new mixed mass of assets—or in other words what shares and debentures he should get in the new Company. But it is possible that other investments on realisation may show loss instead of profit, and it is obvious that it is in the totality of the transactions that the question of profit comes to be fixed. Their Lordships are however of opinion that the company may well be held bound by its own actions. *Commissioners of Taxes v. Melbourne Trust* (1914) AC 1001 (PC.), 30 T.L.R. 685.

Accruals of debt—Section 13 cannot make the mere accrual of a debt income unless the method of accounting adopted by the assessee is such that all accrued debts enter into his profit and loss account. Even if he does not prepare a formal profit and loss account does he so keep his accounts as though the income had been received? In commercial practice and under a strict system of double entry book keeping, though it is true that the profit or loss is really a notional figure represented by the balancing of certain debits and credits, it is not every account in the ledger that enters into the Profit and Loss account. Receipts which are due but which cannot be realised and even receipts realised in special circumstances might be taken to a "suspense" head which would not enter into the Profit and

accounts in an earlier year is released by the creditor in a later year, the release cannot be taken as a trading receipt in the later year. So the fact that the debtor thinks that the debt may not be claimed is no reason for treating the item as a receipt when he thinks so. All that happened in this case was that the liability for repayment of unclaimed balances was transferred from the firm to the partners and mere book keeping entries cannot convert into a trading receipt what was initially not one.

Book keeping—Not conclusive—An assessee cannot be held liable for what he is clearly not taxable upon even though his book keeping may at first sight point to such liability. In *Craig v Commissioners of Inland Revenue* (1914) 51 Sc L.R. 321, a company purchased a going concern for £25,000. For book keeping purposes £5,625 was taken as stock in trade. On the basis of actual stock taking stock was found to be £12,798. The difference £7,173 (subsequently altered to £6,635) between the assumed and real values of stock was carried to a stock suspense account. In the balance sheet the sum of £6,635 was shown as a Reserve Fund. The Commissioners held that this sum of £6,635 was taxable profits. Held that the real value of stock should be taken into account in computing the profits and that mere book keeping is not conclusive. For a similar view see also *Pandurang Ramchandra v Commissioner of Income tax* AIR 1926 Nag 180 2 ITC 69 *Commissioner of Income tax, Burma v P. L. S. M. Concerns* 1934 ITR 417.

The partners trading as wholesale soft goods merchants and drapers formed a private company of themselves. In transferring the business to the company the value of stock was written up by £15,000 and the question arose whether the share of each partner of this £15,000 was taxable. Held by the Privy Council that there was no sale there being only a book keeping entry out of which the partners did not make any real profits and that if there was a sale the receipt was capital and not income. The decision in *Craig v Commissioners of Inland Revenue* (1914) 51 Sc L.R. 321 is that by merely over estimating or under estimating assets profits cannot be made where in fact there are no profits was approved, *Doughty v Commissioners of Taxes* 1927 AC 327 (P.C.).

- See also the case of *Trustees Corporation v Commissioner of Income tax, Bombay* AIR 1930 PC 151 3 ITC 105 referred to under section 10 (2) (xv) and *Commissioner of Income tax Bombay v Sarangpur Cotton Co* 1938 ITR 36 (P.C.).

Where a private company sold materials to an allied private company—with the same shareholders and management—at a price below the market price and the second private company which had heavy unabsorbed depreciation at its credit and thus escaped tax sold the materials in turn at higher prices the Income tax department was allowed to add to the profits of the first company the difference between the price at which the second company sold the materials and the price at which it bought them *Easvi Khas Jharra Colliery v Commissioner of Income tax B & O* 1943 ITR 299.

Where a new company took over all the assets of an old company together with stocks paid for the assets a sum in cash and the balance in its own shares (for which it did not receive cash or any other consideration) it was held that the cash paid plus the face value of the shares in the aggregate—should be allocated—but not necessarily proportionately between the various assets including the stocks. The claim of the company

that the market-value of the stocks which exceeded the total cash paid should be taken as the book value of the stocks was disallowed, so, also, the claim of the Crown that the true value of each asset should be ascertained and the sum of the cash and the value of the shares allocated proportionately between each item. The latter would have been all right if the commissioners had materials before them as to the true value of the other items which they did not have. They could only decide on the materials before them and they valued the stocks at a little less than the cash paid. Their conclusion was one of fact and the Court declined to interfere, *Osborne v Steel Barrel Co*, 1942 C.A.

Foreign income—Constructive receipt of—An assessee cannot keep accounts in one way for his own convenience and claim to have his profits computed in a different way for assessment to income tax. *Commissioner of Income tax v A T K P L S P Subramaniam Chettiar*, 50 Mad. 765, AIR 1927 Mad 841, 2 ITC. 365. An assessee had a business of his own in Rangoon and a business, in partnership, at Penang. Money was transferred from Rangoon to Penang and interest was adjusted in the books at Rangoon as having been received from Penang. He claimed on the authority of *Gresham Life Assurance v Bishop*, 4 Tax Cases 464, (1901) 1 K.B. 153, that the money representing the interest had not in fact been received in British India. The claim was not upheld. The *ratio decidendi* was that according to the assessee's own method of book-keeping it was clear that there had been a constructive receipt, and that according to the method of keeping accounts it was immaterial whether the creditor was in British India or abroad. Following the above ruling it was held by the same High Court, *S V L L Lakshmanan Chettiar v Commissioner of Income tax*, 58 M.L.J. 68, 4 ITC. 200, that even if the debtor is outside British India and the interest is not physically brought therein, the interest is taxable if it has fallen due and been credited in the accounts of the assessee as received. Where an assessee had for many years treated as profits, and paid tax thereon, amounts credited by a foreign branch to headquarters in British India but claimed in a later year that these book entries did not represent any actual bringing into British India—especially in view of the headquarters books showing no corresponding entries—it was held that, as the books were on the mercantile system, the profits were taxable even if not brought into British India and that under section 13 the method of accounting regularly employed could not be altered so as to prejudice the revenue, *Kanwalnen Hamir Singh v Commissioner of Income tax*, U.P., 1938 ITR. 675 (All). In none of these cases does it seem to have been considered whether a rule of computation of income (section 13), *i.e.*, as to *when profits arise* can be used to extend a rule (section 4) which regulates the nature of income liable to tax with reference to *where the income arises*.

Though it is common among Chetti firms, while purporting to charge interest on loans to branches from the head office and showing such interest in the accounts, never in fact to recover such interest, which is calculated *pro forma* only in order to settle the commission payable to the branch agents, yet, if it is found that, in fact, interest is paid by a foreign branch to the head office or a branch in British India, such interest is taxable, *ARARSM Somasundaram Chettiar v Commissioner of Income-tax, Burma*, 2 ITC. 61, 54 M.L.J. 436, AIR. 1928 Mad. 487.

Profits—When arising.—The following dicta on the question *when profits arise* may be noted

'As regards the question of *when* a profit is earned their Lordships' view is that a profit can be said to be earned when it is dealt with as a profit. In ordinary cases this synchronises with the realization of the sums which swell the assets of the person or company and which entering the account (whether on the creditor or debtor side will depend on the particular account in view) go to bring out the balance which is deemed profit. But for the reasons already given their Lordships think that in a case like this the company are entitled to hold at least a part of their realizations in *su pense*—as indeed they have done in their accounts—and that it is only when finally the same is given to the shareholders that the final impress of profit is so to speak stamped upon it and that therefore for the purposes of the Act that is the time at which it is earned per *Lord Dunsedin* in *Commissioners of Taxes v Melbourne Trust*, (1914) A.C. 1001.

The above was followed by the Patna High Court in the case of *Maharajahdhiraj of Darbhanga* 4 ITC 283 9 Pat 240 AIR 1930 Pat 81.

The words income arising or accruing are not equivalent to the words debts arising or accruing. To give them that meaning is to ignore the word income. The words mean 'money arising or accruing by way of income'. There must be a coming in to satisfy the word income.

If the tax payer be the holder of stock of a foreign Government carrying say 5 per cent interest and the Government is that of a defaulting State which does not pay the interest the tax payer has neither received nor has there accrued to him any income in respect of that stock. A debt has accrued to him but income has not. It does not follow that income is confined to that which the tax payer actually receives. Where income-tax is deducted at the source the tax payer never receives the sum deducted but it accrues to him. It is said and truly that a commercial company in preparing its balance sheet and profit and loss statement does not confine itself to its actual receipts—does not prepare a mere cash account—but values its book debts and its stock in trade and so on and calculates its profits accordingly. From the practice of commerce and of accountants and from the necessity of the case that is so. But this is far from establishing that income arises or accrues from (as above instanced) an investment which fails to pay the interest due. The Privy Council in *St Lucia Usines and Estates v Colonial Treasurer of St Lucia* 4 A.T.C. 112 (1924) A.C. 508.

The above judgment was followed in *Raja Raghunandan Prasad Singh's case* 4 ITC 123 by the Patna High Court who saw no material difference in this respect between the Indian Statute and the law as laid down in *St Lucia's case*.

In understanding Lord Wrenbury's words above that there must be a coming in to satisfy the word income it should be noted that profits and gains i.e. from a business etc. are taxable though they do not exactly come in but are only estimated so also the value of property. But there is one essential feature in all taxable income *viz* it is in the enjoyment of the subject who could use the money if he so chose.

The question *when* an assessee comes within the ambit of tax cannot affect the date when a particular item of income arose the latter must be ascertained independently being the date on which it first arose.

to him as income irrespective of whether he was at that point of time liable to tax or not. *Back v Whitlock*, 16 Tax Cases 727

The question is what income a person has received and not what he might have received but for his own default. No one owes a duty to the State to maintain his assessment at the highest figure and any one can give up his income—along with or without the source of that income—and till he receives that income (not necessarily in cash) he cannot be taxed on it. Still less can he be taxed if during the accounting year under assessment the income is not due to the subject (as a debt due to him) or if the sum may never be paid or received at all. A legatee, therefore, who could have claimed but did not claim interest on his legacy from a year after the testator's death was held not to be taxable on the interest, *Dewar v Commissioners of Inland Revenue*, (1935) 2 K.B. 351, 19 Tax Cases 561 (C.A.). Similarly, an annuity not received at all in any form, *i.e.*, over which the recipient exercised no dominion cannot be treated as received merely because he could have asked for the money if he had chosen. *Woodward v Commissioners of Inland Revenue* 20 Tax Cases 673 (K.B.)

For income tax purposes receivability without receipt is nothing. Before a good debt is paid, there is no such thing as income tax upon it, per *Roulatt, J.*, in *Leigh v Commissioners of Inland Revenue*, 11 Tax Cases 590, (1928) 1 K.B. 73. An unrealised decree therefore is not taxable income even if entered in the accounts. *Jagmardardas v Commissioner of Income tax*, 57 All 737 unless the assessee's method of accounting *i.e.*, of computing profits takes credit for such unrealised amounts.

The *St Lucia case*, however, it should be noted, was not a case of assessment of a business in respect of which an unpaid debt may be profits or gains if so treated in the assessee's system of accounting, *Ramkumar Kedarnath v Commissioner of Income tax, Bombay*, 1937 I.T.R. 261. Under the mercantile system of accounting an item may be taxed even if not under the assessee's control in such a way as to be convertible into cash at any time. *British Cotton Growers' Association v Commissioner of Income tax, Punjab*, 1937 I.T.R. 279.

An assessee who had advanced (in 1913) money on simple mortgage on land sued (in 1925) for the money, and obtained (in 1928) a compromise decree under which he was to receive a certain amount by a certain date (1931) failing which the land were to become his. A receiver was also appointed under the decree, and the net rents collected by him were to be given to the assessee (in reduction of the amount due under the decree), who was to receive the balance from the debtor. There was default on the part of the debtor and the assessee received possession of the lands in 1933, but there was further litigation in respect of the title to the lands which was settled only in 1936. Until then the assessee's account books showed the debt as still due from the debtor. From 1926 onwards the assessee had objected to any assessment on the interest on the ground that the profit could not be ascertained until the transaction had concluded. The Income-tax authorities assessed him on the footing that the entire profits arose in 1936 and the High Court declined to interfere. *AL VR ST Veerappa Cheltur v Commissioner of Income-tax, Madras*, 1941 I.T.R. 56.

See also *Smyth v Stretton*, 5 Tax Cases 36, 20 T.L.R. 443 referred to under section 4 (3) (vi); *Walker v Reith*, *infra* and cases of income

from trusts referred to under sections 3 and 41 as to when a particular item becomes income of a person

Where an employer handed over to trustees for the benefit of an employee an annual bonus from each year's profits and such bonuses were payable to the employee only on his death or on the termination of his service by the employer but not if he was dismissed for misconduct or if he assigned his interest to others, it was held by the High Court following *Smyth v Sretton*, that notwithstanding the forfeitability of the bonus in certain events, the bonus became the income of the employee each year as it was paid to the trustees *Walker v Reith*, (1906) 8 F 381, 43 Sc L.R. 245 was distinguished because in that case the grantor desired to keep the control of the business under the trustees. This view, however, was not accepted by the Court of Appeal *Edwards v Roberts* 19 Tax Cases 618. In *Smyth v Sretton* the masters received a salary from which a contribution was compulsorily recovered so the contribution was treated as part of the salary. In this case, on the other hand, the additional payment (bonus) was contingent on many events and could be taxed only when paid.

Receipts in kind and valuation of assets—In *Scottish and Canadian General Investment Company v Easson*, 8 Tax Cases 265, 59 Sc L.R. 248 a company held certain mortgage bonds the coupons on which were not paid. The debtor company gave place to a new company, and the creditor company surrendered its bonds and received debentures in the new company, a part of which were assumed by the Commissioners to represent interest on the old bonds. Held, that no objection having been raised before the Commissioners, the Court had no materials on which to question the finding of the Commissioners.

"the price took form of fully paid up shares in another company but if there can be no realised profit except when that is paid in cash the shares were realisable and could have been turned into cash. Suppose a seller made a profit on a trade transaction but leaves the price in the hands of the buyer at interest. That would not affect the claim of the Revenue for the tax payable on the profit."—Per Lord Trayner in *Californian Copper Syndicate v Harris*, 5 Tax Cases 159, 167.

The PC has held in the *Darbhanga* case, 1933 I.T.C. 94 that a liability to pay interest, like any other liability to make a payment, can be satisfied by the transference of assets other than cash and a receipt in kind can be taxable income. But it is essential that what is received should be money's worth (approving *Californian Copper Syndicate v Harris* and *Scottish and Canadian General Investment Co v Easson*).

A company effected an exchange of securities under an amalgamation scheme. On the date of exchange, the new securities had a lower market value than the old ones and the question arose whether the company could claim any loss on the exchange even though it did not actually realise the investments. The claim was allowed on the ground that the transaction was on a money basis, the securities having an ascertainable value and the loss being susceptible therefore of exact estimation in money, *Royal Insurance Co v Stephen*, 14 Tax Cases 22; 44 T.L.R. 630.

Where a Bank converted one kind of Government securities into another, the House of Lords held that the conversion was "the exact equivalent of what would have taken place, had instructions been given to

sell the original stock and invest the proceeds in the new security' The profit on conversion was therefore taxable, *Westminster Bank v Osler*, 17 Tax Cases 381, (1933) A C 139

A building company sold certain houses partly for cash and partly for a 'ground annual', and it was held that the capitalised (i.e., the selling market) value of the "ground annual" being "money's worth" should be brought into account for working out the profits. The company's claim was that only the actual collection every year on account of the 'ground annual' should be considered

Per Lord Atkin—"The result is not that they exchange part of their stock for a different kind of stock but that they dispose of the whole of their stock for money *plus* money's worth"

Per Lord Thankerton—"it is clear that 'ground annuals' such as these have a well known market value and that they are constantly traded in and in that respect they seem at least as good money's worth as any ordinary security quoted on the Stock Exchange,

if part of the price paid for the land and buildings consisted of money's worth, the market value of which is immediately ascertainable, I fail to see why that should not be brought into computation in the ordinary accounts of the trade for bringing out the results of the year's trading", *Commissioners of Inland Revenue v Emery & Sons*, 15 A T C. 241 (H L), 20 Tax Cases 213 (1937) A C 91

In *Emery's case*, it should be noted, the builder disposed of his entire interest, but where he retains an interest of a real and substantial character, the houses which form the stock in trade of the builder can only be brought into account at cost price or market value, whichever is lower, and only the rent of the year can be taken into the Revenue or Trading account. When he parts with all the interest the sale proceeds, both of the reversion and the right to collect ground rent should be brought into the trading account. Therefore where a speculative builder built houses on freehold land, and among other transactions leased some of the houses on 99 year leases and the question arose whether credit should be taken at once for the present value of the ground rents, it was held by the House of Lords, agreeing with the Court of Appeal and disagreeing with Macnaghten J, and the Special Commissioners, that credit should not be so taken. There was no difference of opinion as to premia (not based on a peppercorn rent) being taxable as income in the year of receipt, *Hughes v Utting & Co*, 19 A T C 53. Where there is a trade in land and chief rent is reserved such rent should be valued and brought in as a receipt of the trade, *Beattie v Broadbridge* and others 1944 K B D

Where a builder acquired land for his business partly freehold and partly leasehold (on long leases), and after developing the land and building houses thereon sold the houses on lease for a cash premium *plus* a ground rent or a higher ground rent as the case may be, the question arose whether the ground rents and improved ground rents could be taxed before realisation, and it was held that they should be treated as trading stocks and valued in accordance with *Emery's case* 20 Tax Cases 213 *Heatherr v G & J A Redfern and others*, 26 Tax Cases 119 (K B D).

A company built houses and sold them to poor persons with the help of a building society, the arrangements being as follows. An out and-out conveyance is made to the purchaser for (say) £595 of which £20 is paid by him and the building society takes a mortgage on the house for £575

more than a certain fraction of

the value of the house, it pays the company only £501 2/3. The company agrees to guarantee the society £150, and as a concession, is allowed to deposit £73 1/3 with the society—at 4 per cent interest—as guarantee. The security is retained by the society till the mortgage loan is reduced to £300. The question arose whether the deposit of £73 1/3 should be taken as an asset at its full value in assessing the company's profits, and it was held by the Court of Appeal that in view of its contingent nature, since it was not returnable in certain events it should be estimated as an asset, not necessarily at its full face value. The House of Lords confirmed this decision subject to the condition that if an estimation was not possible, the sums deposited with the society should not be treated as trading receipts except to the extent to which they were released to the company during the accounting period in question *John Cronk & Sons v Harrison*, 20 Tax Cases 612 (H.L.), (1937) A.C. 185.

This, however, does not mean that a debt which can be valued should be kept out of account altogether and left over to be considered at the time of realisation. So where an assessee, a builder and dealer in properties having bought a plot of land for £37,500, formed a private company with two other persons and transferred the property to the company for £50,000 £12,500 (the assessee's profit) being *inter alia*, treated as a loan due to the assessee from the company and eventually the company did not realise the expected profit and the assessee did not receive what was due to him the Court disallowed the claim of the assessee that the £12,500 should not be taken into account at the time of credit to him of the loan, in computing his taxable income for that period. The debt was like any other trading book debt and there was no reason why it should not be included of course at its proper valuation. In this case there was no evidence at that time that the debt was bad or doubtful. *Lock v Jones* 1942 I.T.R. (Sup.) 153 (K.B.D.). A speculative builder erected small houses which the purchasers bought, first with advances from a building society which had the first mortgage over the houses and then with a further loan from a builder to cover the difference between the cost and the advance by the society, this loan being covered either by a second mortgage or promissory note. The question arose whether these debts covered by the second mortgage or promissory note should be valued from time to time (following *Cronk & Son's Case*) or as trading book debts, i.e., at full value less allowance for bad debts and it was held that they were book debts. In the *Cronk & Son's Case*, the subject matter of the valuation was not anything provided by the purchaser, but a deposit by the vendor in favour of the building society which deposit might become irrecoverable by the vendor whereas in this case the debt was due from the purchaser to the vendor and was a debt pure and simple. *Alsolson v Talbot*, 1944 T.R. 195 (H.L.). A loan by an insolvent company to a building society, advanced as such and carrying interest, even though the latter may be waived in certain circumstances does not cease to be a loan merely because it is open to the debtor to repay the loan *cum* interest by a transfer of groundrents, and does not make the transaction one of purchase of property. Therefore the difference between the value of groundrents received and the loan is taxable profit. It was argued unsuccessfully by the assessee that the transaction was one of purchase of property and that in any case the profit had not been realised. *Ruskin Investments, Ltd v Cofeman*, 25 Tax Cas. 187 (1943) 1 All E.R. 378 (C.A.).

An assessee who dealt in stocks and shares used to adjust his losses and gains only when the shares, etc., were finally sold. A company whose shares he possessed was reconstructed and reduced shares of a smaller value were allotted to the shareholders in lieu of the previous shares. The assessee claimed on the analogy of the *Royal Insurance case*, 14 Tax Cases 22 that he should be allowed the loss on the change of value of shares but the claim was disallowed *Bansil Abirchand v Commissioner of Income tax, C P*, 6 ITC 318.

The privilege of subscribing for shares at less than the true or market value—even if the privilege is not transferable—is a taxable profit in so far as it can be turned into money. The rule in *Tennont v Smith*, 3 Tax Cases 158, (1892) A C 150, applies only to privileges that cannot be turned into money, *Salmon v Wright*, 13 A.T.C. 292 (CA).

If a lessor receives part of the rent in kind, e.g., coal he should include the value thereof in his account of rent, *Hatherton v Commissioners of Inland Revenue*, 15 A.T.C. 173, *Commissioners of Inland Revenue v Bailie*, 20 Tax Cases 187, (1936) S.C. 438. Regarding receipt of agricultural income in kind, see notes under section 2 (1) and *Commissioner of Income tax, Madras v Mathias*, 1937 I.T.R. 435 on appeal to the P.C. 1939 I.T.R. 49 and *Commissioner of Income tax, Burma v Kyauktaga Grant, Ltd.*, 1937 I.T.R. 580.

Where a money lender takes over property deliberately at an agreed valuation in satisfaction of his debts and not at an arbitrary or fictitious figure, he is bound by that value, the more especially in an assessment made under section 23 (4), *Naba Kumar Singh v Commissioner of Income tax, Bengal*, 1944 I.T.R. 327.

Where a debt is discharged partly by payment either in kind (money's worth) or in cash and partly by a fresh evidence of debt (promissory note), the latter is not 'income'. Receiving an I.O.U. is not like receiving a house or jewellery, in the former case the debtor's liability still remains while in the latter it does not, *Maharajahdiraj of Darbhanga v Commissioner of Income tax*, 9 Pat 240 4 ITC 283 (approved by Privy Council). An I.O.U. is merely a document or a voucher of debt possessing certain legal attributes. To give security for a debt is not to pay it, the giving of better or additional security makes no difference. When therefore a mortgage was substituted by another, the grantors being different and the property mortgaged being larger, it was held by the Privy Council that the discharge of the old mortgage was only an incident in the substitution of one security by another and that there was no realisation either of capital or of interest at the time of such substitution, *Raja Raghunandan Prasad Singh v Commissioner of Income tax, Bihar and Orissa*, 1933 I.T.R. 113, 64 M.L.J. 544, A.I.R. 1933 P.C. 101.

In *Raja Raghunandan Prasad Singh's case*, the accounts were on a cash basis and the assessee did not regard the interest on the old mortgage as having been liquidated by the execution and delivery to him of the new mortgage. Further, his accounts did not show the interest under the old loan as having been received or paid. In the *Darbhanga case*, there was an arrangement affecting the whole indebtedness whereby certain assets were accepted in part satisfaction and promissory notes were taken for the balance, there was no continuous or open account and the general rule therefore prevailed that the giving of a promissory note did not amount to payment. Where, however, the assessee himself regards the delivery of the fresh promissory note as amounting to a liquidation of the claim to

interest on the old loan and his books also record the transactions to the same effect, the interest is taxable as income *V S U R Firm v Commissioner of Income tax, Burma*, 1935 ITR. 158. Similarly, where a debtor gave a promissory note in payment of interest on an existing debt and such note was accepted in settlement of the interest, the creditor showing in his accounts (the interest account and the personal account of the debtor) that the item was received during the year of execution of the note it was held that the Income tax Officer had materials on which to find that the interest had accrued to the creditor (assessee) during the year in question *M A L Chettyar Firm v Commissioner of Income tax, Burma* 1935 ITR 193.

Where a moneylender takes over land in satisfaction of debts due to him, the amount of debt is not a true criterion of the value of the land, which should be estimated on its merits (unless it is ascertained by actual sale during the accounting year) the excess of the value of the land over the principal being treated as income. If there is a deficiency, no tax should be levied. But in all cases an adjustment should be made when the land is actually sold. Annual re valuation would not be permissible since lands are not stock in trade of a money lender, *Commissioner of Income tax, Burma v P L S M Firm*, 1934 ITR. 417.

Where a mortgagee purchases property in a public auction in execution of his mortgage decree the price that he bids in the auction is *prima facie* the market value of the property. It is open to the Income tax Officer, however to place a different value on it if there is evidence for that conclusion such as an admission by the assessee or the record of valuation for land cess but there is no onus on the assessee and any failure on his part to produce evidence cannot be taken as conclusive of the property being worth more. The fact that the mortgagee delayed suing or that he sued for the full amount and paid court-fees, etc., thereon are at best only suspicious and cannot justify an enhancement of the value of the property, *Bishwanath Singh Sharma v Commissioner of Income tax, B & O*, ITR 474.

Whatever a debtor's right to allocate payments by him as between interest and principal where a creditor takes over property in satisfaction of his debts, the excess of the purchase price (or value) of the property over the principal represents interest *In re Lachhmandas Brijvallabdas*, 1942 ITR 186 (All).

Where an assessee bought certain lands outside a big town with borrowed money and developed a suburban area out of a part of these lands, spending money on wells a market and the like the Income tax Officer assessed the profits in a particular year on the basis of the area sold in that year its original cost and a proportionate share of the development expenses. In view of the fact that three fourths of the land were still unsold the High Court held that there was no evidence for the conclusion of the Income-tax Officer, *In re Mody* 1940 ITR. 179 (Bom). All that the ruling means is that on the facts of the case, land was not stock in trade and not that in every such venture profits do not accrue until the last bit had been sold. A similar ruling was given in *Commissioner of Income tax, Burma v A K A R family* 1941 ITR 347 in which a money lender took over property in settlement of a debt and sold it gradually in bits. It was held that the profits could not be ascertained until all the bits had been sold. In a Rhodesian case *British South Africa Co v Commissioner of Income tax*, 1946 ITR. (Supp) 17 it was

argued that the cost of acquiring the assets (forming the stock in trade), viz., various rights and concessions could not be allocated to particular assets therefore it was claimed on the basis of expert evidence and of an arrangement with the British Revenue authorities, that no profits should be considered to arise until the total cost had first been recouped by sales and that thereafter the sale proceeds should be taxed in full as profits. The Privy Council rejected this claim. The real point in such cases, is that whether a cash or an accrued system is adopted stock in trade must be valued on a reasonable basis on the last day of closing the accounts and profit deduced on the basis of that valuation.

An assessee purchased an annuity, and later on released the annuity company from a part of its obligation in return for its paying certain insurance premia on the life of the assessee, and it was held that the payments made by the annuity company to the insurance company were the assessee's income being money's worth. *Commissioners of Inland Revenue v Lord Forster*, 19 Tax Cases 738.

W bought a farm for his son and the farm became valuable as building land. Not thinking it wise to hand over the whole of the property to his son for development, he arranged with two friends *O* and *B* to convey the property to them jointly with *W* junior. The conveyance stated the price to be £15,000 but simultaneously *O* and *B* undertook to pay to *W* junior £25,000 as and when they resold the whole of the property. The £15,000 was provided by *O* and *B*. It was held that the cost of the property was £40,000, the liability to pay £25,000 to *W* junior being a valuable obligation. *Bennett, Oswald and Worsett v Bennett*, 16 A.T.C. 142 (K.B.).

During the War, dividends and interest, on shares and securities belonging to a British subject were paid on his account to certain German banks which held the securities, and were duly authorised to receive the monies as his agents. Held, that such dividends accrued or arose when paid to such banks even though not available to the owner because of wartime restrictions and not when actually received by him after the Peace Treaty or when the embargoes were removed. On the other hand when interest on foreign bearer bonds (Budapest City) was payable in London in sterling but under a decree of the Hungarian Government was paid only through the Hungarian National Bank and only to the extent that money was required for use in that country, and a holder of the interest coupons sold them for what they could fetch in the London Market, it was held that the owner had received no interest which could be taxed as income, what had been received was the value of the expectation of interest. *Commissioners of Inland Revenue v Paget* 16 A.T.C. 318 (K.B.), 17 A.T.C. 1 (C.A.). Again, where a defaulting Government offered certain alternatives to its bondholders and a holder, without accepting any of the alternatives, sold his interest coupons in the market, it was held that the sale proceeds did not constitute the receipt of interest. *Commissioners of Inland Revenue v Paget* 16 A.T.C. 318 (K.B.) 17 A.T.C. 1 (C.A.). In all such cases, no doubt if the holder traded in these coupons, he would be taxable.

Again when another defaulting Government issued funding bonds and a holder accepted these bonds and sold them, it was held that, while the value of the bonds, being money's worth, should be brought into the account to work out profit and loss, the receipt could not be taxed in itself as interest, since a creditor does not receive payment of interest merely

from the debtor's promise to pay, *Cross v London Provincial Trust*, 17 ATC 15 (CA). If the holder is not a trader in such bonds, all that he receives will be merely a capital asset in lieu of the interest lost.

The last two rulings referred to (*Cross and Paget cases*) have been largely nullified by the United Kingdom Finance Act of 1938 permitting the taxation of the value of interest coupons sold separately from the bonds to which they relate.

Where, in lieu of a dividend, a company issues a certificate of debt redeemable at a later date the payments are income of the shareholder when actually paid and not when the certificates are issued, for a promise to pay at a future date is not the same as payment. The company, in this case, had made profits but did not have the necessary cash, and being unwilling to borrow, issued these certificates so as to fix the dividend rights of the shareholders and make those rights marketable. *Associated Insulation Products v Golar*, 1944 CA.

Interest—Added to principal—If compound interest is payable to a creditor, and the interest is added to the principal periodically, no payment being made to the creditor either in cash or by credit in the debtor's accounts, such interest is not taxable, *Board of Revenue v Pydah Venkatachalapathy Garu*, 1 ITC 185, AIR 1922 M 426. This decision was given under the old Act, in which there was no section corresponding to the present section 13. According to the present Act, the taxability of such interest would depend on how the assessee, the creditor, treats it in his accounts, *Haji Sheikh Ahmad Din v Commissioner of Income tax, Punjab*, 1934 ITR 367. If nothing can be deduced clearly from the method of accounting adopted by the assessee, the Income-tax Officer is the sole arbiter to decide the question, and no question of law can arise though the assessee can appeal in the usual course against the Income-tax Officer's decision. A money-lender usually finds it convenient to keep accounts on a 'cash' basis and not on the 'mercantile' or 'accrued' basis. The mere fact that interest is added to the accounts of the debtors at the end of each year will not in itself make the accounts 'mercantile', see *Sethi Nanheela's case*, 3 ITC 28, AIR 1928 Nag 241 and *Chitnani's case*, 3 ITC 321, AIR 1929 Nag 50. The mere conclusion of a contract yields no immediate profit. The test is whether interest has become due in such a manner that the creditor can receive it if he desires or has in fact been received in some form or other, if not in cash, at least in kind or by adjustment. Interest on a deposit with a banker which the latter had credited in favour of the depositor and could have been drawn by the depositor at any time has been held to have accrued to the depositor, *Commissioner of Income tax, C P v Bhikam Chand Lakshmi Chand*, 7 ITC 184.

If a money lender who keeps his accounts on a cash basis takes a fresh bond from his debtor in lieu of the old one plus accrued interest, the new bond does not bring any income to the creditor at the time of substitution of the bond. *Raja Raghurandan Prasad Singh v Commissioner of Income-tax*, AIR 1933 PC 101, 64 MLJ 544, 1933 ITR 113 (PC). Under a mercantile system of accounting, the converse need not necessarily happen. For example transactions might be passed through a suspense head before being taken to Profit and Loss. Compare the observations in *Commissioners of Taxes v Melbourne Trust*, (1914) AC 1001. If however, the assessee not only adds the interest to the debit against the debtor but

takes the credit to his own personal account or the profit and loss account (either through an interest account or otherwise), the interest will be part of his taxable income, see *Commissioner of Income-tax, U P v Shrinath Singari Bai*, 1945 ITR 224 (All) overruling *Jagmandar Das v Commissioner of Income-tax, U P*, 1935 ITR 140 (All). So much depends in all such cases on the conduct of the assessee as reflected in his book-keeping and method of computing profits for his own purposes though he must not keep his books in such a manner as to obscure the true profits for the period in question.

In *Narayanan Chetti v Suppayya Chetti*, 43 Mad 629 it was held that if money is deposited on the understanding that interest is added on to capital at each rest and the principal plus interest treated as a fresh deposit Article 60 (and not Article 63) of the Limitation Act applied to the recovery of the interest, i.e., three years from the date of demand—the interest becoming a depo it when it is added on to capital—and not three years from the date when interest became due. Following the above it was held in *Commissioner of Income tax v Pethaperumal Chetty*, 3 ITC 278, AIR 1929 Mad 34, 55 MLJ 850 and *S V L L Lakshmanan Chettyar v Commissioner of Income tax*, 3 ITC 421 AIR 1929 Mad 675, 57 MLJ 60 that interest on deposits of the kind mentioned above should for income tax purposes be treated as having been received and added to the principal. The distinguishing feature between these deposits (peculiar among Nattukottai Chetties) and ordinary cases of compound interest is that in the latter the principal continues to be the original sum advanced while in the former the interest is constructively received at each rest and merged in the principal.

In order to claim an allowance in respect of interest paid on borrowed capital, it must be interest paid during the year of account—either in cash or by adjustment. The real criterion in determining when the interest is paid depends not so much on the formal method of book keeping adopted by the assessee as on the arrangements for payment of interest between the assessee and his creditor. Held, accordingly, in the case of a loan in which at the end of each rest the income became merged in the capital, that the interest was paid at the end of each rest *J P Pethaperumal Chetti v Commissioner of Income-tax, Madras*, AIR 1929 Mad 34, 3 ITC 278.

It was held in the United Kingdom, In re *Cravens Mortgage Davies v Craven*, (1907) 2 Ch 448—an Income-tax case—that accumulated interest on a mortgage was taxable in so far as it had not been made capital by contract between the parties.

In *In re Morris Mayhew v Halton*, (1922) 1 Ch 126 (C of A)—also an Income tax case—it was held that compound interest with periodical rests, though loosely spoken of as the periodical capitalisation of interest, does not really make the interest capital. For the convenience of book keeping the sums accruing as interest periodically may be added to capital, but they are really overdue interest on which further interest is paid and cannot become capital until after the loan account between the creditor and debtor has been adjusted and the creditor has received the interest—either in cash or by adjustment—and actually capitalised it, e.g., by re investment. Doubts were also expressed whether a mere contract between the debtor and creditor to make interest capital would make it such for Income-tax purposes.

The two United Kingdom rulings referred to above were followed by the Patna High Court in *Raja Raghunandan Prasad Singh's case* 9 Pat 48 4 ITC 123

A moneylender's books consisted of the debtor's personal accounts in which the interest due was entered every year as also the interest received and there was no separate interest account or profit and loss account bringing together in one place the total interest or profits of the business. There was also a cash book but no interest ledger or account. Every year the assessee moneylender totalled the figures of accrued interest and returned the total as his profits but in one year he changed his mind and claimed to be taxed on the basis of realisations. The Income tax department objected to the claim on the ground that the assessee attempted to change his method of accounting. *Terrell, CJ*, thought that the assessee had not regularly employed any method of accounting and that his request involved no change in the basis of accounting but only in that of assessment, he also thought that interest accrued but not realised should be assessed only if taken credit for in a Profit and Loss Account. *Macpherson and Agarwala JJ*, however held that the assessee had regularly employed a particular method of accounting though unscientific and had taken all accrued interest into account in computing his profits. The Income tax Department therefore were not wrong in holding him to his own system of accounting. *Dhakeswar Prasad v Commissioner of Income tax Bihar and Orissa* 1936 ITR 71

In connection with capitalisation of interest a question arises in the United Kingdom (but not in India except possibly in respect of payment to non residents) as between the payer and the payee whether the payment is in truth interest or not for if it is interest the payer can deduct tax and if it is capital he cannot. The substance of the course of decisions appears to be that if only the net annual payments (i.e., less tax) are added on and capitalised tax cannot be deducted again at the time of a later settlement otherwise if the gross interest is added on tax can be deducted at the time of final payment.

Allocation between Principal and Interest—Where interest is outstanding on a principal sum due and the creditor receives an open payment from the debtor without any appropriation of the payment as between principal and interest by either creditor or debtor the presumption is that the payment is attributable in the first instance towards the outstanding interest. In *re Gopiram Gobindram*, 1936 ITR 157 (Cal). In a question with the Revenue the tax payer is entitled to appropriate payments as between capital and interest in the manner least disadvantageous to himself and if a certain debt is settled by the acceptance of certain assets in part satisfaction of the debt and of a promissory note for the balance the basis of the presumption *viz* that it is to the creditor's advantage to allocate payments in the first place to interest leaving the interest bearing capital outstanding automatically disappears. *Commissioner of Income tax Bihar and Orissa v Maharajadhiraj of Dharbhanga* 12 Pat. 318 1933 ITR 94 (PC) see also *Cross v London and Provincial Trust Ltd* 1938 ITR 112. Where the deed relating to the debt definitely stipulates that moneys paid should be first appropriated towards interest and the balance only if any, towards principal the Income tax authorities are entitled to assume that appropriation has in fact been so made. *Venkatadri Appa Row Parthasaradhi Appa Rao*, 48 IA 150 44 Mad 570 (PC)

If the creditor can show that in spite of a large balance being legally recoverable it had been necessary to close the account and the account had in fact been closed he might reasonably claim to balance the total receipts first against capital and the remainder only against interest *Maharajadhiraj of Dharbhanga v Commissioner of Income tax*, 4 I.T.C. 283 9 Pat 240

There is no rule of law that in all cases there is an absolute or universal right to attribute interest payments to income if there is any income available

The actual facts in each case must be examined the receipt must be neutral the attribution as between principal and interest must not be inconsistent with the evidence and the conduct of the tax payer must not be inconsistent with the attribution *Paton (trustee for Fenton) v Commissioners of Inland Revenue* 15 A.T.C. 11 (C.A.) 17 A.T.C. 57 (H.L.) As regards capitalisation of interest generally and in particular as to when income may be said to accrue on this account there are in addition to the rulings already cited a number of rulings in the United Kingdom not altogether consistent with each other and resting largely on rather subtle and even obscure distinctions based on the facts of each case e.g. *Earl of Carnarvon v Commissioners of Inland Revenue* 19 Tax Cases 455 *Marland v Commissioners of Inland Revenue* 19 Tax Cases 467 (overruled in *Laurence Graham's case* 17 A.T.C. 105) *Commissioners of Inland Revenue v Holder*, (1931) 2 K.B. 81 16 Tax Cases 540 (overruled in *Paton's Case*) *Commissioners of Inland Revenue v Haddington* 8 Tax Cases 711 (1924) 61 Sc.L.R. 356 *Leigh v Commissioners of Inland Revenue* (1928) 1 K.B. 73 11 Tax Cases 590 *Lambe v Commissioners of Inland Revenue* (1934) 1 K.B. 178 18 Tax Cases 212 *Grey v Tiley* 16 Tax Cases 414 *Champney's Executors v Commissioners of Inland Revenue*, 19 Tax Cases 375 (C.A.) *Bishop v Belfield*, and *Commissioners of Inland Revenue v Laurence Graham & Co* 17 A.T.C. 105 (C.A.)

A further complication under the United Kingdom law in respect of some of these cases is the right of the payer of certain kinds of annual payments to deduct income-tax from the payments, and as a consequence, the spreading back in certain cases of such payments over past years because they relate back to the events of earlier years. See also *English Dairies Ltd v Inland Revenue* 11 Tax Cases 597 and *Robinson Drew and Clydesdale v Ditto* 16 Tax Cases 595

In *Holder's case* (1931) 2 K.B. 81 16 Tax Cases 540 the Court of Appeal had misunderstood *Reddie v Williamson* (1863) 1 Macpherson 228. The practice of bankers adding interest half yearly to overdraft accounts is historically only an ingenious device to circumvent old usury laws against compound interest and irrespective of whether or not as between banker and customer the accrued interest has been merged in capital and ceased to be recoverable as interest it is not paid by the customer within the meaning of the Income tax Acts. Further, the fact that the bank treats such interest as income for its income-tax does not necessarily lead to the inference that the customer had paid it for the purpose of ascertaining his income *Paton (trustee for Fenton) v Commissioners of Inland Revenue* 15 A.T.C. 11 (C.A.) 17 A.T.C. 57 (H.L.) The position in respect of capitalised interest in the United Kingdom has been elucidated by a recent ruling of the House of Lords *Inland Revenue v Oatfield* (1945) 1 All.E.R. 641 in which it was held that unpaid interest which is added to capital is not taxable. Per Lord Macmillan. "The option to capitalise is an option to exact compound interest."

But if the interest is not paid no right or duty to deduct tax arises the unpaid interest never ceases to retain its character as interest although it has from time to time been added to the capital indebtedness and has carried interest in turn.

All this is in exact consonance with the view of Lord Sterndale in *In re Morris* (1922) 1 Ch 126, per Lord Porter. I do not find myself able to distinguish in principle between that case (*Paton v Inland Revenue* 1938 AC 341 17 ATC 57) and the one the House is now considering. In each case there is a debt and in each case there is a contract under which in default of payment a so called capitalisation of interest takes place. It is true that in the one case the contract is constituted by the custom of bankers and in the other by a deed of mortgage but the substance though not the machinery is the same. Per Lord Simonds. The question in the simplest terms is whether, when the mortgagee capitalises interest the mortgagor pays it and the answer in terms as simple is that the mortgagee capitalises it just because the mortgagor does not pay it. It is not a form of payment it is not a substitute for payment the interest remains unpaid but it is impressed with a new quality viz that it carries interest as if it were capital. The interest was already charged on the security it adds nothing to speak of it as a capital charge. I will assume that a mortgagee may accept in full satisfaction of interest something that is not money but money's worth. But that does not justify the further assumption in the reasoning of the Court of Appeal that capitalisation of interest is payment of interest. The judgment followed *Paton v Inland Revenue* already referred to and the Privy Council ruling in *Raghunandan Prasad Singh v Income tax Commissioner* (1933) 60 IA 133 1 ITR 113.

Where a debtor appropriated in his own books certain payments to interest but did not communicate any instructions to the creditor who merely credited the account to the personal account of the debtor and subsequently the debtor reversed the entries in his books claiming in a particular year the interest as a deduction from the profits of his business and the next year as a deduction from his income from house property the Income tax Authorities held that the debtor was in collusion with the creditor and that the creditor must have known that he unappropriated payments were meant for interest. The Court saw no justification for such an inference. It was to the debtor's advantage that a payment should be credited to principal rather than to interest and whatever manipulations the debtor might have made in his books could not by themselves support an inference that the creditor assessee had received instructions to take credit for interest. In *re Alwarilal Babulal* 1941 ITR 627 (All). Where one of two judgment debtors paid a sum in full satisfaction of his liability viz half the costs half the principal and half the interest the Income-tax authorities appropriated the greater part of the amount to interest in the accounts of the creditor (assessee) on the ground that the assessee had made no appropriation in his books. The Court disallowed the claim of the Income tax department and ruled that only half the interest as paid by the debtor representing his share of the liability was taxable. *Siddheswar Prasad Narain Singh v Commissioner of Income tax B & O* 1942 ITR 344.

Mortgagee—Decree holder—Purchase by—Interest—Adjustment of—When a mortgagee who is a decree holder buys the property with the permission of the Court there are really two separate transactions viz the purchase of the property and the repayment of the debt. Order 21

rule 72 (2) of the Civil Procedure Code provides that 'the purchase money and the amount due on the decree may be set-off against one another and the Court executing the decree shall enter up satisfaction of the decree in whole or in part accordingly. The mortgagee cannot therefore claim that he has not received any interest and that all that he has received is the property i.e., capital *Raja Raghunandan Prasad Singh and another v Commissioner of Income tax* 4 ITC 123 following *Scottish and Canadian General Investment Co v Easson* 59 ScLR 248, 8 Tax Cases 265 and *Californian Copper Syndicate v Harris* 6 F 894, 7 Tax Cases 167. The purchase price of the property should be apportioned between principal and interest the excess of purchase price over the principal sum of the mortgage being considered a payment of interest *Raja Raghunandan Prasad Singh v Commissioner of Income tax B & O*, 1933 ITR 113 64 MLJ 544 AIR 1933 PC 101 (PC), see also *Commissioner of Income tax B & O v Maharajadhiraj of Dharbhanga*, 1933 ITR 94 12 Pat 318 (PC). It would not be correct in such cases to allocate first to interest. In the absence of evidence to the contrary the purchase price must be taken to represent market value *Raja Raghunandan Prasad Singh v Commissioner of Income tax Bihar and Orissa* 1933 ITR 113 64 MLJ 544 AIR 1933 PC 101 (PC) see also *Commissioner of Income tax Bihar and Orissa v Maharajadhiraj of Dharbhanga* 1933 ITR 94 12 Pat 318 (PC).

The profit or gains arising to a mortgagee from the buying in of mortgaged property accrue not on the date of decree nor on the date of sale nor on the date of delivery of possession but on the date on which the sale becomes absolute. The decree is only a step towards realisation. On the date of sale the purchaser has no indefeasible right since the sale can be set aside. The fact that when the sale becomes absolute the property vests in the purchaser retrospectively makes no difference. *Raja Raghunandan Prasad Singh v Commissioner of Income tax* 1933 ITR 113 (PC). Where a mortgagee takes over property in satisfaction of his principal and interest the interest accrues to him not when he gets possession of the property but when the conveyance of sale is made and he gets his title. In *re Kunjamal & Sons* 1941 ITR 358 (All).

Loss—Shares—The loss sustained by a dealer in shares arising from the winding up of a company in which he holds shares should be claimed at the time of winding up when the shares lose value, and not either before or after. *Bansal Abirchand v Commissioner of Income tax CP* 6 ITC 318.

Reserves—Distributed as profits—In 1918 a company set aside Rs. 1,00,000 in its accounts as a Reserve for bad and doubtful debts. In 1922 the Reserve was distributed as profit. The Company contended that the sum in question was profit of the year 1918 and that having escaped a cessment then was under section 34 not liable to tax in 1922, more than one year having elapsed. Held that the sum was liable to tax.

'At the end of any given year of any Company's working unless the business has been wound up there must always be certain items in suspense—items of cash which are not yet due to the company or which have not yet been recovered. At the end of the year some of these items may be regarded by the company as good, some as bad, some as doubtful and if the company places on the debit side a certain sum to meet the contingency that some of these debts will prove irre-

coverable, that sum is not a profit but a liability, and the amount of profits arrived at after deduction of that sum is reduced by that very amount. In fact, the sum of Rs 100,000 in question, though part of the income in 1918 was not profit—it was not shown as profit in the accounts, it was not treated as profit by the company, and it did not really become profit until the doubtful debts against which it was set were recovered. It was not treated as profit nor did it become real profit until 1922 when it was incorporated as such in the company's accounts. When a business is a cash business and accounting is not kept in the mercantile fashion no provision is made for bad debts but when the mercantile system of accountancy is followed provision is invariably made for bad and doubtful debts. In *re the Delhi Cloth and General Mills Co Ltd*, 8 Lah 269, 2 ITC 439.

Against the above decision the assessee applied for leave to appeal to the Privy Council but was refused such leave, (*ibid*)

Devices to conceal income—Where as a consequence of a device adopted by an assessee e.g. fictitious cross entries income escaped assessment in a particular year such income cannot be taxed automatically in later years when detected except to the extent that in accordance with the assessee's regular system of accounting if one is so employed it may be possible to attribute income to the year of detection instead of the year of escape. In *re Ratanchand Lallumal* 1936 ITR 189 (All).

Double taxation of same sums—If a person has been taxed in one year in respect of book debts owing to him he cannot again be taxed on the same sums of money when the debts are received in cash in a later year. A man cannot be taxed twice in respect of the same sum. *Commissioner of Income tax v Sarwarajadu* 2 ITC 208. The assessee is entitled to show that the income etc. included in the later assessment was included in the earlier one and it is a question of fact to be decided on the evidence whether it was so included. The Income tax authorities must apply their minds to the materials placed before them, and it is not open to them to argue *a priori* that there can be no double assessment because the earlier assessment was made on a mere estimate. *Commissioner of Income tax, Burma v C T V S Chelliar Firm* 4 ITC. 160.

Where an assessee's basis of accounting is changed over from an accrued basis to a cash basis, there may be items which are taxed twice over—once in the preceding year and again in the current year. Where the basis itself is not in dispute there is no provision in the law under which the assessee can claim the exclusion of the item from the second assessment unless a claim can be made under section 48-A. In *re Amritsar Produce Exchange* 1937 ITR 307 (Lah). Section 48-A has been since repealed and merged in section 48 see notes under that section.

It has also been held in a Scottish case *Commissioners of Inland Revenue v Morrison* 17 Tax Cases 325 (1932) SC 639, that when an assessee changes over from an earnings basis to a cash basis he cannot claim to exclude in the second year items which were due to him at the end of the first year. A tax is not paid on particular items of a profit and loss account but on the profits and gains of the business as a whole in a given year, and on the earnings basis book debts are only one factor taken into account in estimating profits and gains. The exclusion of such items from the profits of later years is therefore only a concession.

In the case of a moneylender whose accounts had been kept substantially on the mercantile basis the Income tax Department decided to tax income for several years on the cash basis as a consequence of the ruling in *Chitnavas' case* 3 ITC 321. The assessee later on offered to be taxed on the mercantile basis if the Income tax Officer excluded certain untaxed items of preceding years and received the tax on other previously untaxed items in instalments. The accounts had all along been kept on the same basis as mercantile and the change had only been in respect of the basis of assessment. The Income tax Officer did not accept the assessee's conditions but nevertheless added to the current assessment the amounts that had not been taxed in earlier years. It was held that in the absence of the unqualified acceptance of the assessee the Income tax Officer could tax escaped income only in accordance with section 34. *Amrستمان v Commissioner of Income tax CP* 1937 ITR 721.

In *Commissioner of Income tax Bombay v Madan* 1945 ITR 1 by an unusual case a company had for several years wrongly deducted tax from dividends and was compelled by a court to repay such tax. The question arose whether such repayment was taxable in the shareholder's hands as dividend and the appellate tribunal found as a fact that during the years when tax had been wrongly deducted by the company, the shareholder had been assessed on a gross dividend which was higher than the net dividend plus the tax deducted. Consequently the repaid tax could not be taxed as a new dividend at the time of repayment. The High Court declined to interfere on the ground that the question was one of fact.

Applies only to assessments under section 23 (3).—The proviso to this section applies strictly speaking only to assessments made under section 23 (3). If the return of the assessee is accepted and the assessment made under section 23 (1) no question can arise under section 13. Nor will the section apply if the assessee is in default and as a consequence assessed under section 23 (4) inasmuch as the Income tax Officer is not bound to follow section 13. This section in fact adds nothing to and takes nothing away from section 23 (3). *Gunda Subbaya v Commissioner of Income tax Madras* 1939 ITR 21. There is nothing however to prevent the Income tax Officer even when acting under section 23 (4) from following section 13 if he has access to the assessee's accounts.

The absence of any reference in section 23 (3) to section 13 or to its substance is due partly to the fact that it would have been redundant and partly to the fact that section 13 applies only to sections 10 to 12 whereas section 23 is of general application. The only section under which an assessment can be made is section 23 and the only section which provides the method of computing profits etc. under sections 10 to 12 is section 13. Therefore sections 13 and 23 cannot be divorced from each other. So when making an assessment under section 23 (3) if the Income tax Officer is not satisfied after examining the accounts [under section 22 (4)] and the evidence produced [under section 23 (2)] it is open to him to avail himself of the provisions of section 13 if he finds that the accounts do not serve as a safe guide in calculating the assessee's profits. *Gangaram Balmukund v Commissioner of Income tax Punjab*, 1937 ITR 464. In doing so the Income-tax Officer must take steps to procure material if not already in possession of it and he can call witnesses and make enquiries and on the material before him make an assessment to the best of his judgment. The

only difference between such an assessment and one under section 23 (4) is that the method of the latter would be more summary *Gunda Subbaya v Commissioner of Income tax, Madras, 1939 ITR 21*

Section 23 deals with assessment and section 13 with the computation of profits one of the elements in the assessment *Commissioner of Income tax C P v Badridas Ramrai 1939 ITR 613*

The use of the proviso to section 13 can only arise in cases falling under section 23 (3). In such cases if the accounts are rejected as to method of accounting but accepted as to facts *i.e.*, as being true the need for the proviso will at once arise. The proviso merely lays down how the materials before the Income tax Officer shall be used and has nothing to do with what the Income tax Officer should do with information obtained by his private enquiries *Commissioner of Income tax Sind v Khemchand Ramdas 1940 ITR 159*

While it is agreed by all that where true accounts are produced but the profits are not properly deducible therefrom the proviso operates there is difference of opinion in respect of its applicability to cases in which the accounts are rejected as unreliable. According to one view (that of the majority in *Sardar Gurmukh Singh v Commissioner of Income tax Punjab, 1944 ITR 393* which reviews most of the authorities) the proviso still applies so long as the assessment is made under sub section (3) of section 23 and not under sub section (4). According to the other view it is illogical to reject accounts as false and yet base the assessment on them though admissions made therein or inferences from them can be used by the Income tax Officer in making the assessment. Section 23 is complete in itself and the law deliberately says nothing as to how evidence shall be appraised and what the Income tax Officer should do when he rejects evidence as worthless.

Flat rate profits—Estimate of—It is under this section that assessments are made on an assumed flat rate of profits on the turnover. Such a flat assessment can be made only if the accounts kept by the assessee are such that the profits cannot be easily deduced therefrom. The basis of flat rates is obviously the previous practice and experience of the Department in regard to similar trades *Patnialal v Commissioner of Income tax 2 ITC 432*. The flat rate which is assumed as the basis of profits does not raise any question of law *Ferozeshah v Commissioner of Income tax Punjab 4 ITC 315, Asgar Ali v Commissioner of Income tax Oudh 6 ITC 27*. There is nothing to prevent an Income tax Officer charging two different flat rates for two different assesseees in the same locality. No question of law is involved in this see *Dayaram Sobharam v Commissioner of Income tax, 2 ITC 26*. Where the principle of estimating at a flat rate is in itself not contested the amount of profit is entirely a question of fact *Ferozeshah v Commissioner of Income tax, Punjab 1933 ITR 219 (P.C.) Ramchandra Tolba Tel v Commissioner of Income tax 1939 ITR 151 In re Naradunp Chandra Nagendra Das 1939 ITR 488 (Cal)*

A company sold stamps through retail dealers who passed them on to purchasers of goods and when the stamps were collected and presented by the purchasers prizes were given by the company. The profits of the company were the difference between the prices at which the stamps were sold to the retailers and the cost of organisation printing stamps and prizes. Since the unredeemed coupons were substantial the cash basis of accounting would have resulted in a loss in the last year of the business and the

question arose what allowance should be made for the unredeemed coupons in a given year. It was held that the allowance to be made was a question of fact, *Crown v Commissioners of Inland Revenue*, 19 Tax Cases 155.

Return—Non-acceptance of—Notice to assessee—While under section 13 it is open to the Income tax Officer to compute the income on such basis as he may decide if the method of accounting adopted by the assessee is irregular or such that income cannot be properly deduced from the accounts, this section does not entitle the Income tax Officer to dispense with a notice under section 23 (2) if he does not accept the return filed by the assessee, *Rampratap Sukhdal v Commissioner of Income tax, Delhi*, 3 ITC 362. That is to say, if the income as calculated by the Income-tax Officer from the accounts [produced under section 22 (4)] or any other evidence differs from that given in the return filed by the assessee, the Income tax Officer should give the assessee an opportunity of explaining the return and producing the evidence in support of it, even though, in the end, the Income-tax Officer may have to work out the income, on his own basis, from the accounts produced or the other evidence. The notice under section 23 (2) is not bound to disclose on what basis the Income tax Officer proposes to make the assessment.

The proviso applies only when no method of accounting has been regularly employed, or when the method is such that in the opinion of the Income-tax Officer the income cannot properly be deduced therefrom. In a case therefore in which the Income-tax Officer said nothing in his assessment order about the method of accounting employed by the assessee, but merely expressed a doubt, for which he gave no reasons as to the genuineness of the accounts, it was held that a notice under section 23 (2) was necessary if the Income tax Officer did not accept the return and that in the absence of such a notice, the assessment was illegal, see *Kesri Das & Sons v Commissioner of Income-tax, Lahore*, 7 Lah. 138, 2 ITC 213.

If the assessee's accounts are found to be not genuine there is no obligation either under the law or in ordinary fairness to inform the assessee of the basis on which the Income-tax Officer proposes to make an estimate of income, etc. Even if the materials before him are insufficient, the Income-tax Officer must somehow make an assessment to the best of his ability. It has been suggested however that if the accounts are not found to be false, the Income-tax Officer should inform the assessee of the defects in the accounts though the Act does not place this obligation on the Income-tax Officer, *Chan Lo Chuan and Tong Hock Hin v Commissioner of Income-tax, Burma*, 3 ITC 397, *Gunda Subbaya v Commissioner of Income-tax, Madras*, 1939 ITR 21. There is no onus on the Income tax authorities to prove by positive evidence that the accounts are unreliable or that the profits cannot be deduced therefrom or that the figure assessed by them is the correct figure, *Gangaram Balmukund v Commissioner of Income tax, Punjab*, 1937 ITR 464, *Ganesh Lal and Sons v Commissioner of Income tax, U P*, 1938 ITR 390.

"Method employed"—These words are used in the proviso refer to the manner in which the accounts are kept, and if the accounts tendered by the assessee are 'cooked' or fictitious it is, obviously, not possible to deduce the profits from them. But even if the words are used in the second alternative of the proviso in a restricted sense, i.e., as referring to the system of accounting, if the Income tax Officer rejects the accounts on the ground

that the assessee keeps no stock registers or vouchers or that he employs an inventory system only which is not conclusive in ascertaining the true profits it cannot be said that he is not attacking the method of accounting. He is therefore entitled to use the power under this proviso *Gangaram Balmukund v Commissioner of Income tax Punjab*, 1937 ITR 464, *Ganeshlal v Commissioner of Income tax*, U P 1938 ITR 390

Basis of estimates—Section 13 does not justify a bald estimate of income by the Income tax Officer without any reasons for arriving at the figure. The Income tax Officer is not entitled to make a guess without any evidence. See *Dunichand Dhaniram v Commissioner of Income tax*, 2 ITC 188 *Radheylal Balmukund v Commissioner of Income tax*, U P (All), 4 ITC 454. Where accounts have been produced and the case is not dealt with under section 23 (4) the basis and manner of computing the profits under this proviso to section 13 have to be legal and judicial. While a reference to earlier assessments of the assessee might in certain circumstances be an adequate basis a mere reference to local reputation or conditions of trade generally would not be an adequate basis. In re *Ramkhehwan and Sahe Thakurdas* 1939 ITR 607 (All). This does not however mean that even if the assessee's accounts are unreliable the Income tax Officer must base his assessment on these accounts in the absence of positive evidence to the contrary *Gangaram Balmukund v Commissioner of Income tax Punjab* 1937 ITR 464. It is the duty of the assessee to present accounts showing his true income and if he fails to do so and if the Income-tax Officer makes an estimate to the best of his ability on the materials before him the assessee must put up with it. *Maharajadhiraj of Dharbhanga v Commissioner of Income tax* 4 ITC 283. Adding on to profits suspicious credits to personal accounts for which the assessee cannot offer a satisfactory explanation will be a reasonable exercise of discretion and will not give rise to a question of law. In re *Muhamad Ayub and Muhamad Jantel* 1941 ITR 610 (All). The Income tax Officer however must be consistent and logical and must not act arbitrarily even if he has only to make an estimate. He must not for example accept only certain entries as correct and reject others as incorrect or add arbitrary figures without giving reasons for his conclusion. *Shiva Prasad Gupta v Commissioner of Income tax*, U P 3 ITC 406 *Hirabai Desai and Sons v Commissioner of Income tax Bombay* 1936 ITR 95. On the other hand he is under no obligation either to accept or to reject the accounts as a whole it is open to him to accept the accounts only partially. *Jugal Kishore Mukatlal v Commissioner of Income tax* 6 ITC 184 (All). *Commissioner of Income tax C.P. v Acharya* 1938 ITR 225. He is under no obligation to issue a notice to the assessee to that effect. *Ganeshlal Chappantal v Commissioner of Income tax*, U P 1941 ITR 81 (All). In no case may an Income tax Officer reject genuine accounts i.e., without finding that they are false merely on the ground that they are complicated see *Dunichand Dhaniram v Commissioner of Income tax* U P 4 ITC 454 (All) or that balance have not been struck. *Raghunath Mahadeo v Commissioner of Income tax Bihar and Orissa* 2 ITC 302 or that profits shown are not adequate. *Pioneer Sports Co Ltd v Commissioner of Income tax, Punjab* 1934 ITR 305 or that they do not cover the foreign business also of the assessee or that they do not show his wealth and its distribution. *P R A I M Muthukaruppan*

fact that the Income tax Officer has justifiably proceeded on a basis and in a manner of his own in computing the assessee's income does not however exempt his computation from examination on appeal and if it appears that the income tax Officer adopted a wrong method the assessment may be set aside *Commissioner of Income tax Bihar and Orissa v Maharajadhiraj of Dharbhanga* 1933 ITR 94 (PC) He should also indicate in his order the material on which he bases his assessment since his order may be the subject of an appeal *Gutda Subbaya v Commissioner of Income tax Madras* 1939 ITR 21 It should be noted that while under this section the Income tax Officer may in certain circumstances reject the assessee's method of accounting he cannot reject the account unless they are false *P R A L M Muthukaruppan Chettiar v Commissioner of Income tax Madras* 1939 ITR 76 The Court will not interfere with the action of Income-tax authorities under the proviso to section 13 unless their action is arbitrary capricious or unreasonable *Ganeshlal Ramchand v Commissioner of Income tax Punjab* 1941 ITR 241 *Makharlal Ramchand v Commissioner of Income tax N W F P* 1941 ITR 330 *Eknath Bellappa v Commissioner of Income tax Bombay* 1942 ITR 110 *Pandit Pearylal Shukla v Commissioner of Income tax UP* 1942 ITR 416 (All) *Sardar Sugar Singh v Commissioner of Income tax UP* 1942 ITR 441 (Bom)

Where an assessee's profits as disclosed by the books were unreasonably low having regard to his profits in preceding years and the current profits of others and the books did not show from whom he bought or even the nature of what he bought it was held that the Income-tax Officer had materials to justify the inference that the books did not disclose the true profits *Ganeshlal Chappanlal v Commissioner of Income tax UP*, 1941 ITR 81 (All)

The non production of debtor's accounts cannot in itself create a conclusive presumption that the debtor had paid money to the creditor (assessee) In a case therefore in which the debtor firm had ceased to exist and no question had been put by the Income-tax Officer to a partner of the firm (who appeared before him) as to payment of interest to the assessee and there was nothing to indicate that the firm's books were being deliberately withheld it was held that there was no evidence to find that interest had been received by the assessee *Naraindas Bhagwandas v Commissioner of Income tax Punjab* 7 ITC 135

In a case in which the turnover and stocks of an assessee rose but the profits shown in his books declined to a very low level notwithstanding the bullish market in the commodity in the year and the assessee did not produce extraneous evidence i.e. voucher and correspondence to support his books it was held that the Income tax authorities had evidence to justify their rejecting the accounts and making an estimate of profits at a flat rate *Badrishah Sohanlal v Commissioner of Income tax* (1946) ITR 387

The following have been held to be adequate ground for rejecting accounts as unreliable viz., suppression of vouchers for purchases in circumstances in which the existence of vouchers can be reasonably inferred (e.g. when other merchants in the same trade and locality take vouchers and produce them or when purchases are made by low paid subordinates) suspicious adjustments at critical dates (e.g. end of the year) for which no satisfactory explanation is given unexplained entries in personal ac-

counts involving transfers between the business and the proprietor's private account suppression of a part of the sales *Commissioner of Income tax Madras v Abdul Aziz Sahib*, 1939 ITR 647. The truth or falsity of the accounts is however a question of fact and the only question of law is whether there is evidence for the finding.

Unintelligible or fictitious accounts—English law—While the Commissioners are not as a rule entitled to insist on the certification by a professional accountant of the accounts produced before them it was held by *Roulatt J* in a case in which the accounts were voluminous kept in shorthand and not easily intelligible that the Commissioners were justified in refusing to look at the books until the assessee had the accounts prepared by a professional accountant *Hunt & Co v Jolly* 14 Tax Cases 165. This view was affirmed by the Court of Appeal in *Wall v Cooper* 8 A.T.C. 240 14 Tax Cases 552. The accounts are not bound to be accepted by the Commissioners irrespective of their unintelligibility and if the Commissioners are unable to accept the books as they stand they may ask for the production of certified accounts by professional accountants. If the assessee fails to comply with the wishes of the Commissioners he cannot afterwards complain against a random assessment. If the Commissioners reject accounts as cooked they should give reasons for their finding so that the Court may be satisfied that there was evidence on which the finding could be based. In the absence of evidence Commissioners can go by practice and by their knowledge of the business and other relevant considerations *Anderson v Commissioners of Inland Revenue (CS)* 12 A.T.C. 619 18 Tax Cases 320.

Possibility of deducing profits from accounts—Income tax Officer—Sole Judge—We think it was clearly intended by the proviso to section 13 of the Act that the Income tax Officer should be the sole arbiter on the question of the possibility of deducing the income profits and gains from the method of accounting employed *Gokalchand Jagannath v Commissioner of Income tax Lahore* 2 ITC 180. This dictum however overstates the power of the Income tax Officer. As pointed out by the Privy Council in the *Sarangpur Cotton Mills Case* 1938 ITR 36 it is misleading to describe this as a mere discretionary power. The judgment of the Income tax Officer under the proviso must be fairly exercised.

If the accounts are incomplete or unintelligible the Court will not consider whether the basis adopted by the Income tax Officer was the soundest in the circumstances *Prem Sagar v Commissioner of Income tax Punjab* A.I.R. 1932 Lah 178 6 ITC 478. Once it is established that no method of accounting has been regularly employed or that the method is such that the income cannot be properly deduced, the proviso comes into operation and the Income tax Officer becomes the arbiter of the basis on which and the manner in which the income shall be computed *Ishardas v Commissioner of Income tax Punjab* 5 ITC 283 *Haryamul Behram v Commissioner of Income tax Punjab* 7 ITC 379. The question is one of fact—and the Court will not interfere unless the discretion has been improperly or capriciously exercised *Gangaram Balmukand v Commissioner of Income tax Punjab* 1937 ITR 464. Even if there is a regular method of accounting it is the duty of the Income tax Officer to examine whether the true profits can be deduced from it *Commissioner of Income tax, Bombay v Sarangpur Cotton Co* 1938 ITR 36 (P.C.).

An inference that the books of account produced are not complete because of the non production of certain books called for coupled with certain other facts is a question of fact, *Commissioner of Income-tax, Burma v E M Chettyar Firm*, 4 ITC 111, *Rulamal Rammall Ram v Commissioner of Income-tax, Punjab*, 7 ITC 352. Whether the profits can be ascertained with any approach to accuracy from the books or not is a question of fact, *James Cycle Co v Commissioners of Inland Revenue*, 12 Tax Cases 98 (C of A), *Maharajahdhiraj of Darbhanga v Commissioner of Income-tax*, 9 Pat 240 4 ITC 283, *In re Radhey Lal Balmukund*, 4 ITC 454 (All), *Neki Devi v Commissioner of Income-tax Punjab*, 1934 ITR 365, *Dixan Chand v Commissioner of Income-tax Punjab*, 1934 ITR 382. Similarly what exactly is the system of accountancy followed by the assessee is a question of fact and unless an Income-tax Officer exercises his discretion capriciously or unjustly, no question of law can arise in regard to such matters, *Ferozeshah v Commissioner of Income-tax, Punjab*, 4 ITC 315. When an assessee has omitted from his return large amounts which are taxable the Income-tax Officer is entitled to assume that there are other similar amounts omitted but not discovered and make a reasonable addition to the estimated assessable income. No question of law will arise, *Sir Harisingh Gour v Commissioner of Income-tax, Central Provinces*, 3 ITC 350. Also, where owing to the incompleteness or unintelligibility of the accounts assessments have to be made on estimates it would be open to the Income-tax Officer to add an estimated figure to the admitted figure of income, *Maharajahdhiraj of Darbhanga v Commissioner of Income-tax, Bihar and Orissa*, 4 ITC 283, 9 Pat 240.

Where an assessee maintained eight years continuous accounts for debtors in which the receipts were recorded as cash was paid without any allocation between principal and interest and subsequently allocation was made without regard to actual dates and on no definite basis and the Income-tax Officer computed the income under the proviso to section 13, the High Court declined to interfere, *Fatchchand Chhakodilal v Commissioner of Income-tax, C.P.*, 1945 ITR 198.

Methods of accounting—Power of Income-tax Officer to alter.—It was suggested in *Bansilal Abirchand v Commissioner of Income-tax*, 3 ITC 57, that under the proviso to this section if the Income-tax Officer considers the system of accounting of the assessee to be unsuitable or improper, he can issue specific orders asking the assessee to change his method of accounting, but until he has done so, the system of accounting adopted by the assessee should be accepted by the Income-tax Officer. The Income-tax Officer's duty is to compute the profits in accordance with the method of accounting regularly employed by the assessee, or if no method of accounting has been regularly employed or if the method employed is such that in the opinion of the Income-tax Officer the income profits and gains cannot properly be deduced therefrom in such manner, i.e., on as equitable a basis as possible, as he may determine. What the Court apparently intended is that having accepted an assessee's method of book-keeping as reflecting his true profits, the Department cannot go back on it without giving the assessee a chance to re-arrange his book-keeping.

Method of accounting—Varying.—It is not open to an assessee who maintains accounts on the 'earned' basis to claim that a particular item or items should be worked out on a 'receipt' basis. No question of law arises in such a case and the Income-tax Officer has absolute discretion as to the method of computing profits, *T O Foster v Commissioner of Income-tax*,

Burma 3 ITC 435 The discretion however is not absolute but quasi-judicial as pointed out by the Privy Council in the *Sarangpur Cotton Mills* case

Whether a method of accounting has been regularly employed is a question of fact but it is open to the assessee to change his method though not from year to year. In doing so he should satisfy the Income tax authorities that he is doing so in good faith and with no interest to defraud Revenue. If the Income tax Officer is not satisfied the assessee can appeal to the higher authorities. *Sarupchand v Commissioner of Income tax Bombay* 1936 ITR 420. Ultimately, everything turns on whether the true profits are reflected in the accounts or can be deduced therefrom.

The fact that a certain debt may turn out to be bad is in itself not an adequate reason to justify a change in the method of accounting for a particular period. The proper course is to claim an allowance for bad debts and eventually if necessary and permissible a refund under section 48 A (now section 48). *Ram Kumar Kedarnath v Commissioner of Income tax Bombay* 1937 ITR 261.

Future losses—Only actual i.e. realised losses during the accounting period and not estimated future losses may be taken into account in arriving at the profits. See *Collins & Sons v Commissioners of Inland Revenue* 12 Tax Cases 773 (1925) ScLT 51. *Whimster & Company v Commissioners of Inland Revenue* (1925) ScLT 623. 12 Tax Cases 813. *J H Young & Company v Commissioners of Income tax* 12 Tax Cases 827 (1925) ScLT 628 (Excess Profits Duty cases) under section 10 and *Dinshaw (as Agent of Gwalior State) v Commissioner of Income tax Bombay* 6 ITC 154.

An anticipated liability is not an ascertained debt and therefore not a proper debit in the accounts. Thus when a company received a claim against them for demurrage which was not at any stage accepted by them and was eventually withdrawn it was held in an Excess Profits Duty case that the claim could not be debited against the Profit and Loss account as the withdrawal of the claim was not the giving up of an ascertained debt. *Ford & Co v Commissioners of Inland Revenue*, 12 Tax Cases 997.

The accounts of a colliery company were made up to 30th June. From April to July there had been a coal strike involving cessation of work. Substantial expenditure on repairs and reconditioning had become necessary as a consequence of such cessation and the expenditure was incurred after July though it was known in June when the accounts were closed that such expenditure was necessary. Provision was made out of the profits of the period ending 30th June in order to meet this expenditure later on and it was held by the House of Lords that this provision could not be deducted from the profits of the period ending 30th June for Excess Profits Duty purposes. *Glamorgan Coal Co v Commissioners of Inland Revenue* 7 A TC 48.

Per Lord Sumner—It seems to me like saying that a man is entitled to charge for supper in his expenses for Sunday night because though he went supperless to bed he orders something extra for his breakfast on Monday morning (*Ibid*).

Equally it is not open to the assessing officer in the absence of express legislative provision to that effect to make a contingent assessment and say that an item is taxable but that it shall not be taxed until it is actually received. Income cannot be taxed unless it exists. *Lt Col Lambe v Com*

missioners of Inland Revenue, 18 Tax Cases 212, (1934) 1 K B 178, 12 A.T.C 398

See also notes under section 10 (2) (xv) under the heading 'Future losses

Method of converting other currency—The proper method would seem to be as follows—

(a) Fixed Capital transactions—at rate of exchange on date of transaction

(b) Floating capital—at rate as on date of balance-sheet (this is the only practicable, even if not completely logical course) and

(c) Profits—at average rate for the period if available, otherwise as on date of balance sheet

Thus also seems to be the method followed in the United Kingdom.

In evaluating in local currency the transactions between an assessee and his foreign customers, regard should be had to the conduct of the parties and the course of transactions between them if there is any doubt or ambiguity about the contracts subsisting between them, *Radio Pictures v Commissioners of Inland Revenue*, 16 A.T.C 236 following *Watcham v Attorney-General of East Africa Protectorate* (1919) A.C. 533

Where interest on certain debentures was payable at the option of the debenture-holder, either in sterling or in florins or dollars (at certain fixed rates of exchange irrespective of market rates) and payment was taken in dollars as a consequence of the United Kingdom going off the gold standard, it was held that income-tax was recoverable only on the basis of payment in sterling. The option to receive in foreign currency was only an added right of delivery of a commodity, viz., florins or dollars and in any case, the person posting the interest warrant could not say at that time how the option would be exercised, *Rhokana Corporation v Commissioners of Inland Revenue*, 17 A.T.C 71 (H.L.).

14. (1) The tax shall not be payable by an assessee in respect of any sum which he receives as a member of a Hindu undivided family where such sum has been paid out of the income of the family.

(2) The tax shall not be payable by an assessee—

(a) if a partner of an unregistered firm, in respect of any portion of his share in the profits and gains of the firm computed in the manner laid down in clause (b) of sub-section (1) of section 16 on which the tax has already been paid by the firm; or

(b) if a member of an association of persons other than a Hindu undivided family, a company or a firm, in respect of any portion of the amount which he is entitled to receive from the association on which the tax has already been paid by the association; or

(c) in respect of any income profits or gains accruing or arising to him within an Indian State, unless such income profits or gains are received or deemed to be received in or brought into British India in the previous year by or on behalf of the assessee, or are assessable under section 42.

History—Section 5 (1) (f) of the 1886 Act was as below — Nothing shall render liable to the tax any income which a person enjoys as a member of a company or of a firm or a Hindu undivided family where the company or the firm or the family is liable to the tax. In the 1918 Act all these items were excluded in computing the taxable income of the assessee [see section 12 (1)] but they were taken into account in fixing his 'total income', i.e., the rate of tax (section 13). In 1922 income from a Hindu undivided family was again excluded from 'total income', i.e., the position before 1918 was restored.

Sub section (2) was entirely recast in 1939 in conjunction with sections 3, 16, 18, 23 (5), 24, 26 and 48. Clause (c) of sub section (2), together with corresponding additions in section 17, was introduced in 1941. The last thirteen words of sub section (1) were added in 1944.

The present scheme is explained as follows in the notes attached to the Statement of Objects and Reasons in 1939.

Sub-section (2) (a) exempts from taxation dividends of companies whose profits have been assessed to tax. This provision needed amendment as the result of a Privy Council decision that it exempts the whole dividend even when only part of the Company's profits have been taxed. Instead of amending it, it has been decided to delete it and amend section 16 (2) and section 18 (5) [clause 16 (2) and 18]. The result of these changes will be that a dividend will no longer be exempt. It will be on the same footing as interest on securities and credit for the appropriate amount of tax on it will be given in the assessment. Other sections affected are sections 48 and 49 (Clauses 51 and 53).

Sub section (2) clauses (b) and (c) of section 14 exempt the proportionate shares of the taxed profits of firms and associations of individuals. Since it has been decided [section 23 (5)—clause 23] to tax the partners of registered firms directly, this sub section as amended relates only to unregistered firms and it exempts not the amount (which is now exempted) of the firm's profits proportionate to the assessee's share therein at the time of making the assessment but the portion of the firm's profits which the assessee is entitled to receive. This change is made in pursuance of a decision to take as the basis for income tax purposes the actual shares of the previous year. The same principle has been adopted in amending section 26 (clause 30).

Sub section (2) as now amended exempts not the amount which a member of an association receives but the amount that he is entitled to receive.

As regards the exemption of the share of profits of a partner in an unregistered firm with reference to his share of the taxed profits in the previous year and not with reference to his share at the time of assessment see also section 26.

Hindu Undivided Family—Taxation of—For a history see notes under section 2 (9). A Hindu undivided family is taxed like an individual at a graded scale according to its total income and no account is taken of how that income is distributed amongst the individual members when such individual members are assessed to income tax or super tax in respect of their separate income. This applies even in cases where the amount of the income of the Hindu undivided family is less than the minimum taxable limit, and is, therefore, not liable to taxation in the hands of the manager of the family. The same remarks apply to super tax. The taxation of the income of a Hindu undivided family thus differs from the taxation of the income of an unregistered firm since, where the profits

of an unregistered firm are not liable to taxation in the hands of the firm, such profits are taxed in the hands of the individual partners, both for the purposes of income tax [section 14 (2) (b) and section 16 (1)] and of super tax (section 55 proviso), and where the profits are taxed in the hands of the unregistered firm, the share of such profits of each partner is included in his 'total income' for the purpose of determining the rate at which he shall pay income tax on his other income [section 16 (1)]. It should be noticed that sub section (1) and clause (c) of sub-section (2), section 14 apply both to income tax and super tax, whereas clauses (a) and (b) of sub section (2) of section 14 apply to income-tax only—see section 58

See, in particular, notes under section 2 (9) relating to maintenance charges received by members of Hindu families. The Patna High Court have held that section 14 (1) applies only to income in which the payee has a vested right *i.e.*, which already belongs to him. While the section relieves the assessee from the burden of proving that the income has already been taxed in the hands of the family, it does not relieve him from the burden of showing that he had a vested right in it as a member of the family. It was held accordingly that when the assessee had failed to raise the issues necessary for the determination of the question, he was not entitled to the exemption. *Commissioner of Income tax, Bihar and Orissa v Maharani Lakshmbai Saheba*, 1935 ITR 49

The widow of a deceased brother in a Mitakshara family who sued the living brother and his sons on the ground that her husband had separated from the family before his death agreed to a compromise, conceding that the family was joint and receiving a maintenance allowance from the living brother and his two sons. It was held, following *Vedathani's case*, 1933 ITR 70 and *Makanji Lalji's case*, 1937 ITR 539 that the widow received the allowance as a member of a Hindu undivided family. Her living separate was immaterial, because as a widow, she could not effect by herself a separation from the family. *Mussamat Radha Kuer v Commissioner of Income tax, B and O*, 1942 ITR 229

The widow of the holder of an impartible estate subject to the Mitakshara law disputed the right of her husband's successor to certain parts of the estate, but settled the claim by a compromise under which she acknowledged the absolute title of the successor and relinquished in his favour all her rights, and in return received an allowance, *inter alia*, charged on the estate, which allowance was to be her absolute property to which the successor and his heirs were to have no claim. It was held that the widow had ceased to be a member of the family and that therefore she did not receive the allowance as a member of the family. She also did not receive the allowance for maintenance. The allowance was therefore not exempt from tax in her hands. *Maharani Dowager of Jaipur v Commissioner of Income tax, UP*, 1944 ITR 489 (Oudh)

The real criterion in such cases is not whether the allowance is paid contractually or whether it is fixed or fluctuating or whether it is charged on the estate but whether the payee continues to be a member of the family or has left it.

A Hindu widow who claimed that her husband had separated from the family before his death compromised her claim, the coparceners of her husband agreeing to give her Rs 1,000 per annum as maintenance for her life. Ultimately, the family divided into five units and by arrangement among themselves, to which the widow was not a party, two of the units

contemplate any greater right than that explained by the Allahabad High Court.

Payments not out of the family income—The concluding words in sub section (1) were added in 1944

Hindu undivided family—The object of this section is to exempt from taxation in the hands of an individual, that which has already been taxed in the hands of the joint family as such. If, however, the individual receives an income *aliunde* from property which has not been taxed as that of a Hindu joint family, then the provisions of this section have no application. Accordingly, in a case in which a person received an allowance from his son out of a property which the latter had inherited from his maternal grandfather, it was held that the allowance received by the father was not exempt from income tax. The allowance, of course, was gratuitous and the father was not legally or otherwise entitled to it by reason of his being a member of the joint family, *Ambica Prasad Singh v Commissioner of Income tax*, 2 ITC 92, 5 Pat 20

Director's fees—The sums earned by a Director of a company as fees are his personal earnings even though he is a director only because the shares of the company belonging to the family have been placed at his disposal, unless the joint family property is spent in earning the remuneration as director, *Commissioner of Income-tax B & O v Darsanram and others*, 1945 ITR 419. See also *Sardar Irdra Singh v Commissioner of Income tax, B & O*, 1943 ITR 16

"Tax has been paid by the firm"—Prior to the 1st April 1939 the corresponding words were 'have been assessed to income tax'. So, whereas formerly, the partner's immunity depended on the assessment of the firm, it now turns on actual payment of tax by the firm. This subsection which now applies only to unregistered firms, formerly (before 1st April, 1939) applied to registered firms also

It will be seen that while this section uses the word "paid", the corresponding proviso under section 55 still adheres to "assessed"

Profits can be said to be 'assessed to tax' only when an order has been made determining the sum payable as tax and not when calculations of profits and losses have been made. Where, therefore, the profits of a firm are more than wiped away by losses, and the partners receive in the nature of interest a share of profits, such share can be taxed in their hands, *Seth Kanhaiyalal v Commissioner of Income tax, UP*, (1937) ITR 739 (All). This question cannot arise now the law having been amended in 1939

From 1st April, 1939, the exemption applies only to the share of profits which the partner is entitled to receive, not necessarily proportionate to his share in the firm. See notes under section 16

Taxation at the source is more a liability than a right and it is not open to a partner to claim that he should not be taxed directly on his share of the profits of the firm. In *re Neemchand Daga*, 58 Cal 1204, AIR 1931 Cal 686, 5 ITC 206. See also notes under section 34. The law as it stands since 1939 however,—see section 23 (5)—lays down clearly when partners of firms are to be taxed directly and when firms themselves

A partner received a salary from his firm and such salary was disallowed as a deduction from the firm's taxable profits. For certain reasons, the firm's profit was 'nil' and no tax was paid by it. The question arose

whether the salary could be taxed in the hands of the partner and was answered in the affirmative *S V K L Somasundaram Chettiar v Commissioner of Income tax Madras*, 55 Mad 885 AIR. 1932 Mad. 435 Cases of real double taxation are met by notification under section 60 No 8 dated the 24th March 1928, which is still in force Before 1939 cases of partners being taxed a second time came within this notification but with express provisions in section 10 (4) and section 16 (1) laying down how payments to partners by firms should be treated such cases will seldom arise now but if they do this notification would still seem to apply

Associations of individuals not being a firm company or Hindu undivided family—Till 1930 the profits and gains of such associations were liable to be taxed twice once in the hands of the association and again in those of the members Clause (b) was amended in 1939 so as to refer to the amount which a member is entitled to receive from the association instead of to what he receives thus assimilating the position to that of partners of unregistered firms

Income in Indian States—Clause (c) of sub section (2) which was inserted in 1941 seeks to tax on a remittance basis the income of British Indian residents arising in Indian States Such income even if not remitted is part of the residents total income i.e. for determining the rate of tax on his other taxable income Up to Rs 4 500 of unremitted foreign income—whether arising in an Indian State or elsewhere—will however be excluded from total income i.e. both for rate and for liability to tax in accordance with the third proviso to sub section (1) of section 4

Section 17 lays down the rate at which such income arising in Indian States shall be taxed when actually brought into British India The amount will be included in total income both in the year of origin and in the year of remittance and section 17 seeks to mitigate this effect in the year of remittance

Investment trusts—See notifications under section 60 regarding the exemption of dividends from super tax in the hands of an investment trust company

Firms—Taxation in the United Kingdom—In the United Kingdom firms are not charged with super tax (see section 4 of the English Act) Under Rule 10 Cases I and II of Schedule D the partnership is taxed jointly and in one sum and under sections 14 (3) (c) and 20 the individual partners can get relief based on the proportion according to their shares of the joint income of the partnership What is allocated is the statutory not the actual income of the firm *Gaunt v Commissioners of Inland Revenue* (1913) 3 KB 395 *Lewis v Commissioners of Inland Revenue* 12 A TC 48 18 Tax Cases 174 (1933) 2 KB 557

15 (1) The tax shall not be payable in respect of any sums paid by an assessee to effect an insurance on the life of the assessee or on the life of a wife or husband of the assessee or in respect of a contract for a deferred annuity on the life of the assessee or on the life of a wife or husband of the assessee, or as a contribution to any Provident Fund to which the Provident Funds Act, 1925, applies

Exemption in the case of life insurances

(2) Where the assessee is a Hindu undivided family, there shall be exempted under sub section (1) any sums paid to effect an insurance on the life of any male member of the family or of the wife of any such member

(2-A) Nothing in sub-section (1) or sub section (2) shall apply to so much of any premium or other payment made on a policy other than a contract for a deferred annuity as is in excess of ten per cent of the actual capital sum assessed, and in calculating any such capital sum no account shall be taken of the value of any premiums agreed to be returned or of any benefit by way of bonus or otherwise which is to be or may be received either before or after death either by the person paying the premium or by any other person and which is not the sum actually assured

(3) The aggregate of any sums exempted under this section shall not, together with any sums exempted under the second proviso to sub section (1) of section 7, and any sums exempted under sub section (1) of section 58-F, exceed in the case of an individual, one-sixth of the total income of the assessee, or six thousand rupees, whichever is less, and in the case of a Hindu undivided family, one-sixth of the total income of the assessee, or twelve thousand rupees, whichever is less

History—Prior to 1918, this exemption rested upon a Notification under the 1886 Act. Under the 1918 Act the one sixth was calculated on the chargeable income and not on the total income.

As regards the omission (in 1924) of the reference to funds under the Provident Insurance Societies Act 1912 *see* notes under section 4 (3) (r). The following changes were made in 1939—(a) Sub-section (1) was altered so as to cover cases of insurance on the life of a husband and (b) a money limit of Rs 6000 (Rs 12000 in the case of Hindu joint families) was imposed on the limit of 1/6th of total income. Sub-section (2 A) was added in 1944

Rebate of tax, how calculated—As regards the method of calculating rebate of tax on insurance premia *see* section 17 (2)

Super tax—No rebate of—*See* section 58 which makes section 15 inapplicable to super tax. No rebate of super tax can therefore be claimed on account of insurance premia etc

Single premiums—Insurance of husband's life, etc.—The sums paid need not be annual or periodical payments. A single payment for an insurance policy is eligible for the exemption but the allowance is subject to the maximum limit of one-sixth of the total income and also to the limit of Rs 6000 (and Rs. 12000 in the case of Hindu undivided families) and of the percentage referred to in sub-section (2 A), the last to be applied to each policy individually. The assessee need not be an adult nor the spouse. No allowance can be claimed on insurances on the life of children or other relations except that in the case of a Hindu undivided

family the insurance may be on the life of any male member of the family or of his wife. Also in the case of a Hindu undivided family the insurance need not be on the life of adult male members or of adult wives of members.

Scope of exemption—Under the provisions of section 7 (1) second proviso and section 15 taken together an abatement of income tax is given on such portion of an assessee's income as may have been—(i) deducted from his salary under the authority and with the permission of the Government for the purpose of securing a deferred annuity to him or making provision for his wife or children [section 7 (1) proviso] (ii) paid by him to an Insurance Company in respect of an insurance or deferred annuity on his own life or on the life of his spouse but subject to the limits laid down in sub-section (2 A) of section 15 or (iii) paid by him as a contribution to any of the provident funds mentioned in section 4 (3) (iv) or (v) paid by him or his employer and exempted as contribution to a recognised provident fund under section 58 F provided however, the total amount on all the items together on which an abatement will be permitted may not exceed one sixth of the total income of the assessee subject also to the superior money limit imposed by this section.

A member of a recognised provident fund under Chapter IX A can therefore get a maximum abatement of tax on one sixth of his salary under section 58 F and the difference between the above abatement and one sixth of the tax on his total income under section 15. To ascertain his total income for this purpose only his own contributions to the fund should be added to his salary and not his employer's contributions or interest—see section 58 E. See also section 58-R under which employee's contributions to approved superannuation funds receive the benefit of section 15.

It should be noted that there is no explicit money limit in regard to the second proviso to section 7.

Widows etc. Funds—Contributions to the Widows Orphans and Old Age Contributory Pension Fund 1925 are exempt from income tax since they are deducted from the salaries payable by or on behalf of the Crown to the soldiers concerned being sums deducted in accordance with the conditions of their service for the purpose of securing to them a deferred annuity and of making provision for their wives and children. Compulsory allotments from a soldier's pay made to his wife in England under Article 886 of the Royal Warrant for Pay are exempt from income tax since they are also deducted from the salaries payable by or on behalf of the Crown to an individual being sums deducted in accordance with the conditions of his service for the purpose of making provision whether present or future for his wife.

The restrictions imposed by the second proviso to sub-section (1) of section 7 and by sub-section (3) of section 15 apply to the above contributions also. No allowance is due in respect of voluntary allotments made by soldiers for the above purpose.

Deductions at source on account of contributions made by an officer to provide passage money for his widow and orphans under the Indian Military Service Family Pension Fund Regulations and the Indian Military Widows and Orphans' Fund Regulations are exempt from income-tax. Under the rules a certificate of health is required before an officer can contribute and the contribution which he has to pay is regulated according to the age of the officer concerned (*Income-tax Manual*).

Combined Life and Accident, etc., policies—Out of the premiums paid in respect of a policy that covers the risks of sickness and accidental injury and also the risk of death only so much as is attributable to the risk of death (from whatsoever cause) is admissible as a deduction from the income liable to tax. The portion of the premium so attributable should be settled in consultation with the Insurance Company concerned (*Income tax Manual*)

Withdrawals from Provident Funds—No rebate of income tax is allowed on any sum withdrawn by an assessee from his Provident Fund in order to pay his life insurance premium. On the premium itself this rebate is no doubt admissible.

Marriage, education etc., policies—Although insurances *on the life of a child* do not entitle the assessee to the concession it should be noted that certain kinds of insurance *for the benefit of the child* should be treated for the purposes of section 15 as insurances on the life of the assessee. Policies are often taken by assessees with a view to securing a provision of a lump sum for their children for their marriage education or other purposes at a stipulated time and the sum assured becomes payable on that date even if the subscriber dies after paying one premium only. An insurance of this kind is really an insurance on the life of the assessee as it is designed to secure in the event of the assessee's early death (though not immediately after his death) a benefit considerably greater in amount than the annual payments which he has made and consequently contributions to such policies are eligible for rebate under section 15 (1). The criterion that should be adopted is whether or not there is a contract *dependent on the life of the assessee*. A fixed term policy under which neither the premiums nor the sum payable by the Insurance Company at the end of the term are dependent on this life of the assessee is not an insurance policy (*Income tax Manual*)

Rebate on foreign income—No relief is admissible on premium paid out of income accruing or arising out of British India when such foreign income is not chargeable to Indian Income tax. Where however in the case of non residents foreign income is included in total world income and it is not possible for the assessee to allocate definitely from which income—British Indian or foreign—the premium was paid the relief admissible will only be proportionate i.e. in the same proportion as the British Indian income bears to the total world income' (*Income-tax Manual*)

Sterling—Conversion of—For the purpose of an abatement claimed by an assessee under this section insurance premia payable in sterling should be converted at the rate of exchange in force on the day on which the premium payment was made in cases where the assessee is unable to state the actual cost of remittance (*Income tax Manual*)

A claim for abatement under this section must if the payment is made otherwise than by a deduction from salary be supported either—*(a)* by the original receipt of the Insurance Company or fund *(b)* where the claim is made by a servant of the Government or of a local authority by a copy of the original receipt presented along with the original to the officer who pays the salary and attested by that officer who should after attestation return the original with a note endorsed upon it that it has been produced and allowed for a copy being attached to the bills sent with the list of payments, or *(c)* by a duplicate re-

ceipt or certificate of payment given by the Insurance Company or provident fund, provided a certificate is given that the original receipt is lost or is not forthcoming, or (d) when the insurance company does not issue a formal receipt, by a certificate of payment of the premium.

Where the Income-tax Officer is satisfied that none of the above prescribed documents can be produced without an amount of delay, expense or inconvenience, which, under the circumstances of the case, would be unreasonable, he may accept such other proof of payment of the premium as he deems sufficient.

Abatement on account of insurance may be given effect to by the person deducting income tax under section 18 (2) from salary at the time of payment.

Where the payment on account of insurance premia, etc., is not claimed at the time when tax is deducted from salary, it may be claimed in the assessment and in the return given by the assessee, under section 22 (1) or 22 (2) as the case may be, or if no assessment is made, a refund on account of such rebate may be claimed.

While the persons responsible for deducting income tax at the source under section 18 (2) should allow an abatement where claimed they need not carry out a check to see whether the abatement claimed under this section exceeds one sixth of the salary or Rs 6000 (Rs 12000) as the case may be. This will be investigated by the Income-tax Officer to whom returns are furnished under section 21 (*Income tax Manual*).

Before 1939, the rebate of tax under this section could not be claimed at the time of refund of tax under section 48, see Note 9 in the form of return prescribed by Rule 37-A. Section 48 as amended in 1939 permits such refund.

"Paid by him"—There is no definition of the word 'paid', but the provisions of section 13 will evidently govern this section if the assessee is assessed under section 10 or 12. But this will not allow an assessee to treat premiums as 'paid' in those cases in which premiums are adjusted by the insurance company out of sums at credit of the assessee, e.g., bonuses on the policies or loans granted, see *Hunter v R*, 5 Tax Cases 13, (1904) A.C. 161, *Watkins v Hugh Jones*, 14 Tax Cases 94.

Firms, Companies, etc.—The relief can be allowed only to individuals and to Hindu undivided families. It cannot be allowed to firms, companies or other associations of individuals.

The rebate is admissible to a partner in an unregistered firm in respect of the insurance on his life though the firm as such is not eligible for the rebate. This is because the partner's share of profits in the unregistered firm is part of the partner's 'total income'—see section 16 (1), and rebate for life insurance is admissible on the basis of total income.

See also notes under section 10 regarding insurance on the life of partners, employees, etc., and notes, *supra*, as regards the position of partners of firms.

Endowment policies—'Endowment' policies are policies on the life of a person, *Gould v Curtis*, 6 Tax Cases 293 (1913) 3 K.B. 84. Similarly, no doubt, are the various recent day developments of endowment policies, e.g., guaranteed option policies, double endowment policies, etc., but

not policies that are known in the Insurance world as "pure endowments", that is, contracts which provide for the payment of fixed sums at fixed dates, death not being one of the contingencies provided against by the policy, *Joseph v Law Integrity Insurance Co*, (1912) 2 Ch. 581 and *In re National Standard Life Assurance Corporation*, (1928) 1 Ch. 427.

Per Lord Justice Buckley—I come to a consideration of the true meaning of the words "insurance on his life". There would, to my mind, be a significant difference if the preposition were "of" and not "on". I can quite agree that if you speak of "insurance of the life" that, as a matter of English, may mean a guarantee of a sum to be paid if the life ceases to exist, if the life drops. That would be an insurance "of" it. The insurance "on" it is, to my mind, a different thing. It seems to me that means the insurance of a sum dependent upon it. The thing mentioned now becomes a contingency upon which the insurance is to be paid. The contingency is death or no death—death or life—and an insurance "on" life, in that sense, is an insurance of a sum payable or not payable according as the contingency of life or death is answered one way or the other. Regarded thus, it is quite plain that, an insurance "on" life includes, at a date, as an obligation to pay a sum of money, if life ceases, at such time as it should happen to cease. The words I think, include an insurance "on" life, in the sense of an obligation to pay a sum of money on an event dependent upon the contingency of human life. If that be sound, of course it follows that the whole of this premium is deductible, because this is altogether an insurance "on" life—*Gould v Curtis*, 6 Tax Cases 293 at 309.

"Insurance" and "Annuity" are words, not of scientific law but of common business', per *Hamilton, J*.

Sub section (2-A)—This was added in 1944 in order to check the avoidance of tax through the taking up of large policies for short periods with the aid of funds lent by Insurance companies to cover the premia the policies not being *bona fide* insurance policies but only devices for avoiding tax. The limit laid down by the sub section is absolute and cannot be exceeded, whether the policy is a *bona fide* insurance policy or not. In applying the limit, everything is ignored except the annual premium and the capital sum assured. The sub-section does not apply to policies for deferred annuities.

United Kingdom law—The law in the United Kingdom is different from the Indian law in several material respects. Till 1920, a 'single' premium paid for a policy could not be allowed exemption as it could in India, see *Turton v O'Brien*, 7 Tax Cases 170. Also the contracts should be—

"with any insurance company legally established in the United Kingdom or in any British possession lawfully carrying on business in the United Kingdom or in the case of a deferred annuity with the National Debt Commissioners" Section 32, Act of 1918.

Further the allowance cannot exceed a certain percentage of the capital sum assured and payable at death or a certain figure per annum, and the rate of rebate on policies insured after June, 1916, is restricted to a certain maximum rate. There are also various special provisions about 'war insurance premiums'.

The United Kingdom law further permits, under certain conditions, the deduction of interest paid on loans taken for the purchase of insurance policies, and cases like the *Earl of Carnarvon v Commissioners of Inland Revenue*, 13 A T C 539, furnish little guidance in interpreting the provisions of the Indian law. Section 13 of the United Kingdom Finance Act of 1930 contains elaborate provisions against the avoidance of surtax by taking up large insurance policies with borrowed money.

Insurance—Joint lives—Two persons who were joint Directors in a company took out an insurance policy on their lives jointly, each of them agreeing to pay half of the premium. A trustee was responsible for collecting the premiums from these two persons and paying them over to the insurance company, and in the event of the death of either of the Directors the capital sum payable under the insurance policy was to be paid to the trustee. *Held*, that the insurance premia paid by the Directors could not be deducted from their remuneration as Directors as premia paid on insurance on their lives.

Per Roulatt, J—Mr Wilson has not made an insurance at all. He has made an insurance jointly with another person. That is not an insurance by him. *Prima facie*, a contract by the two jointly is not describable as a contract by one of them only. Secondly, it is not on his life; it is on the joint lives. It is not an insurance on his life accurately speaking, at all, nor has he paid the premium for any such insurance. *Wilson v Simpson*, 10 Tax Cases 753 (1926) 2 K.B. 500.

This decision, however, will not preclude an allowance under the Indian law, if the insurance is made jointly on the lives of a husband and wife or of two or more male members of a Hindu undivided family. If premia paid on the separate lives of a husband or wife or individual male members of a Hindu undivided family can be allowed, premia paid on insurance policies taken out on their joint lives should also apparently be allowed.

15-A The tax shall not be payable by an assessee in respect of such portion if any, of the earned income included in his total income as is directed by the annual Act of the Central Legislature fixing the rate or rates of tax for any year to be deducted in making an assessment for that year, and for the purposes of determining the rates at which income-tax (but not super-tax) is payable by the assessee for that year his total income shall be deemed to be the total income reduced by the said portion.

History—This section was added in 1945 by an Ordinance along with section 2 (6-AA) and consequential amendments to sections 16, 17, 56 and 58.

Exemption—Under the Finance Act of 1945 one tenth of earned income but subject to a limit of Rs 2000 is both exempt from income-tax and excluded from total income for the same tax. In the Finance Act of 1946, the limits were raised to one fifth and Rs 4000 respectively. For super tax it is neither exempt nor excluded from total income.

The Finance Act also makes special provision for marginal cases.

Exemption and exclusions
in determining the total
income

16 (1) In computing the total income of an assessee—

(a) any sums exempted under the second proviso to sub-section (1) of section 7, the second and third provisos to section 8, sub section (2) of section 14 and section 15 shall be included, and any sum exempted under section 15 A shall also be included except for the purpose of determining the rates at which income tax (but not super-tax) is payable by the assessee to whom the exemption is given,

(b) when the assessee is a partner of a firm, then, whether the firm has made a profit or a loss, his share (whether a net profit or a net loss) shall be taken to be any salary, interest, commission or other remuneration payable to him by the firm in respect of the previous year increased or decreased respectively by his share in the balance of the profit or loss of the firm after the deduction of any interest, salary, commission or other remuneration payable to any partner in respect of the previous year

Provided that if his share so computed is a loss, such loss may be set off or carried forward and set off in accordance with the provisions of section 24,

(c) all income arising to any person by virtue of a settlement or disposition whether revocable or not, and whether effected before or after the commencement of the Indian Income-tax (Amendment) Act, 1939, from assets remaining the property of the settlor or disponer shall be deemed to be income of the settlor or disponer, and all income arising to any person by virtue of a revocable transfer of assets shall be deemed to be income of the transferor

Provided that for the purposes of this clause a settlement, disposition or transfer shall be deemed to be revocable if it contains any provision for the retransfer directly or indirectly of the income or assets to the settlor, disponer or transferor, or in any way gives the settlor, disponer or transferor a right to reassume power directly or indirectly over the income or assets

Provided further that the expression 'settlement or disposition' shall for the purposes of this clause include any disposition, trust, covenant, agreement, or arrangement, and the expression 'settor or disponer' in relation to a settlement or disposition shall include any person by whom the settlement or disposition was made

Provided further that this clause shall not apply to any income arising to any person by virtue of a settlement or disposition which is not revocable for a period exceeding six years or during the lifetime of the person and from which income the

settlor or disponent derives no direct or indirect benefit but that the settlor shall be liable to be assessed on the said income as and when the power to revoke arises to him.

(2) For the purposes of inclusion in the total income of an assessee any dividend shall be deemed to be income of the previous year in which it is paid, credited or distributed or deemed to have been paid, credited or distributed to him, and shall be increased to such amount, as would, if income-tax (but not super-tax) at the rate applicable to the total income of a company for the financial year in which the dividend is paid, credited or distributed or deemed to have been paid, credited or distributed, were deducted therefrom, be equal to the amount of the dividend.

Provided that when any portion of the profits and gains of the company out of which such dividend has been paid, credited or distributed or deemed to have been paid, credited or distributed was not liable to income-tax in the hands of the company, the increase to be made under this section shall be calculated upon only such proportion of the dividend as the amount of the profits and gains of the company liable to income-tax bears to the total profits and gains of the company.

(3) In computing the total income of any individual for the purpose of assessment, there shall be included—

(a) so much of the income of a wife or minor child of such individual as arises directly or indirectly—

(i) from the membership of the wife in a firm of which her husband is a partner ;

(ii) from the admission of the minor to the benefits of partnership in a firm of which such individual is a partner ;

(iii) from assets transferred directly or indirectly to the wife by the husband otherwise than for adequate consideration or in connection with an agreement to live apart ; or

(iv) from assets transferred directly or indirectly to the minor child, not being a married daughter, by such individual otherwise than for adequate consideration ; and

(b) so much of the income of any person or association of persons as arises from assets transferred otherwise than for adequate consideration to the person or association by such individual for the benefit of his wife or a minor child or both.

History.—The first part of the section is an amplification of section 13 of the 1918 Act. The words "second and third" were inserted in 1933 as a consequence of the amendment of section 8.

Sub-section (3) was added in 1937 but so as not to have effect in respect of income chargeable to income-tax for a year ending before the 1st April, 1937. It was again amended in 1939. Barring clause (a) in

sub-section (1), the whole of sub-sections (1) and (2) were newly added in 1939. Before then these two sub-sections stood as below.

(1) In computing the total income of an assessee sums exempted under the proviso to sub-section (1) of section 7, the second and third proviso to section 8 sub-section (2) of section 14 and section 15 shall be included.

(2) For the purposes of sub-section (1) any sum mentioned in clause (a) of sub-section (2) of section 14 shall be increased by the amount of income tax payable by the company in respect of the dividend received. Sub-section (2) was amended in 1941 so as to make it clearer.

The second part of clause (a) of sub-section (1) was added in 1945 as part of the scheme of relief for earned income.

Change of Partnership—As regards total income when there is a change of partnership in a firm, see section 26.

The method of grossing up dividends is as follows. With income tax at a maximum rate which is the rate applicable to a company (say) x annas in the rupee for every $(16-x)$ annas of net dividend received by the shareholder his total income is computed to be one rupee.

Dividends—It is not necessary that the company should actually pay tax on the profits. Cases can arise in which a company declares dividends without itself paying any tax.

Partners of firms—The effect of clause (b) of sub-section (1) is shown in a hypothetical case below. Let us take three partners *A*, *B* and *C* with equal shares and with following data.

Computation of *A's* share—

	Rs.	A.	P.
Salary	4 000	0	0
Interest	3 000	0	0
Loss	—1 000	0	0
	6 000	0	0

Computation of *B's* share—

	Rs.	A.	P.
Loss	—1 000	0	0

Computation of *C's* share—

	Rs.	A.	P.
Salary	6 000	0	0
Interest	2 000	0	0
Loss	—1 000	0	0
	7,000	0	0

Firm's profits would be Rs. 12 000 while assessment will be made on *A* and *B* for Rs. 13 000.

Share—This word refers evidently to the proportion in which the divisible part of the profits is to be divided, i.e. if under the partnership deed a part of the firm's profits is to be kept in reserve or given to a charity and the rest is to be divided in a certain ratio the latter ratio will be the share for the purpose of this clause. See also section 14.

Net profit or net loss—These words are superfluous. The word 'net' evidently refers to the ultimate result of the salary, etc. *plus* the shares of loss of firm (the latter calculated without allowance for salary etc.)

Proviso—This proviso which could have been more appropriately incorporated in section 24 makes it clear how the loss of a partner in a firm is to be computed for the purpose of carry forward under section 24.

Transfers made before 1939—Sub-section (1) (c) applies to all assessments due after 1st April 1939 irrespective of whether the income was earned before that date. The relevant law is the law at the time of assessment. *Commissioner of Income tax, Madras v Maharajah of Pithapuram* 1942 ITR 1.

Also the subject of charge is the income not of the year of assessment but of the previous year. The absence of the words 'whether effected before or after the commencement' of the Amending Act after the latter class of transfer of revocable assets is immaterial and the clause applies to all transfers. The plain word cannot be cut down by adding 'effected after 1939'. *Maharaja of Pithapuram v Commissioner of Income-tax, Madras* 1945 ITR 221 (PC).

Trusts—Clause (c). These provisions—if one omits the third proviso which relaxes the rigour of the rest of the sub-section—are more drastic than the provisions in the United Kingdom law which have been altered many times in recent years and are very elaborate. See, for example *Inland Revenue v Payne*, 1942 ITR (Supp.).

It will be noted that the very wide scope of the main part of the clause and of the first two provisos is severely restricted by the third proviso. If the settlement is not revocable for a period exceeding six years or during the lifetime of the settlor and if he derives no benefit direct or indirect from the income he cannot be assessed on the income. To escape liability both conditions should be satisfied. When the period of non revocability expires however he will be automatically assessed on the income unless he makes a new settlement which is non revocable for another period exceeding six years.

Under the main clause all settlements whether revocable or not and whether effected before 1st April, 1939 or not in which the assets remain the property of the settlor, and all revocable settlements are caught. The first proviso extends the meaning of revocability. Differing views have been held as to whether if the revocation required the consent of third parties or the trustees or was contingent on events the case would be covered by the words of the proviso. See *Ramji Keshavn v Commissioner of Income tax Bombay* 1945 ITR 105.

See notes under section 3 as to charges on income and in particular the ruling of the Privy Council in *Raja Bejoy Singh Dudhuria's Case* and similar rulings by High Courts. Section 16 (1) (c) refers to voluntary dispositions. If a disposition is not voluntary the case will fall under section 40 or 41, failing which under the section 3 in which case the assessee will be taxed on the net income he receives or is entitled to receive after prior charges.

Sections 16 (1) (c) 40 and 41 form exceptions to the general rule in section 3 that a person is taxed on his own income and not on the income of others.

First proviso—In a similar context in the United Kingdom the word 'power' has been interpreted as follows: it is impossible to compare the word 'power' to a strict power in the conveyancing sense. It must therefore, have a wider and more popular meaning—those voting rights used for the purpose for which they were used and playing the part in the scheme which they did play are in my opinion properly described in the context of the section by power per Greene MR in *Inland Revenue v Payne*, 1942 ITR (Sup). In this case the person concerned had a 75 per cent voting power in a company which he could wind up if he chose and thus terminate the payments in question which were payable to the company either for the person's life or till the company was wound up.

Income paid to the settlor in repayment of loans from him would be caught by the word indirectly cf *Jenkins v Inland Revenue* 1944 (KBD).

The settlement of shares in a company dominated by the settlor and giving him or capable of giving him loans or other benefits in excess of his interests in the company would be caught by the words 'power indirectly over the income or assets' cf *Heddon Court House Ltd v Inland Revenue* 1944 (KBD) following *Inland Revenue v L. B. Holdings Ltd*.

Where the settlor keeps a part of the settled property for his own enjoyment there is no question of retransfer or reassumption *ab initio* the income from that part continues to be his income *Ramji Keshavji v Commissioner of Income tax Bombay* 1945 ITR 105.

Where side by side with the payment of an annuity to a person there is an obligation on his part to repay the annuity to the settlor the settlement will be ignored *Lee v Inland Revenue* 1944. If in fact repayment is made it is voluntarily the question would then arise whether the settlement was genuine or only a sham.

Second proviso—A mere right to assume power over income so as to give it to one beneficiary rather than another would be caught by this proviso. Though by such a device the settlor could not affect his own income directly he could do so indirectly e.g. by giving the income to a major son instead of a minor son whose (the latter's) would be aggregated with the father's *Keshavlal Putjaram v Commissioner of Income tax Bombay* 1944 ITR 185. The word arrangement is not a word of art.

It is used in this context in what may be described a business sense—the whole of what was done must be looked at—(the assessee) deliberately placed himself in a certain relationship to the company as part of one definite scheme—if a deliberate scheme perfectly clear cut—is not an arrangement. I have difficulty in seeing what useful purpose was served by the Legislature in putting that word into the definition at all per Greene MR in *Inland Revenue v Payne* 1942 ITR (Sup).

An arrangement evidently implies a common purpose and a connection between different facts making them into a single scheme with a definite purpose—things done either simultaneously or otherwise with the deliberate intention that in conjunction they shall produce a certain result is an arrangement (*ibid*) see also *Chamberlain v Inland Revenue* 1942 C.A.

Third proviso—The meaning of the word revocable in the third proviso applies to the first proviso also and is not restricted to the substantive provision cf *Commissioners of Inland Revenue v Warden* 17 ATC 521 (CS) and see *Ramji Keshavji v Commissioner of Income tax* 1945 ITR 105.

The Crown has to establish affirmatively that the income is payable or applicable—not merely may be—for less than the life of the beneficiary and what has to be considered is the effect of the settlement in the light of the circumstances at the relevant time. If the settlement will operate at some future date even to cut down or destroy the interest of the beneficiary, the section will apply to the whole or part of the income as the case may be. If on the other hand the circumstances continue undisturbed except by an extraneous event which may or may not happen (*e.g.* in the case before the Court the birth of other children) the income will be considered to be applicable for the benefit of the beneficiary for the whole of his life. *Manray v Inland Revenue* 1944 CA. This ruling suggests that in the first proviso revocability depending on extraneous events is to be excluded.

Profits dealt with under section 23-A—In construing a trust deed under which the settlor *inter alia* had to give away a fraction of his total income which shall accrue due and be receivable by him in that year it has been held that profits apportioned to him under section 21 of the United Kingdom Finance Act of 1922 (roughly corresponding to section 23 A of the Indian Act) could not be included in the total income of the settlor shareholder not being due and receivable by him. *Earl of Normanton v Inland Revenue* 18 ATC 301 (CA).

Trusts for employees—With a view to affording certain employees a closer interest in the business the principal controlling shareholder (Sir Charles Parsons) set aside some shares of his to be transferred to each employee when the dividends thereon together with any sums paid by the employee amounted to the par value of the shares. The dividends and any payments by the employees were credited to the shares in a separate account for each employee and if the employee died before the shares were fully paid for the full amount credited to his account was to be paid to his estate in cash. But until the transfer of the share to the employee the shares were in the name of Sir Charles Parsons who received the dividends and had full control over the shares. *Held* that the dividends were taxable as the income of Sir Charles Parsons. *Inland Revenue v Parsons* 41 TLR 672 13 Tax Cas 700 (CA). The owner of a business who desired its continuance after his death provided *inter alia* that the net profits should be divided annually among certain selected employees of whom the appellant was one in certain shares. Ten per cent of the profits was to be paid over to the employees in proportion to their shares but the remainder was not to be drawn out by them until the whole of the late owner's capital had been paid out. In the meantime their shares were credited to their respective accounts in the books. The employees had no power to sell or dispose of their interests which did not vest in them till the whole capital had been paid out. *Held* that the business was the property of the trustees that the employees were not partners and that the 90 per cent credited in the accounts was not the income of the employees. Of course the mere fact though under a man's contract of service a portion of his salary is held up or payment of it is deferred does not less make it a part of his income. The deferred portion of the salary is still salary. There is all the difference between a case of that kind and one where the fund is said to form part of a man's income but may from causes over which he has no control be never his at all per *Lord Stormonth Darling* *Walker v Reith* 1906—8 T 381 43 Sc L R 245. Where an employer handed over to trustees for the benefit of an employee an annual bonus from each year's profits and such bonus was payable to the employee only on his death or on the termination of his service by the employer but not if he was

dismissed for misconduct or if he assigned his interest to others it was held following *Smyth v Stretton* 5 Tax Cas 36 that notwithstanding the forfeitability of the bonus in certain events the bonus became the income of the employee each year as it was paid by the employer to the trustees *Edwards v Roberts* 19 Tax Cas 618 (CA). An agreement to sell a business under which all receipts belong to the vendor until the purchase money has been fully received is not the same as selling the business at once and keeping the receipts therefrom as security for the payment of the purchase money. In the latter case the business belongs to the purchaser while in the former it belongs to the vendor till the purchase money has been fully paid *Bonter v Froud* 18 Tax Cas 488.

Accumulations for minors.—There has been considerable litigation in the United Kingdom on this subject. The latest case was *Stanley v Inland Revenue* 1944 in which the Court of Appeal differed from the High Court. The case is understood to be before the House of Lords.

Sub section (2)—This sub-section is part of the new scheme of taxing dividends. Formerly under section 14 no further tax was payable by the shareholder on a dividend which however was included in the total income under section 16 (after a proportionate increase for income tax). Now the exemption under section 14 has been removed and the dividend would be automatically taxable in the hands of the shareholder but *per contra* under section 18 (5) credit is given to him for tax. This sub-section was amended in 1941 so as to make its meaning clearer.

Deemed to have been paid etc.—The cases contemplated by these words are not clear. The reference cannot be to section 23 A for in that case shareholders are to be taxed directly. The reference may be to section 16 (1) (c) section 16 (3) section 2 (6 A) section 44 D and sections 44 E & F.

Rate of tax—It will be seen from this sub-section and section 18 (5) that the relevant rate is not that of the financial year in which the corresponding profits of the company are assessed but that of the financial year in which the dividend is paid etc. So tax to be added in respect of different half years may be different.

Proviso—This deals with cases in which only a part of the company's profits was taxable.

As the sub-section stands the whole of the dividend is taxable in the hands of the shareholder even though a part of it may have been derived from non-taxable sources *e.g.* agricultural income or tax free securities. All that the shareholder can claim under the proviso is that the notional tax addition to be made to the dividend shall be restricted to a fraction.

In other words while the old law as interpreted by the Privy Council in the *Hungerford Trust* case 62 Cal 133 7 ITC 441 took up one extreme position *viz.* that the whole dividend was exempt even though the company had paid tax only on a fraction of its profits the new law takes up the other extreme *viz.* the whole dividend is taxable even though the greater part of it may have been derived from tax free sources. But in practice the Crown taxes only a proportion of the dividend for example only 40 per cent of dividends of tea companies is taxed.

Paid credited or distributed—The alternatives are evidently put in out of abundant caution in order to cover all possible cases of payment in kind or by book adjustment.

Sub-section (3)—The sub-section was introduced in 1937 and clauses (a) (i) and (b) were amended in 1939. As regards clause (b) the notes on clauses attached to the amending Bill state as follows.—

'The wording of this clause has been found to be defective as it may be possible for a person to transfer income to an association of individuals which includes a person other than that individual or his wife but in such circumstances that the income becomes the income of the wife or minor child. For this reason the words 'consisting of such individual and his wife are being omitted and the word, 'for the benefit of his wife or a minor child or both are being added. It will be seen that the provisions in sub section (1) (c) cover all cases of transfers of income and also cover cases of revocable transfers of assets. This clause as now amended covers the further cases of irrevocable transfers of assets where the income accrues to the benefit of the wife or minor child of the transferor.'

Benami—This sub section applies only to the cases referred to them and does not deal with the general question of benami which has to be dealt with under the general law in accordance with the relevant evidence and if the Revenue seek to establish that the ostensible owner of property or income is not the real owner the onus lies on the Revenue to establish that conclusion. *Ramkunkar Banerji v Commissioner of Income tax, B & O 1936 ITR 118* *Sovaram Johhram v Ibid, 1944 ITR 110* *Shahk Mohammad Nagi v Commissioner of Income tax, Punjab 1945 ITR. 452*

Retrospective effect—Though there are no express words covering transfers made before 1937 (compare section 16 (1) (c) where express reference is made to settlements, etc. whether made before or after the introduction of the provisos and also section 44-D where express words appear) and though penal legislation cannot be applied retrospectively without express words to that effect to be extended to this case, it has to be remembered that what is taxed is only *current* income. It is not the transfer of assets as such that is taxed but only the income that arises from the assets nor does the law seek to invalidate past transactions. The Amending Act of 1937 which originally introduced sub section (3) merely stated that the provision would not apply to incomes that arose before 1st April 1937, and nothing further. It has accordingly been held that this sub section applies to all income that arose on or after 1st April 1937 irrespective of when the assets were transferred. *H P Banerjee & Co v Commissioner of Income tax, B & O 1941 ITR. 137* *Pandit Ganga Prasad Tiwari v Commissioner of Income tax UP 1942 ITR. 308* (All) *In re Sardasim Narain Kuer, 1943 ITR 448* (Lah) *Sheik Mohammad Nagi v Commissioner of Income tax, 1945 ITR. 452* (Lah)

Transfers from wife—The sub section does not cover transfers from wife to husband. The position about transfers from a mother to a minor child is not clear. The word 'individual in sub-clause (iv) refers to the individual at the beginning of the sub section which in the light of sub clauses (i) and (iii) evidently refers to a male.

A wife or minor child—The words clearly cover more than one wife or child.

Onus of proof—There is no presumption that the assets of a Hindu wife are *stridhanam* and it is for the assessee to prove that his wife's assets arose otherwise than by transfer from him directly or indirectly. The question is one of fact and so long as there are materials for the findings of the Income tax authorities the findings will not be disturbed by the Court. *Sinnassivami Pillai v Commissioner of Income tax, Madras 1942 ITR. 71* It has been held, however that where documents of title are in the name of the wife the onus is on the department to show that

she is not the real owner *Sozaram Johhiram v Commissioner of Income-tax, B & O*, 1944 I T R. 110 The question is always one of fact, and while the onus lies on that party which seems to show that the apparent is not real, it should also be remembered that in most cases the assessee alone has possession of all the evidence and his refusal to produce the evidence will result in an inference against him

Where an assessee transferred to his wife two houses, without consideration, and not as part of an agreement to live apart and the wife ran a school in one of the rooms and let out the rest of the property, and later on the wife transferred the properties to a trust out of the funds of which she was to receive Rs 50 a month as head manager thereof (and her husband also, a monthly remuneration as their agent), it was held that the wife's income not being salary, but a part of the income of the trust could be added on to the income of the husband under this section, *Pandit Gaya Prasad Tewari v Commissioner of Income tax, U.P.*, 1942 I T R. 309 (All)

An assessee who had certain shares and securities jointly with his wife, executed a trust deed binding himself to hold certain shares in trust for his wife. He, however, continued to receive the income Held that the property in the shares and securities continued to remain in the assessee's hands and that the income was taxable in his hands *Sir Sorabjee Mehta v Commissioner of Income tax, C.P.*, (1927) 2 I T C. 286, following *Egger v Commissioner of Income-tax, Burma* 4 Rang 538 This decision however, was given before the advent of section 16 (1) (c) and sub-section (3) of that section

Adequate consideration—Pre-nuptial settlements and settlements in favour of children to be adopted will presumably be transfers for adequate consideration, and in any case they are not transfers to a wife or child, but to a *prospective* wife or child The question of adequacy of consideration is primarily a question of fact depending on the circumstances of each case Thus (say) a payment to a wife with an independent business of her own (of a nature not falling within the mischief of this sub-section) in return for surrender of something valuable by her would be a payment for adequate consideration

Transfers from a husband to his wife, of assets otherwise than for adequate consideration cover gifts out of love and affection The word 'consideration' is used in a legal sense, and love and affection cannot be such consideration It has not been defined in the Transfer of Property Act, and should be given a similar meaning to that in the Contract Act 'Adequate consideration' is quite different from *good* consideration, *H P Banerjee v Commissioner of Income tax, B & O*, 1941 I T R. 137 In re *Sardann Naram Kuer*, 1943 I T R. 448 (Lah.)

Associations—Clause (b) as it stood before 1939 applied only to associations composed of an individual and his wife, now it applies to any person or association receiving income for the benefit of the wife or minor child or both. The words 'otherwise than for adequate consideration' were also added in 1939 to exclude *bona fide* transfers of assets for adequate consideration This clause is, it is submitted otiose, since the cases contemplated by it would be covered by the word 'indirectly' in clause (a) So long as the income is intended for the benefit of the wife (or child), it is not necessary that it need be actually spent for their benefit before the income can be added to the income of the husband (or father)

Where a Muslim assessee formed a *wakf*, of which his wife was one of the beneficiaries it was held that the part of the income of the *wakf* which went to the wife could be aggregated with the income of the husband *Commissioner of Income tax, Bombay v Sir Muhammad Ismail* 1944 ITR 8

Partnership [sub clauses (i) and (ii) of clause (a)]—No matter how unimportant the interest (or professional skill) in the firm of the husband (or father) and how dominant that of the wife (or minor child), and no matter wherefrom the wife or child derived the assets in the partnership their income from the firm will be included in that of the husband (or father)

Sub-clause (ii) will apply irrespective of whether the minors were admitted to the benefits of partnership *grants* or whether they contributed to the assets e.g., their shares in a disrupted Hindu family out of which the partnership has been formed *Commissioner of Income tax, Madras v Lakshmanier* 1941 ITR 668 If a child admitted to the benefits of partnership attains majority after the date of assessment of the firm and before the date of assessment of the father its income will still be aggregated with that of the father The material date for section 26 (1) is the date of assessment of the firm In *re Chumanbhai Lalbhai* 1944 ITR 199 (Bom)

'Not being a married daughter'—These words appear in sub-clause (iv) of clause (a) but not in sub-clause (ii) or in clause (b) The omissions do not seem to be intentional but the presence of the words in that part of the sub-section and their absence elsewhere cannot be ignored.

Scope of Section—Total income does not include income which under the charging sections (4 and 6) is not liable to tax at all That is to say none of the items exempted e.g., agricultural income casual receipts not connected with business etc. can be taken into account. Total income includes in addition to income on which tax is payable by the assessee directly items taxed at source or on the assessee's behalf and items of income which really belong to him though nominally to others All such items are detailed in this section See also section 58 E

Total income being so determined the assessee's liability to tax and the tax that he should pay are fixed by the Finance Act Credit is given to him for tax collected or assessed at source [see section 18 (5)] and the assessee can get a refund under section 48 if eligible

Rules 19 and 19 A lay down the form in which details of 'total income' should be furnished to the Income tax Officer

Partners' shares of unremitted foreign income—Where the rebate of Rs 4500 under the third proviso to section 4 (1) has been allowed to a registered firm rebate on the same ground cannot be claimed also by the partners Section 4 (1) deals with the assessment of tax i.e. with what is taxable while section 16 deals with the levy i.e. from whom the tax shall be due The rebate, therefore is allowed at the first stage and not at the second *Commissioner of Income tax Sind v Vahram Bhermal* 1946 ITR 407 See also notes under section 4 (1)

Dividends of Foreign Companies—It was decided under the pre-1939 law that dividends payable abroad and actually so paid to shareholders not resident in British India by Companies registered abroad but doing business in British India and paying tax here cannot be included in

'total income under this section since such dividends do not accrue or arise in British India *Commissioner of Income tax Bombay v Major Golde* 5 I.T.C. 228 55 Bom 734, A.I.R. 1931 Bom 420 This ruling however was nullified by Explanation to sub section (1) of section 4 See notes thereunder This Explanation has been challenged as being *ultra vires* the powers of the Legislature and this case is now before the Privy Council the Federal Court having held the explanation to be *intra vires* *Governor General in Council v Raleigh Investments* 1944 I.T.R. 265

- 17 (1) Where a person is not resident in British India, and is a British subject as defined in section 27 of the British Nationality and status of Aliens Act, 1914, or a subject of a State in India or Burma, or a native of a

Determination of tax payable in certain special cases.

Tribal Area the tax, including super-tax, payable by him or on his behalf on his total income shall be an amount bearing to the total amount of the tax including super-tax which would have been payable on his total world income had it been his total income the same proportion as his total income bears to his total world income, and in the case of any other non resident person, the income-tax payable by him or on his behalf on his total income shall be at the maximum rate and the super tax payable thereon shall be an amount bearing to the total amount of super-tax which would have been payable on his total world income had it been his total income the same proportion as his total income bears to his total world income

(2) Where there is included in the total income of any assessee any income (including income from a share in an unregistered firm, if assessed as such) exempted from tax by or under the provisions of this Act, the income-tax excluding super-tax payable by the assessee shall be an amount bearing to the total amount of the income-tax excluding super-tax which would have been payable on the total income had no part of it been exempted the same proportion as the unexempted portion of the total income bears to the total income

(3) Where there is included in the total income of any assessee any income exempted from tax under clause (c) of sub section (2) of section 14, the super-tax payable by the assessee shall be an amount bearing to the total amount of the super tax which would have been payable on the total income had no part of it been so exempted the same proportion as the total income less the portion so exempted bears to the total income

(4) Where any income exempted from tax under clause (c) of sub section (2) of section 14 which has been taken into account under section (2) or sub-section (3) of this section as part of the total income of an assessee for the purpose of deter-

mining the income-tax or super-tax payable by him is in a subsequent year brought into or received in British India by the assessee and becomes chargeable with tax accordingly the tax including super-tax payable by the assessee on his total income of that subsequent year shall be—(a) the amount which bears to the total amount of the tax including super tax which would have been payable on his total income as reduced by the amount of the income so brought into or received in British India had such reduced income been his total income the same proportion as his total income bears to such reduced income or

(b) the amount which bears to the total amount of the tax including super-tax which would have been payable on the amount of the income so brought into or received in British India had such income been his total income the same proportion as his total income bears to the amount of the income so brought into or received in British India, whichever is the greater,

(5) Where the amount of the total income of any assessee is deemed to be the total income reduced under the provisions of section 15 A by an allowance for earned income, the expression 'total income' in this section shall, for the purpose of determining the amount of income tax (but not super-tax) payable by the assessee, be deemed to refer to his total income so reduced

History—This section as framed in 1939 is entirely new and has nothing in common with the old one. The old provision relating to marginal relief cannot arise under the 'slab' system and has therefore been dropped. Sub sections (3) and (4) were added in 1941 when section 14 was amended.

Scope—Sub section (1) deals with the taxation of non residents dividing them into two classes *viz* British or Indian State or tribal subjects on the one hand and others *viz*, aliens on the other. Sub section (2) deals with exemptions like income tax on life insurance premia. Sub section (3) with Indian States income and sub section (4) with remittances of such Indian States income.

Income in other than Indian States—Sub section (1) of the new section which deals with non residents partly incorporates sub section (4) and (5) of old section 48. Whereas formerly the world income was taken into account only for determining the rate of income tax for the purpose of refund of tax collected in excess at source tax is now levied on what may be loosely called a *pro rata* basis with reference to world income and British India income subject however to the condition that a non resident alien has to pay income tax (not super tax) at the maximum rate.

Under section 4 (1) a resident who is ordinarily resident will be taxed on his world income. A resident who is not ordinarily resident will be taxed on his British India income and also on a part or the whole of his foreign income according to circumstances as laid down in the second proviso to sub section (1) of section 4 and in either alternative in the latter case in fixing the rate of tax 'excluded foreign income will be excluded from total income'. A non resident however though taxed only on his

British Indian income will pay tax at a rate determined with reference to world income (or at maximum rate). As a consequence a resident who is not ordinarily resident may often be more leniently dealt with than a non resident (even a British subject).

Income in Indian States—Under clause (c) of sub-section (2) of section 14 income in Indian States not brought into British India nor taxed under section 42 is included in total income, i.e., for rate purposes but not in taxable income. When such income is brought into British India in a later year the tax is regulated as follows.

Let F be the amount so brought in B the assessee's other total income (including of course income in Indian States arising in that year but not brought in and therefore not taxed). T_f the tax on F if that had been the total income. T_b the tax on B if that had been the total income. The tax

payable is (1) $T_f \times \frac{F+B}{F}$ —or (2) $T_b \times \frac{F+B}{B}$ —whichever may be the greater in

other words if F is greater than B , i.e. the amount brought in the year exceeds the other income the rate will be that applicable to that income and in computing tax this rate will be applied to that income plus his other income similarly if the amount brought in is less than the other income the rate will be that applicable to the other income and this rate will be applied to the whole of the income i.e. other income plus the income brought in.

It will be noted that the basis of sub-section (4) is entirely different from that of the other sub-sections.

Non resident—I.e. not a resident. For definition of resident see section 4-A. It will be seen that the status of an assessee will have to be examined afresh with reference to facts every year.

Payable on his behalf—See section 16 18 43, 44 D and 49 P as to circumstances when tax is payable on an assessee's behalf.

British subject—According to section 27 of the British Nationality and Status of Aliens Act 1914 the expression British subject means a person who is a natural born British subject or a person to whom a certificate of naturalization has been granted or a person who has become a subject of His Majesty by reason of any annexation of territory.

It will be noted that the rate of tax on aliens is more onerous than on British etc. subjects. Hindu undivided families are treated in practice like individuals for the purpose of their rights as British subjects under this section. See Report of Select Committee 1941.

Where income partly exempt—Sub-section (2) has been necessitated by the slab system. The exemptions contemplated are those referred to in section 16 (1) viz. those under sections 7, 8 14 and 15 which apply only to income-tax and not to super tax. It will be noted that the sub-section refers to the computation of income tax excluding super tax.

Sub-section (2) deals with income-tax (not super tax) and includes also income-tax on Indian States income exempted by section 14 (2) (c) sub-section (3) on the other hand deals with super tax only and in respect of only one item viz. Indian States income exempted under section 14 (2) (c).

Marginal relief—Old section 17 provided for marginal relief which to the extent required is now a-days given by the Finance Act itself.

Earned income—Sub-section (5) was added in 1945. See sections 2 (6-AA) and 16 (1) (a) and notes thereunder. As to marginal relief in respect of earned income see notes on section 7 of the Finance Act of 1945.

CHAPTER IV.

DEDUCTIONS AND ASSESSMENT.

Payment by deduction
at source

18. (1) * * *

(2) Any person responsible for paying any income chargeable under the head "Salaries" shall, at the time of payment, deduct income-tax and super-tax on the amount payable at a rate representing the average of the rates applicable to the estimated total income of the assessee under this head :

Provided that such person may, at the time of making any deduction, increase or reduce the amount to be deducted under this sub-section for the purpose of adjusting any excess or deficiency arising out of any previous deduction or failure to deduct.

(2-A) Notwithstanding anything hereinbefore contained, for the purpose of making the deduction under sub-section (2), there shall be included in the amount payable any income chargeable under the head "Salaries" which is payable to the assessee out of India by or on behalf of the Crown, and the value in rupees of such income shall be calculated at the prescribed rate of exchange

(2-B) Any person responsible for paying any income chargeable under the head 'Salaries' to a person not resident in British India shall, at the time of payment deduct income-tax at the maximum rate and also super-tax at the rate or rates applicable to the estimated income of the assessee under this head.

(3) The person responsible for paying any income chargeable under the head "Interest on Securities" shall, unless otherwise prescribed in the case of any security of the Central Government, at the time of payment, deduct income-tax but not super-tax on the amount, of the interest payable at the maximum rate :

Provided that where the Income-tax Officer gives a certificate in writing (which certificate he shall give in every proper case on the application of the assessee) that to the best of his belief the total income or the total world income of a recipient will be less than the minimum liable to income-tax or will be liable to a rate of income-tax less than the maximum rate, the person responsible for paying any income referred to in this sub-section or in sub-section (2-B), as the case may be, to such recipient shall, until such certificate is cancelled by the Income-tax Officer, pay the income without deduction or deduct the tax at such less rate as the case may be.

(3-A) Any person responsible for paying to a person not resident in British India any interest not being 'Interest on

Securities,' or any other sum chargeable under the provisions of this Act, shall, at the time of payment, unless he is himself liable to pay income-tax thereon as an agent, deduct income-tax at the maximum rate

Provided that where the person so payable is a British subject as defined in section 27 of the British Nationality and Status of Aliens Act, 1914, or a subject of a State in India or Burma, and the Income-tax Officer gives a certificate in writing (which certificate he shall give in every proper case on the application of the assessee) that to the best of his belief the total world income of such person will be less than the minimum liable to income-tax or that his total income will be liable to a rate of tax less than the maximum rate, the person responsible for paying any income referred to in this sub section shall, until such certificate is cancelled by the Income-tax Officer, pay the income without deduction or deduct the tax at such less rate, as the case may be.

Provided further that nothing in this section shall apply to any payment made in the course of transactions in respect of which the person responsible for making the payment is deemed under the first proviso to section 43 not to be an agent of the assessee

(3-B) Where the Income-tax Officer has reason to believe that the total world income of any person residing out of British India to whom any interest not being 'Interest on Securities' or any other sum chargeable under this Act is payable, will in any year exceed the maximum amount which is not chargeable with super-tax under the law for the time being in force, he may, by order in writing, require the person responsible for making such payments to such person to deduct at the time of payment super-tax at the rates determined by the Income-tax Officer to be applicable to the total world income of such person in that year

(3-G) Where the person responsible for paying any interest not being 'Interest on Securities' or any other sum chargeable under this Act to any person makes to that person in any year payments exceeding in the aggregate the maximum amount which is not chargeable with super-tax under the law for the time being in force, the person responsible for making such payments shall, if he has not reason to believe that the recipient is resident in British India, and no order under sub-section (3-B) has been received in respect of such recipient, deduct at the time of payment super-tax on the amount by which the total amount of such payments exceeds the maximum amount not chargeable with super-tax at the rate applicable to such excess

(3-D) Where the Income-tax Officer has reason to believe that any person, who is a shareholder in a company, is resident out of British India and that the total world income of such person will in any year exceed the maximum amount which is not chargeable to super-tax under the law for the time being in force, he may, by order in writing, require the principal officer of the company to deduct at the time of payment of any dividend from the company to the shareholder in that year super-tax at such rate as the Income-tax Officer may determine as being the rate applicable in respect of the income of the shareholder in that year.

(3-E) If in any year the amount of any dividend or the aggregate amount of any dividends paid to any shareholder by a company (increased in accordance with the provisions of sub-section (2) of section 16) exceeds the maximum amount of the total income of a person which is not chargeable to super-tax under the law for the time being in force, and the principal officer of the company has no reason to believe that the shareholder is resident in British India, and no order under sub-section (3-D) has been received in respect of such shareholder by the principal officer from the Income-tax Officer, the principal officer shall at the time of payment deduct super-tax on the amount of such excess at the rate which would be applicable under the law for the time being in force if the amount of such dividend or dividends increased as aforesaid constituted the whole total income of the shareholder.

(4) All sums deducted in accordance with the provisions of this section shall, for the purpose of computing the income of an assessee, be deemed to be income received.

(5) Any deduction made in accordance with the provisions of this section and any sum by which a dividend has been increased under sub-section (2) of section 16 shall be treated as a payment of income-tax or super-tax on behalf of the person from whose income the deduction was made, or of the owner of the security or of the shareholder, as the case may be, and credit shall be given to him therefor in the assessment, if any, made for the following year under this Act :

Provided that, if such person or such owner obtains, in accordance with the provisions of this Act, a refund of any portion of the tax so deducted, no credit shall be given for the amount of such refund :

Provided further that where such person or owner is a person whose income is included under the provisions of clause (c) of sub-section (1) or sub-section (3) of section 16, section 44-D or section 44-E in the total income of another person such other

person shall be deemed to be the person or owner on whose behalf payment has been made and to whom credit shall be given in the assessment for the following year

(6) All sums deducted in accordance with the provisions of this section shall be paid within the prescribed time by the person making the deduction to the credit of the Central Government or as the Central Board of Revenue directs

(7) If any such person does not deduct or after deducting fails to pay the tax as required by or under this section, he, and in the cases specified in sub-sections (3-D) and (3-E) the company of which he is the principal officer shall, without prejudice to any other consequences which he or it may incur, be deemed to be an assessee in default in respect of the tax

Provided that the Income-tax Officer shall not make a direction under sub section (1) of section 46 for the recovery of any penalty from such person unless satisfied that such person has wilfully failed to deduct and pay the tax

(8) The power to levy by deduction under this section shall be without prejudice to any other mode of recovery

(9) Every person deducting income-tax or super-tax in accordance with the provisions of sub-section (3), (3-A), (3-B), (3-C), (3-D) or (3-E) shall, at the time of payment of the sum from which tax has been deducted, furnish to the person to whom such payment is made a certificate to the effect that income-tax or super-tax has been deducted, and specifying the amount so deducted, the rate at which the tax has been deducted, and such other particulars as may be prescribed

Rules.—Several rules have been made with reference to this section These are

(1) Rule 10 prescribing the time within which deductions of tax have to be paid to Government

(2) Rule 10-A laying down the rate of exchange for conversion of overseas or other pay paid abroad in sterling by Government.

(3) Rule 11 regarding the details of the information to be given to the Income-tax Officer in respect of (a) deduction of tax from salaries other than those paid by Government and (b) deductions by approved superannuation funds and Rule 11-A permitting in certain cases provisional payments monthly subject to adjustment at the end of the year

(4) Rule 12 regarding information similarly to be given in respect of tax on interest on securities

(5) Rule 12 A similarly in respect of cases under sub sections (3 A), (3 B) (3 C), (3 D) and (3 E)

(6) Rule 12 B as to the action to be taken to pay the Income-tax in cases governed by Rules 12 and 12 A

(7) Rule 13 regarding the certificate of deduction of tax in respect of interest on Government securities.

(8) Rule 13 A similarly in respect of other securities

(9) Rule 13 B similarly in respect of interest not being interest on securities

(10) Rule 13 C in respect of tax on deductions of shares registered in the Reserve Bank of India

History—The Act of 1918 provided that where a payment was a non-recurring payment, the tax should be deducted at the rate appropriate to that particular sum, as if it were the whole of the assessee's income, and that where a payment was a recurring payment the tax should be deducted on the assumption that the total income of the assessee amounted to twelve times the recurring sum. Section 18 (2) of the Act now provides that deductions from salary shall be made at a rate which should approximate as closely as possible to the rate appropriate to the total assessable income of the assessee under the head "salaries", and it further empowers the person deducting income tax from "salaries" to rectify, in subsequent deductions, mistakes made in previous deductions.

Under the 1918 Act private employers could not deduct tax at source on salaries of employees.

See also sections 7, 8 and 13 of the 1886 Act under which only the interest on Government Securities and the salaries and pensions of Government servants and servants of local authorities were subject to deduction of tax at source.

The changes made since 1922 are as follows —

(1) Sub section (2-A) was added in 1925 to provide for the taxation of sterling overseas pay,

(2) sub sections (3 A) and (3-B) were inserted in 1933, also the provisos to sub-sections (3) and (7)

(3) in the same year sub sections (3 C) and (3 D) were transferred to this section from section 57, and sub section (1) omitted the words 'unless otherwise prescribed in the case of any security of the Central Government' being added to sub section (3), and the following minor changes made viz the insertion of the words 'but not super tax' in sub sections (2) and (3) of the words 'or super tax' in sub sections 5 and 9 and of the words "or under" in sub section (7), and the substitution of the words 'an assessee' for "personally" in sub section 7,

(4) the words 'the Crown' were substituted for 'Government' in 1937 by the Adaptations Order

(5) the second proviso to sub section (5) was added in 1937,

(6) in 1939, several important changes were made, sub section (2) was amended so as to permit deduction of super tax, sub sections (2 B) and (3 A) were added, sub-section (5) was altered so as to give credit to a shareholder in a company for the (notional) income tax paid on his behalf, sub-sections (3 B) and (3 C) (as renumbered) were altered so as to provide for deduction of super tax from payments to non residents of any sum chargeable under the Act (*see* section 42) reference was made in sub sections (3 B) and (3 D) to 'total world income' in place of 'total income', the second proviso to sub section (5) was expanded so as to cover cases under sections 44 D and 44 E and minor consequential changes were made in other sub sections.

In 1940 a proviso was added to sub section (3 A) on the lines of the proviso to sub section (6), and in 1941 a drafting amendment made in sub-section (3-E) in regard to the 'grossing' up of dividend

Deduction at source—Deduction at source is made in the following cases *viz* Both Income-tax and Super tax on salaries (*see* section 7), Income-tax on Interest on Securities (*see* section 8), both income-tax and super tax on other kinds of interest or other sums chargeable when paid to a non resident [in the circumstances set out in sub-sections (3 A), (3 B) and (3 C) of this section] super tax on dividends of companies paid to a non resident [as in sub sections (3-D) and (3-E)] and tax on payment of accumulations in recognised provident funds (*see* section 58-H)

Scope of Section—This section provides for the *deduction of tax at the source* as distinguished from *taxation at the source* (the latter in respect of unregistered firms and certain associations of persons)—*see* sections 14 and 16. The tax so deducted is paid over by the persons making the deduction to the credit of the Central Government within the period specified in the rules above along with a statement as prescribed by them. Such deductions of income-tax are under sub section (5) of section 18 treated as payments of income-tax on behalf of the persons from whose income or interest the deduction was made and credit is given to them in the assessment of their income if an assessment is made of their other income.

In respect of dividends of companies, however, there is no provision in the Income tax law for deduction of tax at source, but the tax paid by the company is deemed by sub section (5) of this section, to have been paid on behalf of the shareholder. But there is nothing to prevent a contractual arrangement between a company and its shareholder empowering the company to deduct tax on dividends but this arrangement has nothing to do with the Crown.

References—As to the meaning of 'Salaries', *see* section 7 which makes the expression include advances and certain capital receipts also, and as to that of 'Securities' *see* section 8. As to the meaning of 'reside' and 'resident', *see* notes under section 4. As to 'grossing' up of dividends *see* section 16 (2).

PLAN OF SECTION.

Sub-section.	Nature of payment.	Status of payee.	Tax to be collected.	Rates.	Remarks.
(2) & (2-A)	Salaries.	Resident.	Income-tax and super-tax.	Average estimated rates.	Paying person to collect <i>suo motu</i> .
(2-B)	Do.	Non-resident.	Do.	Income-tax at maximum rate and super-tax at average rates.	Do.
(3)	Interest on securities.	Immaterial.	Income-tax.	Maximum rates (or lower rate on certificate of Income-tax Officer).	Payer of interest <i>suo motu</i> .
(3-A)	Other sums chargeable including other kinds of interest.	Non-resident.	Income-tax.	Do.	Do.
(3-B)	Do.	Do.	Super-tax.	Rate applicable to total world income.	Payer to act on instructions from the Income-tax Officer.
(3-C)	Do.	Not known to payer to be resident.	Do.	As if payments through the payer were the total world income.	Payer to act <i>suo motu</i> .
(3-D)	Dividends.	Non-resident.	Do.	As in (3-B).	As in (3-B).
(3-E)	Do.	As in (3-C).	Do.	As in (3-C).	As in (3-C).

It will be noted that there is no provision for collection of Super-tax at source on Interest on Securities.

Sub-section (2)—Two important changes were made in this sub-section in 1939 *viz.*, (1) super tax also has to be deducted at the time of payment and (2) the rate at which tax is to be deducted (both income-tax and super tax) is to be the average of the rates applicable to the estimated total income under the head salaries.

'Under this head'—The rate to be applied to any particular payment is that applicable to the estimated income under salaries for the year in which payment is made *Chalmers v Rex* 1 Rang 335 1 ITC 140 AIR 1924 Rang 30. The assessee's income from other sources than salaries must be ignored for this purpose.

Paying—The person responsible for paying the salary means in the context of this section the person responsible for making the payment and not the person responsible for bearing the financial liability. Sub-sections (3 B) and (3 C) each of which refers to more than one category of payments use the word 'making such payments' and not 'paying' thus making the intention clear.

Average—Tax has to be deducted at the average rate every month because of the slab system. In the context average simply means one twelfth of the estimated tax on salaries for the whole year.

Accrued salary—Though under section 7 salaries can be taxed *i.e.*, included in total income and assessed on an accrued basis, sub-section (2) of section 18 does not authorise the person paying the salary to deduct tax on an accrued basis. The words are 'shall at the time of payment deduct income tax and super tax on the amount payable'. In spite of the ambiguity of the word 'payable' it does not seem correct to hold that tax can be collected on the entire amount due (payable?) even though a fraction thereof is actually paid. The word 'payable' which has been in this sub-section from long before the amendment of section 7 in 1939 permitting the taxation of salaries on an accrual basis simply refers to the gross amount that would be payable but for the withholding of tax. *See also* the third proviso to section 7 (1) under which when tax is deductible under section 18 the assessee cannot be called on to pay tax unless he has received the salary without deduction.

Capital sums in salaries—*See* section 7 and note in particular that under Explanation 2 thereof and section 2 (6-C) salaries include certain accumulated payments. As a consequence the person making such payments has to collect the appropriate tax at the time of payment. *See also* sub-section (2) of section 60 which permits the mitigation in certain circumstances of the burden of tax on accumulated sums under salaries.

Residents—Sub-section (2) is evidently intended to apply to salaries paid to residents contrast sub-section (2 B) which expressly provides for salaries paid to non residents.

Insurance premia—Abatement on—For the power of an employer to allow abatements on account of insurance premia *see* notes under section 15. As regards private employers it may be noted that it is open to them to make these allowances on account of insurance premia or not according as it may suit the convenience of themselves and their employees as if such rebate is not given when the tax is deducted at the source it may be claimed by the employee in the following year either as a refund or a set-off against the amount due by him if he is assessed under section 23.

Refund in cash—The Officer responsible for collecting tax under this section is not competent to refund in cash any excess tax collected. All that he can do is to adjust the excess by short collection and *vice versa*.

Overseas pay—Sub section (2 A) which was added by Act XVI of 1925 provides that tax shall be deducted in India at the time of payment of the remaining salary in India in respect of all payments on account of salary made out of India by and on behalf of Government. But for this provision tax can be deducted only by an assessment under section 23 and not at source. It does not in itself impose any liability to tax which is laid by section 4.

Salaries of non residents—Sub section (2 B) was inserted in 1939. Income tax will be collected at the maximum rate (subject to refund if any with reference to sections 17 and 48) and super tax at estimated average rate (subject to similar refund if any).

Leave salary—The exemptions which had been granted under section 60 in respect of leave salaries paid abroad have been cancelled as from 1st April 1939. See section 60 and the notes under it.

Responsibility of person who has to deduct tax at source—Any person required to make a deduction under section 18 who fails to do so may himself under sub section (7) be deemed to be an assessee in default in respect of the tax while he is also liable to be prosecuted for an offence punishable under section 51 (a) and also liable to a penalty under section 46 (1). The proviso to sub section (7) restricts such liability under section 46 to cases of wilful default. Failure to give a certificate under section 18 (9) also renders the person liable to prosecution under section 51 if there is no reasonable cause or excuse for the failure.

Persons making deductions at the source are indemnified for the deduction under section 65.

Where a person has a dual capacity both as person responsible for making payments and as payee his liability to deduct and account for tax will not be lessened by the dual capacity cf *Howells v Commissioners of Inland Revenue* 1939 All E.R. 144 (K.B.).

Recognised provident funds—Payment of accumulations—Sub section (4) to (9) of this section apply also to tax collected at source under section 58-H in respect of accumulations paid to members of recognised provident funds. See notes under that section.

Treasury Bills—The only securities of the Central Government (other than income tax free securities) from the interest on which income tax is not deducted in advance are Treasury Bills. The so called interest on them is more of the nature of discount.

Reserve bank shares—It will be seen from Rules 13 C that dividends on the shares are treated somewhat like interest on securities these dividends being taxable.

Securities in the custody of banks—It frequently happens that security holders hand over their securities and bonds to their bankers for collection. In that event the certificate given by the person deducting the income-tax from the security would be given to a bank for a whole block of securities. In such a case the Income tax Officer should accept a certificate from the bank in the following form and act upon it as if it were

a certificate received direct from the person deducting income tax from the security —

We hereby certify that interest on the various securities specified on the back hereof was collected by us on behalf of and that we received payment or were credited with the proceeds thereof (less income tax) as stated on the other side amounting to Rs

The securities specified are covered by certificates issued to the Bank under section 18 (9) of the Income tax Act 1922

Signature of Banker_____

Address_____

Date_____

(To be signed by the claimant)

I hereby declare that the securities on which interest as above specified has been received are my own property and were in the possession of _____ at the time when income tax was deducted.

Signature_____

Date_____

(NB—The securities to be produced when required in support of any claim.)

REVERSE OF FORM
Schedule of Securities

No and description of securities	Date of payment of interest after deduction of income-tax	Period for which interest has been paid	Amount of interest (less income tax)	Remarks

The certificate under section 18 (9) must be taken by the Income tax Officer of the area in which the claimant or assessee is assessed or resides (see rule 39) as conclusive evidence of the payment of the tax, both where a refund is claimed in cash and where a set-off against the tax assessed on other income is claimed (*Income tax Manual*)

Anticipatory certificates—The following executive instructions may be noted

It is desirable that refunds should be avoided as far as possible. There are, for example certain institutions, authorities and funds the income of which is exempt from tax under the provisions of section 4 (3). Similarly there are persons whose assessable income is less

as a part of the general recasting of the basis of taxation of dividends—compare sections 14 16 18 and 48 which have all been recast as part of a single plan. The tax notionally paid by the company is treated explicitly as paid on behalf of the shareholder.

The second proviso which was inserted in 1937 in order to cover cases falling under section 16 (3) was expanded in 1939 so as to cover also cases under sections 44-D and 44 E.

Company doing business of a shareholder—Whatever the legal position of a Company in relation to a shareholder in respect of income tax on dividends there is nothing to prevent a company as a corporate entity from acting as the agent of an individual who may be a shareholder and really carrying on his business. *Commissioners of Inland Revenue v Sansom* 8 Tax Cases 20 (1921) 2 KB 492 but as regards dividends and the tax on them the position is unaffected by such agency so long as the agency is not a sham. The company as such that is as a separate legal entity will pay tax on its own profits and the shareholder will get relief under sections 16 18 (5) and 48. As regards bogus companies and those not distributing profits see notes under sections 2 (6-A) 3 and 23 A.

Dividends paid out of untaxed profits—The words where the profits and gains have been assessed to tax which occurred in section 14 as it stood before 1939 were construed in their natural meaning. Accordingly dividends received by a shareholder were wholly exempt from tax in his hands even though a part of the dividends might have been paid out of profits which were exempt from tax in the hands of the paying company. In *re the Hungerford Investment Trust, Ltd* 1935 ITR 65 62 Cal 133 7 ITC 441. This ruling has been nullified by the amendment in 1939. In the United Kingdom the Court of Appeal disallowed the claim of the Crown to tax in full in the shareholder's hands preference dividend received from an Indian Company part of whose profits was received from dividends of United Kingdom Companies which had been taxed in that country on their profits. For this purpose the Court thought that it was immaterial whether the dividends were preference or ordinary, *Barnes v Hutchison* 17 ATC 263 (CA). This judgment however, was reversed by the House of Lords. The principle against double taxation applies only to payment of tax by the same person twice in respect of the same income, and as the preference shareholder in this case had received the full dividend to which he was entitled he was not entitled to any relief on the basis that he had borne a share of the tax paid by the company. (1939) 3 All ER 803. In *Canadian Eagle Oil Co v Rex*, 1945 the House of Lords went further and overruled *Gilbertson v Fergusson* 1 Tax Cas 501 (CA) that is extended to all cases what was decided about preference shares only in *Barnes v Hutchison*.

Super tax—Paid by company—Under section 16 (2) dividends of companies are grossed up with reference to income tax only (and not super tax) and under section 18 (5) credit is given to the shareholder only for the amount of income tax added on in grossing up. A shareholder is therefore liable to pay super tax at his appropriate rate on the dividends received by him and he receives no credit for the super tax paid by the company. The same result was achieved even before 1939 through section 14 and 38 as they then stood see *Maharajadhiraj of Darbhanga v Commissioner of Income tax, B and O*, 3 Pat 470 AIR 1924 Pat 474 1 ITC 303.

Preference shareholders—Position of—In *Purushottamdas Harishandas v C I Spinning Company*, 42 Bom 579 1 I T C 11, it was decided that as between preference and ordinary shareholders the former are not entitled to have their preference dividends paid free of income tax in the absence of express word to that effect in the contract regulating the rights of the parties. The law in the United Kingdom expressly authorises the deduction by a company, of income tax at the standard rate, from dividends and the company is not accountable to the Crown for these deductions so a company can deduct tax even if it is not itself taxed. In India, there is no similar provision in the income tax law and it is a matter to be settled by contract (i.e. the memorandum and the articles of association) between the company and its shareholders. In the absence however, of such an arrangement a dividend stated merely to be subject to tax cannot be subjected to tax unless the company itself pays tax. *Bai Lalji v Tata Iron and Steel Co.*, 1940 I T R 337 (Bom).

There is nothing to prevent a company from so defining the dividend rights of its shareholders as it pleases so long as the articles are clear that a particular class of shareholder is entitled to a dividend on a definite basis, the dividend is so payable to him. The position of the shareholder vis à vis the Crown is a different matter and has to be regulated by sections 16, 18 (5) and 49 B, cf. *Palestine Electric Corporation, Ltd v Meyer Sulzertan and Amalco Pennon Trusts*, 1944 Ch.D.

Sub-section (7)—It will be seen that in cases falling under sub-sections (3 D) and (3 E) both the company and the principal officer will be liable to account for the tax.

Sub section (9)—Certain minor changes were made in 1939 consequent on the changes made in the other sub sections.

United Kingdom Law—Though the relationship of the shareholder to the company, that is the extent to which, if any, the company acts as the agent of the shareholder in this respect, has been made clear in the Indian Law through sections 16, 18 (5) and 48, and there is little in common between these provisions and the provisions in the United Kingdom Acts, a brief reference to the Law in the United Kingdom will be of interest. The statutory provisions in that country have at no time been too clear and there has been considerable litigation especially in comparatively recent years. To quote the MacMillan Committee's Report (paragraph 100, *et seq*) —

The principle upon which the taxation of dividends was administered from 1842 onwards and up to 1930, is set forth in the case stated, and was sanctioned by the Court in *F H Hamilton v Commissioners of Inland Revenue*, (1931) 2 KB 495. The case stated deals with the practice as follows —

It is, and always has been, the almost universal practice to deduct from the gross amount of the dividend the tax appropriate to that amount, or, if the dividend is declared to be 'free of tax', to treat it, for the purposes of computing total income, as equivalent to the gross amount which, after deduction of the appropriate tax, corresponds to the net amount actually paid, without any reference to the amount of the company's statutory income. This method of dealing with dividends is one of the accepted conventions under which the Income tax Acts are regularly administered, and it is consistent with the actual words of the Acts. An exception to the general rule has, in

recent years been admitted in a few special cases where it has been clear that the payment of a dividend was in whole or in part a distribution of profits which by reason of their capital nature were not within the charge to income tax.

The idea that a company's power of deducting tax from dividends was simply a power to pass on to its shareholders its own tax on its own income resulting as it would have done in a company deducting as tax from its dividends an amount representing tax at a smaller or greater rate than that in force for the year or being unable to deduct any tax at all and in elaborate inquiries into the past history of the company's income and its accumulation was thus never acted upon.

So also dividends were always treated as part of a tax payer's income from all sources for the purpose of claiming exemption and returnable accordingly as being annual payments' liable to deduction of tax. They were similarly without question treated as annual payments charged to income tax under Schedule D in claims by charities for exemption from tax under section 105 of the Income tax Act 1842 (now incorporated in section 37 of the Income-tax Act 1918). The speech of *Halsbury LC* in the case of *Attorney General v Ashton Gas Company* (1906) A C 10 well illustrates the then prevalent view that (whatever the method of collection) dividends of companies were taxable income. It is indeed difficult to imagine from a commonsense standpoint a receipt which is more obviously income.

In 1910 super tax was introduced and the inclusion of dividends in the content of total income from all sources became a matter of moment to tax payers whose means enabled them to test the matter by litigation. Thus (to mention only a few cases) in *Brooke v Commissioners of Inland Revenue* (1915) A C 478 the bold contention was put forward that having regard to the taxation of dividend through the medium of the company's profits a dividend was not returnable as part of total income at all i.e. as income of the shareholder. This view was rejected by the Court of Appeal and their decision on this point was subsequently approved by the House of Lords in the case of *Whitney v Commissioners of Inland Revenue* (1926) A C 37. In the course of the *Brooke* case the observation was made that a company deducting tax from dividend did so as agent for the shareholder. This view of the situation was however qualified a few years later by the view expressed in *Lord Cave's* speech in *Commissioners of Inland Revenue v Blott* (1921) 2 A C 171 as follows —

"Plainly a company paying income tax on its profits does not pay it as agent for its shareholders. It pays as a tax payer and if no dividend is declared the shareholders have no direct concern in the payment. If a dividend is declared the company is entitled to deduct from such dividend a proportionate part of the amount of the tax previously paid by the company and in that case the payment by the company operates in relief of the shareholder. But no agency properly so called is involved."

We now come to the year 1930 when in the case of *Gimso v Commissioners of Inland Revenue* (1930) 2 K B 246 the contention was raised and accepted by the High Court that the receipt of dividends paid out of a fund consisting in part of receipt of an

income nature which would not upon the statutory rules for computing income either themselves be taxed or form part of a computation for the purposes of an assessment could not render the shareholder liable to super tax since such dividends could neither be the subject of deduction of tax at the source nor be charged upon the recipient under Case VI of Schedule D.

The decision in *Gimson's case* was relied upon in the next case which arose (that of *Hamilton v Commissioners of Inland Revenue* (1931) 2 K.B. 495) to support a contention that if as regards any year taxed profits of a company were less than the amount of a dividend declared for that year so much only of the total distribution of dividend was liable to be charged to income-tax (and so included for the purposes of surtax in an individual's total income) as corresponded with the amount of the company's taxed income. This contention failed.

In 1931 for the purpose of surtax the law in the United Kingdom was amended somewhat on the lines of section 16 (2) in the Indian Act but the House of Lords decided in *Neumath v Inland Revenue* 18 Tax Cases 332 and *Cull v Inland Revenue* 1940 I.T.R. (Sup) 1 that the grossing up was to be made only if the company had in fact deducted tax and not otherwise. These rulings furnish no guidance for construing the Indian law.

Leaving aside dividends of companies the broad rule in the United Kingdom law is that tax can be deducted at source by the payer only if the payment is made out of a taxed fund. There is no rule of law that there is an absolute or universal right to attribute interest payments to income if there is any income available save only in cases of illegality or *ultra vires*. There is no abstract right of attributing interest to a taxed fund merely because such a fund is available. The facts must be examined in each case and the attribution made as between the taxed and untaxed funds on the basis of evidence and the conduct of the tax payer must not be inconsistent with the attribution. *Paton (Trustee for Feiton) v Inland Revenue* 15 A.T.C. 11 (1936) 2 K.B. 59 (CA).

Before 1927 when the law was amended in the United Kingdom in certain cases a person who deducted tax at source did not hold it in trust for the Crown. [In *re Lang Propeller Ltd* 11 Tax Cases 46 (CA).]

18-A (1) (a) In the case of income in respect of which provision is not made under section

Advance payment of tax

18 for deduction of income tax at the time of payment, the Income tax Officer may, on or after the 1st day of April, in any financial year, by order in writing, require an assessee to pay quarterly to the credit of the Central Government on the 15th day of June, 15th day of September, 15th day of December and 15th day of March in that year, respectively, an amount equal to one quarter of the income-tax and super tax payable on so much of such income as is included in his total income of the latest previous year in respect of which he has been assessed if that total income exceeded six thousand rupees. Such income tax and super tax shall be calculated at the rates in force for the financial year in which he is required to pay the tax, and shall bear to the total amount

of income-tax and super-tax so calculated on the said total income the same proportion as the amount of such inclusions bears to his total income or, in cases where under the provisions of sub-section (1) of section 17 both income-tax and super-tax or super-tax are chargeable with reference to the total world income, shall bear to the total amount of income-tax and super-tax which would have been payable on his total world income of the said previous year had it been his total income the same proportion as the amount of such inclusions bears to his total world income :

Provided that, where the previous year of the assessee in respect of any source of income ends after the 31st day of December and before the 30th day of April, the order in writing issued by the Income-tax Officer requiring the payment of income-tax and super-tax on that source of income shall substitute for the four quarterly payments hereinbefore specified, three payments of equal amount to be made on the 15th day of September, the 15th day of December and the 15th day of March, respectively :

Provided further that, if the assessee is a partner of a registered firm and an assessment of the firm has been completed for a previous year later than that for which the assessee's last assessment has been completed, his share in the profits of the firm shall, for the purposes of this sub-section, be included in his total income on the basis of the latest assessment of the firm :

Provided further that, if after the making of an order by the Income-tax Officer and before the 15th day of February of the financial year an assessment of the assessee or of the registered firm of which he is a partner is completed in respect of a previous year later than that referred to in the order of the Income-tax Officer, the Income-tax Officer may make an amended order requiring the assessee to pay in one instalment on the specified date, or in equal instalments on the specified dates if more than one, falling after the date of the amended order, the tax computed on the revised basis as reduced by the amount, if any, paid in accordance with the original order ; but if the amount already paid exceeds the tax determined on the revised basis, the excess shall be refunded.

(b) If the notice of demand issued under section 29 in pursuance of the order under clause (a) of this sub-section is served after any of the dates on which the instalments specified therein are payable, the tax shall be payable in equal instalments on each of such of those dates as fall after the date of the service of the notice of demand, or in one sum on the 15th day of March if the notice is served after the 15th day of December.

(2) If any assessee who is required to pay tax by an order under sub section (1) estimates at any time before the last instalment is due that the part of his income to which that sub section applies for the period which would be the previous year for an assessment for the year next following is less than the income on which he is required to pay tax and accordingly wishes to pay an amount less than the amount which he is so required to pay, he may send to the Income tax Officer an estimate of the tax payable by him calculated in the manner laid down in sub section (1) on that part of his income for such period, and shall pay such amount as accords with his estimate in equal instalments on such of the dates specified in sub section (1) (a) as have not expired or in one sum if only the last of such dates has not expired

Provided that the assessee may send a revised estimate of the tax payable by him before any one of the dates specified in sub section (1) (a) and adjust any excess or deficiency in respect of any instalment already paid in a subsequent instalment or in subsequent instalments

(3) Any person who has not hitherto been assessed shall, before the 15th day of March in each financial year, if his total income of the period which would be the previous year for an assessment for the financial year next following is likely to exceed six thousand rupees send to the Income-tax Officer an estimate of the tax payable by him on that part of his income to which the provisions of section 18 do not apply of the said previous year calculated in the manner laid down in sub section (1) and shall pay the amount, on such of the dates specified in that sub section as have not expired, by instalments which may be revised according to the proviso to sub section (2)

(4) Where part of the income to which sub section (1), (2) or (3) applies consists of any income of the nature of commission which is receivable periodically and is not received or adjusted by the payer in the assessee's account before any of the quarterly instalments of tax become due, he may defer payment of tax on that part of his income to the date on which such income would be normally received or adjusted and if he does so he shall communicate to the Income tax Officer the date to which such payment is deferred

Provided that, if the tax of which the payment is deferred is not paid within fifteen days of the date on which such income or part thereof is received or adjusted by the

payer in the assessee's account, the tax shall be payable with six per cent. simple interest per annum from the date of such receipt or adjustment to the date of payment of the tax.

(5) The Central Government shall pay on any amount paid under this section simple interest at two per cent. per annum from the date of payment to the date of the assessment (hereinafter called the 'regular assessment') made under section 23 of the income, profits and gains of the previous year for an assessment for the year next following the year in which the amount was payable :

Provided that on any portion of such amount which is refunded under the foregoing provisions of this section interest shall be payable only up to the date on which the refund was made.

(6) Where in any year an assessee has paid tax under sub-section (2) or sub-section (3) on the basis of his own estimate, and the tax so paid is less than eighty per cent. of the tax determined on the basis of the regular assessment, so far as such tax relates to income to which the provisions of section 18 do not apply and so far as it is not due to variation in the rates of tax made by the Finance Act enacted for the year for which the regular assessment is made, simple interest at the rate of six per cent. per annum from the 1st day of January in the financial year in which the tax was paid up to the date of the said regular assessment shall be payable by the assessee upon the amount by which the tax so paid falls short of the said eighty per cent. :

Provided that, where, as a result of an appeal under section 31 or section 33 or of a revision under section 33-A or of a reference to the High Court under section 66, the amount on which interest was payable under this sub-section has been reduced the interest shall be reduced accordingly and the excess interest paid, if any, shall be refunded together with the amount of income-tax that is refundable :

Provided further that, where a business, profession or vocation is newly set up and is assessable on the income, profits and gains of its first previous year in the financial year following that in which it is set up, the interest payable shall be computed from the 1st day of April of the said financial year.

(7) Where, on making the regular assessment, the Income-tax Officer finds that any assessee has—

(a) under sub-section (2) or sub-section (3) under-estimated the tax payable by him and thereby reduced the amount payable in any of the first three instalments, or

(b) under sub-section (4) wrongly deferred the payment of tax on a part of his income, he may direct that the assessee shall pay simple interest at six per cent per annum, in the case referred to in clause (a) for the period during which the payment was deficient on the difference between the amount paid in each such instalment and the amount which should have been paid having regard to the aggregate tax actually paid under this section during the year, and in the case referred to in clause (b) for the period during which the payment of tax was wrongly deferred on the amount of which the payment was so deferred

Provided that for the purposes of this sub section any instalment due before the expiry of six months from the commencement of the previous year in respect of which it is to be paid shall be deemed to have become due fifteen days after the expiry of the said six months

(8) Where, on making the regular assessment, the Income tax Officer finds that no payment of tax has been made in accordance with the foregoing provisions of this section, interest calculated in the manner laid down in sub section (6) shall be added to the tax as determined on the basis of the regular assessment

(9) If the Income tax Officer, in the course of any proceedings in connection with the regular assessment, is satisfied that any assessee—

(a) has furnished under sub section (2) or sub section (3) estimates of the tax payable by him which he knew or had reason to believe to be untrue, or

(b) has without reasonable cause failed to comply with the provisions of sub section (3), the assessee shall be deemed, in the case referred to in clause (a), to have deliberately furnished inaccurate particulars of his income, and in the case referred to in clause (b), to have failed to furnish the return of his total income, and the provisions of section 28, so far as may be, shall apply accordingly

Provided that the amount of penalty leviable shall, in the case referred to in clause (a), be a sum not exceeding one and a half times the amount by which the tax actually paid during the year under the provisions of this section falls short of the tax that should have been paid by the assessee under sub section (1) or eighty per cent of the tax determined on the basis of the regular assessment as

modified in the manner provided in sub-section (6), which-ever is the less, and, in the case referred to in clause (b), one-and-a-half times the said eighty per cent.

(10) (a) If any assessee does not pay on the specified dates any instalment of tax that he is required to pay under sub-section (1) and does not, before the date on which any such instalment as is not paid becomes due, send under sub-section (2) an estimate or a revised estimate of the tax payable by him, he shall be deemed to be an assessee in default in respect of such instalment or instalments

(b) If any assessee has sent under sub-section (2) or sub-section (3) an estimate or a revised estimate of the tax payable by him, but does not pay any instalment in accordance therewith on the date or dates specified in sub-section (1), he shall be deemed to be an assessee in default in respect of such instalment or instalments :

Provided that the assessee shall not, under clause (a) or (b), be deemed to be in default in respect of any amount of which the payment is deferred under sub-section (4) until after the date communicated by him to the Income-tax Officer under that sub-section

(11) Any sum other than a penalty or interest paid by or recovered from an assessee in pursuance of the provisions of this section shall be treated as a payment of tax in respect of the income of the period which would be the previous year for an assessment for the financial year next following the year in which it was payable, and credit therefor shall be given to the assessee in the regular assessment

History.—This section was introduced in 1944 as one of the anti-inflationary measures during the war, but as it has taken the form of an addition to the Income-tax Act it remains to be seen whether, and when it will be removed. The appropriate occasion for its removal will arise when a policy of 'reflation' of currency is adopted

Plan of section.—The initiative in case of old assessee is to be taken by the Income tax Officer on the basis of the income of the assessee's latest previous year, and the assessee has the option to submit an alternative estimate of income, but if his estimate of tax turns out to be less than eighty per cent of the tax eventually assessed, he has to pay interest at six per cent per annum on the difference. Advance payments carry simple interest at two per cent per annum till the regular assessment. The advance tax is ordinarily payable in four instalments. Most of the detailed provisions are self-explanatory and are merely intended to facilitate estimating and collection

Rules.—See Rule 20-A prescribing the form in which the demand is to be made by the Income-tax Officer under sub-section (1)

Income to which section applies—As is to be expected the section applies only to cases in which under section 18 tax is not deducted at source. The section also does not apply to income below Rs 6000 (according to the last assessment).

Provisional—The current rates of tax are applied provisionally in respect of these advance collections and the necessary adjustments made when the assessment is made in the next year with reference to the then rates.

Penalties—Section 28 is attracted by default or false returns under this section also to the extent laid down in sub-section (9).

Returns *suo motu*—Persons previously assessed will receive an order from the Income-tax Officer to pay the advance tax in instalments, but persons not previously assessed should send returns and the tax *suo motu* if their estimated income exceeds Rs 6000 for the previous year relating to the assessment for the next financial year.

19 In the case of income in respect of which provision is not made under section 18 for deduction of income tax at the time of payment, and in any case where income tax has not been deducted in accordance with the provisions of section 18, income tax shall be payable by the assessee direct.

History—This roughly corresponds to section 15 (7) of the Act of 1918. It has been recast several times viz in 1933 1934 and 1939.

The recasting of the earlier part of the section in 1939 was consequential on the changes in section 18 (some of which were made even in 1933) which now extends to many other items than salaries and interest on securities.

Scope of section—The intention of the section is that the tax shall be levied directly on the assessee (not by deduction at source) in the following cases—(1) All income in respect of which deduction at source is not permissible under section 18. (2) Income in respect of which such deduction can be made but has not been made. As regards the latter see also sub-section (8) of section 18 under which the right to deduct tax at source is without prejudice to any other method of recovery.

'Income'—In this section means income profits and gains and not a distinguished from profits and gains.

19 A The principal officer of every company shall, on or before the 15th day of June in each year, furnish to the prescribed officer a return in the prescribed form, and verified in the prescribed manner, of the names and of the addresses, as entered in the register of shareholders maintained by the company, of the shareholders to whom a dividend or aggregate dividends exceeding such amount as may be prescribed in this behalf has or have been distributed during the preceding year and of the amount so distributed to each such shareholder.

Supply of information regarding dividends

abroad is a valid certificate for the purpose of section 48 *Commissioner of Income tax Bombay v Major Goldie*, 55 Bom 734 AIR 1931 Bom 420 5 ITC 228

It is doubtful if the penalty can be enforced if the dividends are distributed outside British India. The shareholder will suffer if the certificate is not given because in its absence he cannot get a refund under section 48. Apart from the prosecution by the Assistant Commissioner it is not clear whether a shareholder can obtain a mandamus or an injunction compelling the principal officer of the company to give him the certificate under this section.

United Kingdom—A provision corresponding to this section was introduced in the United Kingdom in the Finance Act of 1924 (see section 33). The Royal Commission of 1920 had recommended such a rule.

20-A The person responsible for paying any interest not being 'Interest on Securities' shall, on or before the fifteenth day of June in each year, furnish to the prescribed officer a return in the prescribed form and verified in the prescribed manner of the names and addresses of all persons to whom during the previous financial year he has paid interest or aggregate interest exceeding such amount not being less than four hundred rupees as may be prescribed in this behalf, together with the amount paid to each such person.

Supply of information regarding interest

Rules

R 42 A—A return shall be furnished by the person responsible for paying interest not being interest on securities in respect of amounts of interest or aggregate interest exceeding Rs 400.

R 43 A—The return under section 20 A shall be in the following form and shall be delivered to the Income tax Officer in whose jurisdiction the person responsible for paying interest resides —

Return under section 20 A of the Indian Income tax Act 1922 for the year 1st April 19 to 31st March 19

Name of payer
Address of payer

Ser al No	Name of payee	Address of payee	Date of payment	Amount of interest or aggregate interest

I hereby certify that the above statement contains a complete list of persons to whom interest or aggregate interest exceeding Rs. 400 was paid during the period 1st April, 19 , to 31st March, 19

Signature

Dated . . . 19

History.—This section was added by Act XVIII of 1933, and the limit of Rs. 400 was substituted for that of Rs. 1,000 in 1939

21 The prescribed person in the case of every Government office, and the principal officer or the prescribed person in the case of every local authority, company or other public body or association, and every private employer shall prepare, and, within thirty days from the 31st day of March in each year, deliver or cause to be delivered to the Income-tax Officer in the prescribed form, and verified in the prescribed manner a return in writing showing—

(a) the name and, so far as it is known, the address, of every person who was receiving on the said 31st day of March, or has received or to whom was due during the year ending on that date, from the authority, company, body, association or private employer, as the case may be, any income chargeable under the head 'Salaries' of such amount as may be prescribed ;

(b) the amount of the income so received or so due by each such person, and the time or times at which the same was paid or due, as the case may be ;

(c) the amount deducted in respect of income-tax and super-tax from the income of each such person

See Rule 15 as to the authorities who shall prepare the returns under this section in respect of Government servants, Rule 16 as to limit of salary and Rule 17 as to the form of the return and its verification

Annual return of employees—The following instructions have been issued

Under section 21, read with rules 15, 16 and 17, a return in the form prescribed in rule 17 must be made of all employees deriving in income of Rs. 1,600 per annum or over, by the Government officers mentioned in rule 15, by every private employer and by, in the case of local authorities, companies or other public bodies or associations, the "principal officer" "or the prescribed person". Where a company has got several places of business it may be more convenient for the company that the returns under this section should be made not by the principal officer at the headquarters of the company but by officers at different branches since this return has, subject to what is said in the next paragraph, to be made to the local Income-tax Officer, i.e., to the Income-tax Officer of the place where the employees happen to reside. The liability for making this return remains, under section 21, with the principal officer unless another person is prescribed. The object of the return is to enable Income-tax Officers to see that the tax has been deducted at the source under section 18 (2) or 18 (2-B), to

arrange for adjustments where the collections at the source have not been made correctly, and to assess 'salaried persons' under section 23 whether the tax has been collected at the source or not where the salaried persons have other income than salary'

This section prescribes that the return must be delivered to the Income tax Officer but does not state to which particular Income-tax Officer the return should be made. Every Income tax Officer has under the provisions of section 64 (4), all the powers conferred by or under the Act on an Income tax Officer, in respect of any income accruing or arising or received within the area for which he is appointed, irrespective of whether the particular income is assessed by him or not. In most cases it is convenient that this return should be made to the Income tax Officer of the area in which the employees reside, but in some cases it may be more convenient that the return should be made to the Income tax Officer of the area in which the headquarter of a widespread business is situated. It is for the Income tax Commissioner in each doubtful case to decide to which particular Income tax Officer this return should be sent.

The return prescribed under this section is the return of all employees who during the period of 12 months ending 31st March last were in receipt of an amount of salary which together with the amount of salary due for but not paid in that year is not less than Rs 1600 and the return must be furnished to the Income tax Officer in the proper form before the 1st of May. The obligation to make this return is a statutory one and no preliminary notice or request from the Income tax Officer is required. Failure to furnish this return is punishable under section 51 (c) of the Act. Any false statement made in this verification mentioned in section 21 is an offence punishable under section 52 (*Income tax Manual*).

History—A corresponding provision of some sort was to be found in earlier Acts also. It was expanded in 1922 and the following changes were made in 1939

(a) The return has now to be verified in the prescribed manner (with a corresponding penalty under section 52);

(b) salary whether received or due has to be included (consequent on the change in section 7)

(c) the return covers both income-tax and super tax (consequent on the changes in section 18)

The words 'or so due' have been inserted before by in clause (b) through inadvertence the words should be 'So received by or so due to'

Law in the United Kingdom.—Under section 105 of the English Income-tax Act of 1918 returns can be called for similarly but only by a notice being served by the assess or on the principal officer or employer. Here under this section the returns have to be sent in without any notice having to be served.

22 (1) The Income-tax Officer shall, on or before the 1st day of May in each year, give notice by publication in the press and by publication in the prescribed manner, requiring

Return of income

every person whose total income during the previous year exceeded the maximum amount which is not chargeable to income-tax to furnish, within such period not being less than sixty days as may be specified in the notice, a return in the prescribed form and verified in the prescribed manner, setting forth (along with such other particulars as may be required by the notice) his total income and total world income during the previous year

Provided that the Income tax Officer may in his discretion extend the date for the delivery of the return in the case of any person or class of persons

(2) In the case of any person whose total income is, in the Income-tax Officer's opinion of such an amount as to render such person liable to income-tax the Income-tax Officer may serve a notice upon him requiring him to furnish, within such period, not being less than thirty days, as may be specified in the notice, a return in the prescribed form and verified in the prescribed manner setting forth (along with such other particulars as may be provided for in the notice) his total income and total world income during the previous year

Provided that the Income-tax Officer may in his discretion extend the date for the delivery of the return

(3) If any person has not furnished a return within the time allowed by or under sub-section (1) or sub-section (2), or having furnished a return under either of those sub sections, discovers any omission or wrong statement therein, he may furnish a return or a revised return, as the case may be, at any time before the assessment is made

(4) The Income-tax Officer may serve on any person who has made a return under sub-section (1) or upon whom a notice has been served under sub section (2) a notice requiring him, on a date to be therein specified, to produce, or cause to be produced, such accounts or documents as the Income-tax Officer may require

Provided that the Income-tax Officer shall not require the production of any accounts relating to a period more than three years prior to the previous year

(5) The prescribed form of the returns referred to in sub-sections (1) and (2), shall, in the case of an assessee engaged in any business, profession or vocation, require him to furnish particulars of the location and style of the principal place wherein he carries

on the business, profession or vocation and of any branches thereof, the names and addresses of his partners, if any, in such business, profession or vocation and the extent of the share of the assessee and the shares of all such partners in the profits of the business, profession or vocation and any branches thereof

Rules—For the form of Return of Income, *see* Rule 19. As regards income due for assessment in any year ending before the 1st April, 1939 *see* Rule 19 A.

Previous law—Under the 1886 Act, while there was an obligation on the principal officer of a company to furnish a return there was no similar obligation on the part of individual assesseees to furnish returns. All that the Collector could do was to invite returns from such persons if the Local Government had so authorised him by Rules. The power to call for returns was first given by the Amending Act of 1916.

As regards the demand for the production of accounts the Income-tax Officer had under the 1918 Act to call for the accounts in every case in which he did not accept the return of the assessee. Since 1918 he is not bound to do so. Further under the 1918 Act the accounts could be called for only if the return was not accepted by the Income tax Officer. If no return had been filed the accounts could not be demanded. Since 1918 however the accounts can be called for at any stage and whether the return has been filed or not. But *see* notes under section 23.

Sub-section (3) was first introduced in 1922.

The most important changes in 1939 are the following—

(1) Insistence on a return *suo motu* from the tax payer in all cases not only in the case of companies as before (with a corresponding penalty under section 28)

(2) The removal of the concluding part of old sub-section (3) under which a correct return made at any time before assessment saved the assessee from penalties for earlier failures and wrong statements, now the putting in a return only saves the person from an assessment under section 23.

(3) The calling for information regarding places of business, names of partner etc. in the return [*see* sub-section (5)]. This was formerly provided for under section 39 (3). Other changes are minor and consequential.

It will be noted that the form of return of income has been radically revised as a consequence of the revision of section 4.

United Kingdom Law—In the United Kingdom the accounts of the assessee cannot be demanded nor is there a penalty for not producing the accounts. All that he can be asked to do is to produce evidence in support of his return (section 139 of the English Income tax Act of 1918) and if such evidence is not produced though available there would be the usual presumption against the assessee.

Sub-section (1)—In each year, sub-section (1) clearly means in each financial year. The Income tax officer has to publish both in the Press (obviously at his discretion as to the papers selected) and in the prescribed manner. Rules have been prescribed for the latter purpose.

As to 'person', *see* section 2 (9). Rules 19 and 19-A set forth the prescribed form of return of income.

The prescribed return must set forth total income and total world income of the assessee in addition to other particulars prescribed.

Though an obligation is laid under sub-section (1) on the assessee to furnish a return *suo motu*, the Income tax Officer has the option under sub-section (2) to serve a notice and call for a return. An assurance was given on behalf of Government that in practice the Income-tax Officer would send notices under sub-section (2) to persons believed to be taxable. It will be noticed that the time limit under sub-section (2) is 30 days while that under sub-section (1) is 60 days.

Under both the sub-sections the Income tax Officer has discretion to extend the time limit and thus save the assessee from penalty under section 28.

Company in liquidation—Such a company is a company within the meaning of the Act and is therefore liable to make a return of income. *Commissioner of Income tax U P v Agra Spinning and Weaving Mills (All)* 1934 ITR 79 A.I.R. 1934 All 170. As to the taxability of profits of such a company see notes under sections 2 (2) and 3.

Notice before passing of Finance Act—The Income tax Officer's opinion should be reasonably formed. Obviously, the Income tax Officer cannot be satisfied about the liability of a person to tax before any tax has been imposed by the Legislature. A notice issued before the passing of the Finance Act was therefore not valid before section 67 B was inserted in the Act. The section now authorises the operation of the Income-tax Act in all respects pending the passing of the Finance Act.

Persons denying liability—There is no obligation on the Income-tax Officer to establish the fact that a person has taxable income before a notice can be issued under section 22 (2) or 22 (4). *Bhagat Dhunichand v Commissioner of Income tax Punjab* 4 ITC 33 10 Lab 596 A.I.R. 1929 L 593. *Kanawari Ananda v Commissioner of Income tax Bihar and Orissa* 3 ITC 417 A.I.R. 1931 Pat 306 11 Pat. 187. Even if a person has no taxable income he should furnish a return if called upon to do so by the Income tax Officer. *Attorney-General v National Provincial Bank* 14 Tax Cases 111 44 T.L.R. 701.

Notices on agents of non residents—See section 43 and notes thereunder.

Summary assessments of small incomes—During the period 1931 to 1936 when the limit of taxable income was temporarily lower the Finance Acts specially provided for the summary assessment of small incomes by the Income-tax Officer without his calling for a return of income option however being given to the assessee to ask for the reopening of the assessment by submitting a return.

Again since 1942 there were similar special provisions of a temporary nature (as part of the Government's anti inflationary measures) for the taxation of incomes below Rs 2000 a year in a summary manner the assessee being given the option in the alternative to make a certain returnable deposit with the Government. The provisions were embodied in the annual Finance Acts and the rules made thereunder *q.v.*

Delay in audit—The non audit of its accounts is no justification for a Company not filing its return in time, *Manbhumi Transport Co v Commissioner of Income tax B & O* 6 ITC 203. See, however the declaration—

ration at the end of the form of return which the principal officer has to make

Who should sign returns?—The form of return will show that an individual has to sign the return himself but the word individual would include a person acting as an agent or attorney for an individual. The signatory will be liable for prosecution under sections 51 or 52 if he commits an offence. Where the assessee is not an individual whoever signs the return being competent to do so has to satisfy himself that the return is correct and will be liable in case of default or fraud to prosecution under section 51 or 52 as the case may be.

A power of attorney empowering an agent to file suits, applications, plaints, memoranda of appeal and written statements and affidavits on behalf of the principal before Civil Courts, Revenue Courts and other Government departments does not empower the agent to file a return of income binding the principal. *Kaja Sayyid Mohammad Mehdi v Commissioner of Income tax U P (Oudh) 1935 ITR 202*

Firms etc.—A firm's return need be signed by a single partner only and that of a Hindu undivided family by the managing member. In all cases what is necessary is that some one whose signature will bind the assessee should sign the return.

On the other hand, the application for registration by a firm has to be signed by all the partners. *See section 26-A and Rule 2 et seq*

Persons wrongly described in notice.—A person who was the Manager of a Pharmacy was served with a notice under section 22 (2) addressed to him as Proprietor of the Pharmacy. He made no return and the Income tax Officer, assessed him under section 23 (4). Instead of following the remedies open to him under the Income tax Act he sued the Crown. *Held* that a suit was barred by section 67 of the Income tax Act and that a mere error of description in the notice was not a good excuse for not submitting a return and therefore for invalidating the assessment. *Dr R Singha v Secretary of State 2 ITC 462 5 Rang 825*

Hindu Undivided family.—The question whether individuals on whom separate notices have been served under section 22 (2) can be assessed together as a Hindu undivided family without a further notice to the family as such has been raised but not decided. *Sardar Kirpal Singh etc v Commissioner of Income tax Punjab 1937 ITR 548*

Notice form not prescribed.—There is no prescribed form for the notice under sub-section (2); it is only the form of return of income that has been prescribed—*see rule 19*. The assessee must be given a minimum period of thirty days within which to comply with the requirements of the notice. If not an assessment made under section 23 (4) for failure to file a return in time is illegal and any subsequent opportunity given to the assessee will not cure this initial defect. *Kajornmal Kalyanmal v Commissioner of Income tax, U P, 3 ITC 451 122 IC 741, AIR 1930 All 209 Jannadhar Potdar v Commissioner of Income tax Punjab 1935 ITR 12*. The thirty days will evidently count from the date of receipt of notice by the person called upon to make the return. The expression used is 'thirty days' and not 'one month' the reckoning should therefore be made in days. Also note the expression 'not less than' which means that just thirty days' notice is sufficient on the other hand will not

thirty days will be insufficient, *Commissioner of Income tax, Bombay v Ekbal & Co*, 1945 ITR 154

A notice issued under section 22 (2) on a representative of a deceased under section 24-B should state whose income is required to be returned, *Maharaja of Patala v Commissioner of Income tax (Central), Bombay*, 1943 ITR 202

Consequences of failure to furnish a return of income—Failure to make a return under section 22 (1) exposes the defaulter to penalty under section 28 if his total income is not less than Rs 3,500 but not to prosecution under section 51 (c) but failure to submit a return under section 22 (2) on the other hand carries the risk both of section 23 (4) and of section 51 (c) and also of section 28. Also if the assessee is a registered firm, failure to submit the return may result in the cancellation of registration under section 23 (4)

Sub-section (3)—Sub-section (3) as it stood before 1939 gave persons who had *bona fide* omitted to file a return or filed an incorrect return protection from prosecution under section 51 (c) and penalty under section 28

To obtain the benefit of this sub-section, the return should be filed before the assessment has been made it is of no avail to file it after the assessment even if no notice of demand has been issued under section 29, *Dhaniram Dharampal v Commissioner of Income tax, Punjab*, 1936 ITR 113, also the sub-section applies only to *bona fide* errors and not to deliberately false returns, *Commissioner of Income tax, C P v Badridas Ramrai*, 1939 ITR 613. With reference to a similar provision in the United Kingdom, it has been held that the word 'discovers' refers to genuine and spontaneous rectification of undeclared errors and omission and that a person may not, when penalty proceedings are imminent, free himself from liability by correcting a return which he knew to be wrong at the time it was made or in which errors have been discovered and pointed out by the Inspector, *Attorney-General v Midland Bank Executor Co*, 19 Tax Cases 136

A mere letter to the Income tax Officer that in the return already submitted an item of so much had been omitted is not equivalent to the submission of a revised return, *Gopaldas Parshothamdas v Commissioner of Income-tax, UP*, 1941 ITR 130 (All)

What constitutes failure to make a return—See notes under section 23

'Documents'—The word 'documents' "shall include any matter written expressed or described on any substance by means of letters, figures or marks or by more than one of those means, which is intended to be used, or which may be used for the purpose of recording that matter" Section 3 (16), General Clauses Act (X of 1897).

'Accounts'—"Books of account" have been held not to include 'letters, cheques and vouchers from which books of account can be made up'—*Per Curia, J*, in *In re Winslow* 16 QBD 696 (a case under the Bankruptcy Act) 'Accounts' presumably mean the same as 'books of account'. The expression 'document' is, of course, wider

Production of accounts—The following instructions have been issued

Under sub-section (4) of section 22 the Income-tax Officer is empowered to call upon any person who has made a return under section

22 (1) or upon whom a notice under section 22 (2) has been served to produce such accounts or documents as he may require. Where the services of competent and reliable accountants are employed by assessee, steps will be taken to see that those services are utilised to the fullest extent by the Income tax Officers. Where a statement of profit and loss and a balance sheet filed by an assessee has been certified as correct and complete by such an Accountant, the Income-tax Officer should, unless he sees reason to the contrary, and entirely at his discretion accept them as correct and complete, although he will frequently have to call for details showing how various figures are made up. In such cases, however, the accountant himself when authorised by the assessee to appear on his behalf, will normally be asked to supply the details (*Income-tax Manual*).

Limitation on accounts to be called for—The proviso to sub-section (4) of section 22 prevents any Income tax Officer from calling upon an assessee to produce books of account going back for a period of more than three years i.e., three accounting periods prior to the "previous year", i.e., the accounting period [See section 2 (u)]. This limitation applies merely to books of account it does not apply to documents. The Income-tax Officer can therefore call for documents of any date.

It should be noted, however, that under sections 34, 35 and 50 as amended in 1939, the period of limitation is four years, and in some cases eight years. But he cannot call for accounts more than three years old. If, however, the assessee can produce them but will not, an adverse inference may be drawn against him.

The limit of three years applies only if the notice is issued under this sub-section and not if the Income-tax Officer calls for older accounts under section 37 in order to test the assessee's return or evidence in support of it. But failure to comply with a summons under section 37 will not have the same consequences as failure to comply with a notice under section 22 (4), and in particular an assessment cannot be made under section 23 (4) for failure to produce evidence called for under section 37, *Sankaralinga Nadar v Commissioner of Income tax, Madras*, 4 ITC 226, AIR 1930 Mad 209, *Fatchand Chhakodilal v Commissioner of Income tax, UP*, 1945 ITR 198.

'Require' means require as a piece of relevant evidence. Therefore if the Income tax Officer can make an assessment without the documents or accounts called for, there is no default in failure to produce such documents or accounts. In *re Ganga Sagar*, 53 All 451 AIR 1931 All 717. On the other hand an assessment under section 23 (4) would not be invalid merely because in the opinion of the assessor the accounts called for but not produced were irrelevant. It is for the Income tax Officer to determine what accounts and documents he requires to be produced. Also the fact that somehow the Income tax Officer made an estimate of the income on the evidence before him does not mean that the evidence not produced by the assessee was not required for the assessment, *Tulsidas Nagnuchand v. Commissioner of Income tax, Punjab*, 1938 ITR 385 AIR 1938 Lah 551, I.L.R. 1938 Lah 551.

Failure to produce accounts and documents.—Neglect to furnish accounts or documents asked for by the Income-tax Officer under section 22 is punishable under section 51 (d), and, further, the person will be liable to be assessed under section 23 (4) with the attendant consequences.

No question of law arises out of failure to produce accounts in existence when called for, *Haji Ali Mohammad v Commissioner of Income tax*, C.P., 1940 ITR 243

Notice—More than one—The Income tax Officer may issue more notices than one under this sub section. As he proceeds with the examination of each case, he may require to see other documents and accounts that he may not have required in the first instance. The fact that he so requires further accounts and documents to be produced does not mean that his earlier notices need not be complied with. There can be no implied waiver of such earlier notices merely because supplementary information is called for later.

Accounts etc., to be specified—Not confined to British India—Under this sub section it is the duty of the Income-tax Officer to specify the accounts or documents that he requires. Under section 23 (2), he need not do so and may leave it to the assessee to decide what evidence to produce. Also, under section 22 (4), the Income tax Officer can only call for accounts or documents. He cannot ask for the attendance of persons. For that purpose, he must invoke his powers under sections 23 and 37. The accounts and documents called for under this sub section need not necessarily be within British India: it is open to the Income tax Officer, under this sub-section to call for accounts and documents relating to branches of business abroad which are kept outside British India, *Radhakishan and Sons v Commissioner of Income tax, Punjab*, 2 ITC 345, AIR 1927 Lah 5, *Somasundaram Chettiar v Commissioner of Income-tax Burma*, 7 Rang 10 AIR 1930 Rang 10, *In re Lahtaprasad*, (All) 6 ITC 182. Sections 22 and 23 and all other relevant provisions of the Act apply to income taxable under section 4 (2), i.e. foreign income *V R S A R Arunachalam Chettiar v Commissioner of Income tax, Madras* 57 MI J 300 AIR. 1929 Mad 769.

Accounts of foreign partnerships—The Income tax Officer can call for accounts kept outside British India even though they relate to a partnership. If there is a default the fact that the accounts relate to a partnership will be relevant only in determining whether the assessee can be reasonably expected to produce the accounts. But it would be for the assessee to show that he had no control over the accounts or that he had other difficulties constituting sufficient cause for his failure to comply with the notice of the Income tax Officer, *Mahomed Kassim Rowther v Commissioner of Income-tax, Madras*, 59 MLJ 220, AIR 1930 Mad 763. The criterion is whether the foreign accounts or documents called for are in the possession of or under the control of the assessee or the person making the return of income. *Commissioner of Income tax, Bombay v Bombay Trust Corporation*, 1938 ITR 445. Where an assessee first concealed the existence of a foreign business and then evaded producing the accounts of that business or even copies thereof even though he went abroad frequently to the place of the foreign business in which he evidently had a considerable interest and there was nothing to show that the books were not under his control or that he could not have access to them (e.g. dispute with partners) it was held that the Income tax Officer was justified in asking him to produce his foreign accounts and in proceeding under section 23 (4) when the accounts were not produced. *Bhivani Sahai v Commissioner of Income tax, Punjab* 1936 ITR 225.

Heading of notices—Nowhere in the Act is there any provision making it necessary for the officer serving the notice to state the section

under which the notice is served or to state the section under which his powers have been granted, *Ram Khelavant Ugaulal v Commissioner of Income tax*, 7 Pat 852, 3 ITC 225 AIR 1928 Pat 529

Notice under section 22 (2)—Precedent condition—The Income tax Officer can use section 22 (4) only if a notice under section 22 (2) has already been served on the person or he has submitted a return *suo motu* under sub section (1). Where two Income tax Officers have concurrent jurisdiction see section 64 it will be sufficient if the notice under section 22 (2) is issued by the officer at the principal place of business, *Lachmandas Baburam v Commissioner of Income tax*, 4 ITC 61, 1933 ITR 275 AIR 1933 All 853

Where an assessee submitted a return of income to Income tax Officer B, in response to a notice under section 22 (2), then again to Income tax Officer C to whom the case was transferred in response to a similar notice from him, and the case was later retransferred to B and the assessee appeared before him several times and did not object to the want of a second notice under section 22 (2) from him it was held that the assessee was not justified in not complying with a notice under section 22 (4) on the ground that the proceedings of the Income tax Officer B, were vitiated by the absence of a second notice under section 22 (2), *Hiralal v Commissioner of Income tax UP* 1942 ITR 148 (All)

Notice pending orders under section 64—The Income tax Officer within whose jurisdiction income accrues to a person is competent to issue a notice under section 22 (2) pending the determination of the question of jurisdiction under section 64 (3) by the Commissioner, where the assessee does business in more places than one. This notice is valid under section 64 (4) and the Officer who has territorial jurisdiction over the principal place of business as determined by the Commissioner need not issue a fresh notice as a preliminary to assessment *Bisheshar Prasad, etc v Commissioner of Income tax* 7 ITC 74 (All)

See however section 64 which has since been amended and notes thereunder

Notices—On persons outside British India—Validity of—The validity of service of notices to make a return, and of notices of assessment on non residents, has been the subject of litigation in the United Kingdom and it was finally held by the House of Lords in *Whitney v Commissioners of Inland Revenue* 10 Tax Cases 88, confirming *Commissioners of Inland Revenue v Hum*, 8 Tax Cases 466 that the service of the notice was mere machinery to enable the Commissioners to do their duty, that the principles relating to the service of writs did not apply to these notices and that these notices were not judicial processes

The House of Lords confirmed the decision of the Court of Appeal by a majority of 3 to 2. Extracts from the judgments representing both views are given below —

Per Lord Chancellor Cave —

This enactment which does not (as was suggested) give a privilege but imposes a duty is plainly binding upon any person (whether British or not) who is within the jurisdiction and it may be—though on this I express no opinion—that it binds a British subject resident abroad. But it is difficult to believe that the Legislature of this country can have intended to impose such a duty upon a subject of a foreign country resident

and being in that country, whether he is or is not chargeable to super tax here. The difficulty is increased when it is noted that by sub section (3) of the same section (section 7 of the Income tax Act 1918) it is made the duty of every person chargeable with super tax to give notice to the Special Commissioners that he is so chargeable—in an enactment which is surely inapplicable to an alien resident and being out of the jurisdiction who cannot be assumed to have any knowledge of our law and that by sub-section (4) any person who without reasonable excuse fails to make any return or to give any notice required by the section is made liable to an immediate and a continuing penalty. By what right such a penalty could even in express terms be imposed upon an alien resident and being abroad it is not easy to understand and it appears to me that sub section (2) and (4) cannot have been intended to apply to such a person. Now the power given by sub-section (5) to the Special Commissioners to make an assessment to super tax according to the best of their judgment is contingent on failure to comply with the obligation to make the return under sub section (2) and I see no escape from the conclusion that where no such obligation exists there can be no such failure to comply with it and accordingly that in such a case an assessment under sub section (5) cannot be made.

When a notice is sent by post the postal authorities are only the agents of the sender to deliver the notice. The position is the same as if the sender—in this case the Special Commissioners—had sent a messenger abroad to serve the notice there upon the appellant in person, and if (as I hold) personal service of the notice in this case could not have been effectively made upon the appellant in New York it follows that the service by post was equally ineffective. The regulation cannot alter the construction of the Act or enlarge the Commissioners' jurisdiction (*see Lord Davey in Barraclough v Brown* L.R. (1897) A.C. 615, at p. 624). If the machinery provided for a assessment is not applicable to the case then there is no power to tax.

It appears to me that the whole statute is framed on the basis that direct assessment, whether to income tax or to super tax can only be made upon persons who are or reside in this country or on representatives in this country of persons who reside abroad and that if it is desired to have effective machinery for charging with super tax an alien resident and being abroad who has no representative here that machinery must be provided by an amendment of the statute.

Per *Lord Dunsedin*— It is here that I part company with the noble and learned Lord Chancellor. Holding that sub sections (2) (3) and (4) setting forth the request for and the making of the return of income from all sources are inapplicable to an alien non resident in the United Kingdom he concludes that where no return has been made there can be no failure in the sense of sub-section (5) and that accordingly no assessment can be made. My Lords I cannot help feeling with the utmost respect, that that is tantamount to making liability dependent on failure to make a return, and yet *ex hypothesi* a liability is already established. But my real reason for differing from my noble and learned friend is that I look on these sub-sections as mere aids to the Special Commissioners in their task and not as

tions of their power. That power is, to my mind, conferred by sub section (1). As in the cases of *Tischler*, 2 Tax Cases 89 and *Werle*, 20 Q B D 753, it was held that the power given to charge a resident abroad in the name of a person acting on his behalf in the United Kingdom did not prevent a direct assessment on that person if he was in effect found in the United Kingdom so by analogy I think that a failure of some of the provisions of the succeeding sub sections to fit a particular case does not prevent the Special Commissioners proceeding under the powers of sub section (1). It is I think, apparent that the Special Commissioners are bound if they can to adopt the methods provided by the succeeding sub sections and so I think indeed they have done. They have sent a notice requiring particulars in the only way available to them *viz*, by post and it is admitted that that notice was received. The next step lay with the appellant and he made no return and I agree that the penalty section is inapplicable. For the appellant is not subject to the jurisdiction of the English Court nor has the British Parliament power to enjoin him personally to do anything.

Then comes sub section (5). I think that he failed to make a return for I read failure in the sense of '*de facto* did not make not in the sense of contrary to law did not make. Accordingly I think the Special Commissioners were authorised to make an assessment according to the best of their judgment. But quite apart from that I think that under sub section (1) they were entitled to assess. I lay stress on that for this reason. It might have been that the notice never reached him. I think that the Commissioners would still have been entitled to assess, but the difference would have been that if and when the appellant came to know of the assessment made he would have been absolutely entitled to be heard as to the amount and if necessary to get it altered under the powers conferred on the Commissioners by sub-section (7), whereas when there has been failure by a person who is bound to furnish the notice under sub section (3), I imagine that there is no absolute right on the part of the person assessed to have the assessment altered although I doubt not as the object of the Act is to tax people justly and not unjustly that the Commissioners would even then be ready to consider the question of the amendment of an assessment quite unjust as to amount.

Per Lord Wrenbury — ' There was sent to the appellant by post addressed to him in the United States a notice under section 7 (2) requiring him to make a return. It is contended that there was no right to post him such a notice so addressed. The case it is contended is similar to the case of service of a writ out of the jurisdiction. I do not agree. It is similar rather to the service of a notice of dishonour of a bill or of notice to quit or of a notice requiring payment of calls upon shares as a preliminary to forfeiture in default of payment. It is not a step in a judicial proceeding but a step which will create *inter partes* a state of things in which judicial proceedings can subsequently be taken in default of compliance. I think the notice was duly served. In my opinion *Inland Revenue Commissioners v. Hum* (1923) 2 K B 563, 8 Tax Cases 466, was rightly decided.

"Section 7, sub section (1), is self contained and imperative. Section 4 has imposed a charge. Section 7 (1) has imposed upon the

Special Commissioners the duty of assessing the amount. Sub-sections (2) to (5) do no more than supply machinery for giving effect to sub-section (1). But there are no words to the effect that if that machinery is inapplicable to the particular case the duty in sub-section (1) shall fail to exist and shall not be performed. Under section 7, sub-section (3) it is the duty of every person chargeable with super-tax to give notice that he is chargeable. If therefore I am right in thinking that the non-resident alien is chargeable in respect of property in the United Kingdom it was his duty to give that notice and whether he performed that duty or not and whether the notice addressed to him out of the United Kingdom was duly served or not it remains that section 7 sub-section (1) stands as a statutory duty which the Special Commissioners must discharge to the best of their ability, leaving the party assessed to his remedy if he is in a position to prove that the assessment made upon him is excessive. The power of the Commissioners to assess in default of a return is not an exclusive power to assess. Their power and duty to assess arises not only in the case in which the tax-payer makes default but because sub-section (1) gives them power to assess and imposes upon them the duty to do it. If (but for this point) the liability exists I am unable to agree in the view that the liability is non-existent if it be found that the machinery provided by the Act does not fit the case.

Per Lord Phillimore — But if I find that the procedure is inapplicable this will be a strong reason for supposing that Parliament did not intend to tax this class with this tax.

'If a non-resident and especially a non-resident alien should be minded to come to this country for the purpose of visiting the Exhibition at Wembley would it not be monstrous if he were suddenly prosecuted for this penalty?' It seems to me no answer to suggest that in the circumstances the penalty imposed would be a nominal one. He would have been treated as a law-breaker. It is only when there is a failure or an unsatisfactory return that they are enabled to make an assessment according to the best of their judgment. Failing the condition precedent they have no jurisdiction. But I am sure that it is not the duty of a non-resident and undomiciled alien to know them.

In the *Bombay Trust Corporation case* 3 ITC 135 the Bombay High Court doubted in passing whether the above ruling can be followed in this country.

There seems however to be nothing in the Indian Income-tax Act to cast a doubt on the validity of notices issued under the Indian Act on non-residents. A non-resident (British subject or foreigner) can be taxed with reference to income accruing in India and the fact that he has or has not an agent in British India does not affect the question *see* sections 42 and 43. Sections 3 and 4 which impose the tax do not exempt non-residents; on the contrary the law makes them clearly liable. Section 22 sub-section (2) under which an Income-tax Officer has to serve notice upon a person likely to be liable to tax requiring him to furnish within the prescribed period a return in the prescribed form does not equally with the section in the English Act on which the *Whitby* ruling was based restrict it to any person resident within British India. Sub-section (4) of section 23 is also general in its terms and therefore under that sub-section, an assessment can be made if the non-resident person

Provided that the registration of a firm shall not be cancelled until fourteen days have elapsed from the issue of a notice by the Income-tax Officer to the firm intimating his intention to cancel its registration.

(5) Notwithstanding anything contained in the foregoing sub-sections, when the assessee is a firm and the total income of the firm has been assessed under sub-section (1), sub-section (3) or sub-section (4), as the case may be,—

(a) in the case of a registered firm, the sum payable by the firm itself shall not be determined but the total income of each partner of the firm, including therein his share of its income, profits and gains of the previous year, shall be assessed and the sum payable by him on the basis of such assessment shall be determined:

Provided that if such share of any partner is a loss it shall be set-off against his other income or carried forward and set-off in accordance with the provisions of section 24:

Provided further that when any of such partners is a person not resident in British India, his share of the income, profits and gains of the firm shall be assessed on the firm at the rates which would be applicable if it were assessed on him personally, and the sum so determined as payable shall be paid by the firm; and

(b) in the case of an unregistered firm, the Income-tax Officer may instead of determining the sum payable by the firm itself proceed in the manner laid down in clause (a) as applicable to a registered firm, if, in his opinion, the aggregate amount of the tax including super-tax, if any, payable by the partners under such procedure would be greater than the aggregate amount which would be payable by the firm and the partners individually if the firm were assessed as an unregistered firm.

(6) Whenever the Income-tax Officer makes a determination in accordance with the provisions of sub-section (5), he shall notify to the firm by an order in writing the amount of the total income on which the determination has been based and the apportionment thereof between the several partners.

History.—This section which was radically altered in 1922 underwent a change in 1930, so as to permit the cancellation of registration of firms in the circumstances stated. In 1939, minor changes were made in sub-sections (1), (3) and (4); and sub-section (5), which involves radical changes, was newly added. Sub-section (6) was added in 1941.

Evidence in assessment proceedings other than returns and accounts of assessee.—The following executive instructions have been issued.

In addition to his general power [i.e., under section 22 (4)] to call for accounts the Income tax Officer, if he is not satisfied that a return made under section 22 (1) or section 22 (2) is correct or complete, has power under section 23 (2) to call upon an assessee to attend before him or to produce or cause to be produced evidence of the correctness of his return. If an assessee fails when required by an order under section 23 (2) to attend or to produce evidence in support of his return, he is liable to a penalty under section 28, and also to be assessed under section 23 (4). If the assessee is a registered firm the Income tax Officer may cancel its registration.

Under section 23 (3), the Income-tax Officer is empowered to utilise any evidence bearing on the assessment, which he may have obtained while under section 37, he can enforce the attendance of any person for this purpose and compel the production of the information that he requires.

Since the power to inspect, and take copies of entries in share registers, register of debenture holders and/or register of mortgages is specially conferred on Income tax authorities by section 39, they cannot be called upon to pay any fees for inspection or copies under the Companies Act.

General—Before 1939 because under the then law no appeal lay in respect of an assessment under section 23 (4) it was a matter of much greater importance to assesses than at present to avoid an assessment being made under section 23 (4). So there was much litigation as to the validity of assessments made under section 23 (4), depending in turn on the validity of notices under sections 22 and 23 the exact procedure in respect of such notices the procedure of assessment and so forth.

Proof of payments—There is no provision in the Act under which an assessee can be compelled to give information regarding payments made by him, on the other hand if the assessee, on whom the onus lies to prove a payment which he claims as a deduction, fails to furnish evidence in support of the payment, he will naturally lose his claim to the deduction.

Sub-sections (1) and (2)—The words 'without requiring the presence of the assessee or the production by him of any evidence' added in 1939 in sub-sections (1) and (2) are superfluous, and were inserted for sentimental reasons in order to obviate the possible misunderstanding that an Income tax Officer accepted a return as correct on mere favouritism.

Sub-sections (2) and (3)—Scope of—The scope of section 23 (2) and (3) was examined in *In re Lachman Das Narain Das of Calcutta*, 2 I.T.C. 1.

Per Walsh, C.J.—The other evidence which the Income tax Officer may require on specified points under sub-section (3) of section 23, is evidence which he may require from the assessee and of which he may give him notice specifying the points and requiring its production. This interpretation enables the machinery to work smoothly and naturally and any other interpretation works difficulty. There is no doubt that the enquiry contemplated by section 23 is an enquiry such as that which the appellate Court under section 31 may direct the Income-tax Officer to hold, or may himself make during the hearing of the appeal. (See, however, *Gopirath Nair v. Commissioner of Income-tax, U.P.*, 1936 I.T.R. 1 and *Sheik Abdul Razzak v. Commissioner of Income-tax, B and O*, A.I.R. 1935 Pat 425—both referred to *post* under this

section) It is deemed to be a judicial proceeding, and the Income tax Officer has the same power as a Court under the Civil Procedure Code when trying a suit to enforce the attendance of any person and to compel him to give evidence on oath to compel the production of witnesses and of documents and to examine witnesses on commission. So that he has all the powers of a Judge in a suit so far as concerns witnesses and documents. This gives him ample facilities for securing information and guidance from rivals in the trade of the assessee or experts or past employees or managers acquainted either with the particular business of the assessee, or the class of business in the neighbourhood—and no further provision is required in any other part of the Act to vest that power in him. Section 37 is comprehensive and adequate. If sub-section (3) of section 23 gave power to the Income tax Officer to summon further evidence himself it would be tautologous. It would be merely repeating in unconvincing and inadequate form what is expressly provided by section 37. In my view the matter is simple and clear. When the day is appointed and the notice requiring the assessee to attend and produce evidence and forthwith the enquiry has been complied with up to that point, there has been no default under sub-section (2). If the assessee makes default under sub-section (2) by failing to attend or failing to produce evidence then undoubtedly the Income tax Officer may, and indeed has no option but to do his best under sub-section (4). But in this imperfect world especially with businesses difficult to understand for any one who has not been specially trained occasions must often arise when the evidence produced before a tribunal falls short of giving the Income tax Officer full and complete satisfaction. In this case for example the assessee might have said 'the wastage is abnormal I admit. The fact is that our machinery is worn out. It has given great trouble this year, and partly on that account the wastage has been excessive and our profits much diminished. The obvious course for the Income tax Officer would be to say I was not aware of that and if you satisfy me on that point, I shall be prepared to accept your claim of wastage. But before I do that, I require you to produce further evidence about the machinery. He may then adjourn the enquiry, fix a fresh date and in order to prevent mistake require by a fresh notice the assessee to produce other evidence on the specified point namely on the defect which had appeared in the machinery on such adjourned date. As my brother pointed out during the argument sub-section (2) does not confine the Income tax Officer to one notice, and such further notice if given would become a notice under sub-section (2). The evidence if produced would be other evidence such as the Income tax Officer has required on specified points and having obtained it he can then assess under sub-section (3). If the assessee chooses not to produce the further evidence on those specified points then the Income tax Officer is thrown back on to sub-section (4) just as he is if the assessee has failed to produce any evidence in the first instance.

Dalal J—

The applicant desires us to hold that the Income tax Officer could hear evidence only of witnesses produced by him while the Income tax Commissioner expresses alarm in case this Court held that by the word 'require' in this clause is meant require from the assessee. The Commissioner enquires how a fair assessment is to be made if the Income tax Officer is confined to hear evidence

produced by the assessee only and not any other evidence. This clause however is to be read with the rest of the Act and it does not take away the power of the Income tax Officer to call for and hear evidence under the powers he has under section 37 of the Act. The only difference between clause (3) and clause (4) is that in cases falling under clause (3) he is to arrive at an assessment to the best of his judgment on the evidence before him while under clause (4) he is to decide in the absence of evidence.

As suggested in *Walsh & J* a judgment above the words 'such other evidence as the Income tax Officer may require' in section 23 (3) simply refer to any evidence that the Income tax Officer may call for under section 22 (4) or section 23 (2) or section 37. Section 23 (3) does not of itself, confer on the Income-tax Officer any power to call for evidence and that is why—(a) No form has been prescribed for a notice calling for the production of evidence under section 23 (3). (b) No special penalty apart from that prescribed under the Civil Procedure Code has been prescribed for failure to comply with such a notice.

If the Income-tax Officer require further evidence he should apparently give reasonable time to the assessee and also specify the evidence.

Personal attendance of assessee—The following executive instructions have been issued:

When a notice under section 23 (2) of the Act is issued an assessee may attend the Income-tax Officer's office in person or produce or cause to be produced any evidence on which he relies in support of his return. But if he does not attend in person he should send a representative with necessary evidence. If the Income tax Officer wishes the assessee to attend personally he can insist on this by an order under section 37 (*Income tax Manual*).

As to who may represent the assessee in Income tax proceedings see section 61.

Under sub section (2) of section 23 an assessee cannot be asked both to attend and to produce the evidence, also it is entirely for the assessee to decide whether he should attend in person or produce the evidence relied on and it is not open to the department to decide as to the alternative. A notice, therefore, under section 23 (2) which calls upon the assessee to attend without giving him the alternative of producing his evidence is irregular and invalid, *Rajmunder v Commissioner of Income tax UP*, 1937 I.T.R. 631 (All.) 172 I.C. 354.

Adjournments—Though words similar to those in section 31 (1) in which it is stated that the Assistant Commissioner 'may from time to time adjourn the hearing' do not appear in section 23 (3), it is clear from the words "as soon after as may be" that the Act contemplates the adjournment of hearing by the Income tax Officer. Apart from these words the power of adjournment is so necessary, convenient and universally conceded that unless it is expressly withheld by statute or rule having the force of law it must be taken to vest in him. It is not possible to regard a question of this kind apart from considerations of practical expediency in its relation to the transaction of public business.

It is not the practice—much less a rule of procedure—even in a court of justice that an adjournment date is intimated by post to an absent party. It is for him to take steps to ascertain the date. If an assessee does not appear or produce the evidence on the specified date in response to a notice

of section 23, if the Income tax Officer is satisfied that the return made under section 22 is correct and complete his obvious duty is to assess the total income of the assessee in accordance with the return. He cannot ask for (why should he?) further information. Equally, the assessee cannot claim that the Income tax Officer should not have accepted the return of income because it was incorrect in certain respects. *Asoka Mills v Commissioner of Income tax, Bombay*, 6 ITC 339. If, on the other hand the Income tax Officer has reason to believe that the return made under section 22 is either incorrect or incomplete, he must serve on the person who made the return a notice as required by sub-section (2) of section 23. It will be seen that the Income tax Officer has no discretion in the matter. He must issue a notice if a return has been sent in, and he is not prepared to accept it as it stands. See *Nirmal Kumar Singh v Secretary of State for India* 2 ITC 20 AIR. 1925 Cal 890 in which, however there are obiter dicta, *Greaves J.*, suggesting that this notice could be waived if the assessee had equally adequate opportunity to substantiate his return. As to the circumstances in which a return sent in by an assessee is not a valid return see below. There is no prescribed form for this notice under section 23 (2) but it should specify the date on which the person who made the return should attend or produce or cause to be produced the evidence on which such person may rely in support of his return. Any number of notices can be issued under section 23 (2), see *In re Lachmandas Naraindas*, 2 ITC 1. The provisions of sub-section (2) of section 23 will be complied with if the Income tax Officer asks the assessee to show cause why he should not be assessed at a particular figure and on a particular basis. *Nopechand Magniram v Commissioner of Income tax Bihar and Orissa* 2 ITC 146. Under section 23 (3) the Income tax Officer should on a specified date or as soon as possible afterwards hear such evidence as the person may produce. The Income tax Officer is not precluded from calling for further evidence from the person who made the return in regard to specified points. Such evidence as has not been called for under section 23 (2) or under section 22 (4) should be called for by the Income tax Officer under section 37. After hearing both the evidence called for on the specified points and the evidence produced by the person who made the return in support of his statements the Income tax Officer shall assess the total income of the assessee and determine the amount payable by him as tax on the basis of this assessment. This order must be in writing. It is subject to appeal and should therefore be ordinarily speaking a reasoned order. The Income tax Officer however, is not a party to a suit and has no onus to discharge. It is therefore unnecessary for him to adduce evidence in the strict sense of the Indian Evidence Act in support of his conclusions. But the assessee should ordinarily have an opportunity of rebutting if possible the evidence or the grounds on which the Income-tax Officer proposes to assess him.

Differing views were held at one time as to whether the issue of a notice under section 23 (2) precludes an Income tax Officer from issuing a notice under section 22 (4) also and whether a notice under section 22 (4) can be issued in cases in which a return has been submitted. But all High Courts are now agreed that the notice under section 22 (4) can be issued at any time before the assessment. If a notice under section 22 (4) had been issued before the assessee's return was received by the Income-tax Officer, and if the Income tax Officer is unable to accept the return

as it stands, it is still obligatory on his part to issue a notice under section 23 (2) notwithstanding the fact that a notice under section 22 (4) was pending. But if there has been a default under section 22 (4), the Income tax Officer need not continue proceedings under section 23 (2), *Magaral Pranyan and Co v Commissioner of Income tax Burma*, 7 ITC 39. In other words notice under both sections 23 (2) and 22 (4) is not obligatory in all cases. The former is obligatory in all cases in which a return is received and not accepted, as it stands by the Income-tax Officer, unless there has already been a default under section 22 (4) but the latter notice is optional and may be issued irrespective of whether a return has been submitted or not *Ramkissendas Bagri v Commissioner of Income tax, Bengal*, 2 ITC 325 see also 3 ITC 290 and connected rulings. The Allahabad High Court have ruled that though the issue of a valid notice under section 23 (2) is not a condition precedent to an assessment under section 23 (4), a notice under section 23 (2) is obligatory if the Income tax Officer does not accept a return of income, and he cannot assess under section 23 (4) merely for default under section 22 (4). The point is that in response to the notice under section 23 (2) the assessee might satisfy the suspicion of the Income-tax Officer without producing accounts which may not be really necessary to check the returns with, *Rajamani Debi v Commissioner of Income tax, UP* 1937 ITR 631. This view however is not in accord with that of the Privy Council *Commissioner of Income tax C.P v Laxminarain Badridas* 1937 ITR 170 (PC). In the notice under section 22 (4), an Income tax Officer should specify what evidence he requires and such evidence must be confined only to accounts and documents. Further the accounts should not relate to a period more than three years prior to the previous year. If he wants to hear oral evidence on any point on which the assessee does not adduce any evidence himself, the Income tax Officer would have to invoke his powers under section 23 (3) read with section 37. In a notice under section 23 (2) on the other hand it is left entirely to the assessee to determine what evidence he should adduce. There is nothing however to preclude an Income tax Officer from issuing a notice under section 23 (2) specifying the points on which he wants the assessee's written evidence if the Income-tax Officer is in a position to do so, in fact such specification would help both the Income-tax Officer and the assessee if only it was possible. But it is usually difficult for an Income tax Officer at this stage to specify what he wants as he would perhaps have to call for the assessee's entire accounts etc. See however, the remarks of *Mookerjee J* in *Nirmal Kumar Singh v Commissioner of Income tax*, 2 ITC 20.

Even after proceedings have started under section 23 (3) an assessment can be made under section 23 (4) if the conditions therein laid down are satisfied *Gopaldas Purshotamdas v Commissioner of Income tax, UP*, 1941 ITR 130 (All).

Bearing of section 23 (4) on section 22 (4)—The wording of sub-section (4) of section 23 has given rise to much discussion as to when the notice contemplated under section 22 (4) may be issued. There had been incidental references to the question in various rulings *Nirmal Kumar Singh v Commissioner of Income tax*, 2 ITC 20, AIR 1925 Cal 800, *Dhunjichand Dhaniram v Commissioner of Income tax*, 2 ITC 188 7 Lah 201, AIR 1926 Lah 161, *Ramakrissandas Bagri v Commissioner of Income-tax*, 2 ITC 324 *Radhakrishnan and Sons v Commissioner of*

Income tax 2 I T C 345 A I R 1927 Lah 8 in all of which it had been tacitly assumed that the notice could be issued at any stage of the proceedings irrespective of whether the return had been submitted or not and whether a notice had been issued under section 23 (2) or not. In *Brijraj Rangilal* 2 I T C 458 A I R 1927 Pat 39 the Patna High Court doubted the correctness of this view and suggested that the absence of the words having made a return in the earlier part of sub-section (4) of section 23 which refers to the failure to comply with the notice issued under section 22 (4) and the presence of those words in the later part of the sub-section which deals with failure to comply with the notice issued under section 23 (2) indicated that the notice could be issued under section 22 (4) only when a return had not been submitted. The Allahabad High Court on the other hand held in *Lala Chandra Sen Jani v Commissioner of Income tax* 3 I T C 17 that a notice under section 22 (4) could be issued at any stage of the proceedings irrespective of whether a return of income had been submitted or not and whether any notice had been issued under section 23 (2) or not. The Allahabad ruling was followed by the Calcutta High Court in the case of *Harmukhrai Dunchand* 3 I T C 198 56 Cal 39 A I R 1928 Cal 587 by the Patna High Court in the case of *Ram Khelawan Ugamal* 3 I T C 225 7 Pat 852 by the Rangoon High Court in the case of *R M P Chettyar Firm* 3 I T C 335 7 Rang 26 and by the Madras High Court in the case of *R M S R M Ramaswami Chettyar* 3 I T C 290 52 Mad 194 A I R 1929 Mad 60. But in the case of *Iachhmandas Baburam* 4 I T C 61 A I R 1930 All 49 *Mukerjee J* of the Allahabad High Court dissented from the above view and a reference was made to a Full Bench who decided that the question did not arise on the facts of the case. In *Khushiram Karamchand v Commissioner of Income tax* 108 I C 524, A I R 1928 Lah 219 2 I T C 517, the Lahore High Court considered that the primary object of calling for accounts and documents under section 22 (4) was to enable the Income tax Officer to decide whether he would accept the return of the income under section 23 (1) or proceed to enquire under section 23 (2) and (3) and that therefore the notice under section 22 (4) should precede and not follow the notice under section 23 (2). In a later case *Muhammad Hayat v Commissioner of Income tax Punjab* 5 I T C 159 A I R 1931 Lah 87 12 Lah 129 a Full Bench of the Lahore High Court overruled the above ruling and held that a notice under section 22 (4) could be issued at any stage—either before or after submission of the return and even after the starting of an enquiry under section 23 (3). The Allahabad High Court also has since agreed to fall in line with other Courts. In *re Palumall Bholanath* 1933 I T R 235 59 All 804 A I R 1933 All 541 6 I T C 463 All High Courts are now agreed. Most of this litigation was due to the non appealability before 1939 of assessments made under section 23 (4).

Failure to comply with notices.—Failure to comply with a notice under section 23 (2) brings the assessee under the operation of section 23 (4) and also exposes him to a penalty under section 28. Failure to comply with notice under section 22 (4) on the other hand brings the assessment within section 23 (4) and exposes the person to prosecution under section 51, or to a penalty under section 28.

Section 23 (4) can come into operation only if the person—

(a) fails to make a return in response to a notice under section 22 (2), or (b) fails to comply with all the terms of the notice issued under section 22 (4), or (c) having made a return fails to comply with all the terms of the notice issued under section 23 (2). And when it comes into operation as a consequence of such non compliance the Income tax Officer must assess under that sub section *Commissioner of Income tax CP & Jammaram Badridas* 1937 ITR 170 (PC). See also section 30.

Non compliance with a notice under section 22 (1) is not a necessary condition precedent to section 23 (4) coming into operation it is only one among different alternatives. In re *Behari Lal Chatterjee*, 1934 ITR 377 (All) 7 ITC 123 56 All 518.

Failure to produce accounts—An Income tax Officer is not bound to make up his mind the moment he receives a return as to whether he accepts or not. It is open to him before he deals with the question to call for the production of accounts and as the accounts have to be proved by somebody to call upon the assessee to appear in person. If the assessee appears but does not produce the accounts section 23 (4) is automatically attracted and no further notice under section 23 (2) is required. *Rm Pl S Sivaramu Chettiar v Commissioner of Income tax Madras* 4 ITC 207 AIR 1930 Mad 127. On the other hand failure to produce accounts before filing the return cannot deprive the assessee of his right to have his return examined under sub sections (2) and (3) of section 23 since under section 22 (3) it is open to an assessee to put in a return before the actual assessment and such return cannot be still born because of an antecedent failure to comply with a notice under section 22 (4). It follows therefore that the Income tax Officer should issue a second notice under section 22 (1) if necessary after receipt of the return under the first three sub sections of section 22. In re *Sadaram Puranchand* 5 ITC 459, AIR 1931 Cal 729.

Non residents—The failure to make a return may justify an assessment under section 23 (4) but would not in itself justify the application of Rule 35 the latter would depend on the nature of the data available to the Income tax Officer from which he can estimate the profits in British India, *Commissioner of Income tax, Bombay v National Mutual Life Association* 1933 ITR 350 AIR 1933 Bom 427.

Res Judicata—An Income tax Officer is not a Court except for the purposes mentioned in section 37. In re *Nataraja Iyer* 36 Mad 72 is not an authority for the position that an Income tax Officer is a Court for all purposes. The principle of *res judicata* applicable to the decisions of Civil Courts does not apply to the proceedings of Income tax Officers. If a question is referred to the High Court and decided by it it will of course be binding on the Income-tax Department for that particular assessment. For later assessments of the same assessee it will be ordinarily *res judicata* if the answer to the question does not depend on circumstances which vary from year to year, e.g., whether a certain property is a trust property. Otherwise, if the answer to the question depends on facts varying from time to time it will not be *res judicata*. It is not open to the Income tax authorities however to re-open concluded facts except in accordance with natural justice. Where Income tax Officers have after enquiry assessed a particular person on a definite basis it would not be open to the department arbitrarily to change the assessment though it would be open to them to go back on the previous basis in the light of fresh fact. If there is evidence on which the change in basis is justified the High Court will not

interfere. See *Commissioner of Income tax, Madras v Massey & Co, Ltd*, 3 ITC 302, AIR 1929 Mad 453, and *Santharalinga Nadar and Bros v Commissioner of Income tax*, AIR 1930 Mad 209, 4 ITC 226 (based on *Hoystead v Commissioners of Taxation*, (1926) AC 155 and *Broken Hill Proprietary Co v Broken Hill Municipal Council*, (1926) AC 94. See also *Deokinandan and Sons v Commissioner of Income-tax, Delhi* 4 ITC 398, *Electric and Dental Stores v Commissioner of Income tax, Punjab*, 5 ITC 254, 12 Lah 663, AIR 1931 Lah 341, *Mathradas & Sons v Commissioner of Income tax, Punjab*, 1933 ITR 212, 7 ITC 34, AIR 1933 Lah 815, *Commissioner of Income tax, CP v Sir Sorabji Mehta*, (1927) 2 ITC 286 *Tarachand Pothumal v Commissioner of Income tax, Punjab*, 1936 ITR 312) *Kaniram Ganpatrao v Commissioner of Income tax, B & O*, 1941 ITR 332, *Jivanlal Chamanlal v Commissioner of Income tax, Punjab*, 1941 ITR 296, *Sirdar Indra Singh v Commissioner of Income tax, B & O*, 1943 ITR 16

In *Hoystead v Commissioner of Taxation*, (1926) AC 155, the Privy Council ruled that a decision of the Court on a fundamental point created an estoppel on the same question in a later year as between the same subject and the taxing authority. In the *Broken Hill* case, (1926) AC 94 the Privy Council decided that a decision of the Court relating to a valuation and liability to tax in an earlier year did not provide an estoppel or *res judicata* for later years, the valuations in different years being different questions.

Income tax assessments are inherently of a passing nature and do not deserve such permanence as to provide an estoppel by *res judicata* in later years by reason of a matter taken into account or not taken into account in an earlier year or assessment. Further if an income tax authority has to decide any question of law it is only incidental to his main object of ascertaining the assessee's income and the determination of a collateral or incidental question cannot form the basis of *res judicata*. It was held therefore by the Court of Appeal that the principle of *res judicata* would not apply to proceedings before Income tax authorities. *Commissioners of Inland Revenue v Sneath* 17 Tax Cases 149 (1932) 2 KB 362. The Court dissented from *Aylmer v Mahaffer* 10 Tax Cases 594, which was decided by the Court of Appeal in Northern Ireland. It was again affirmed in *Trustees of Will of Brodie v Commissioners of Inland Revenue*, 12 ATC 140 17 Tax Cases 432 that there is no estoppel as between the Revenue and the tax payer, especially, since Revenue Officers have no power to make contracts or declarations binding on Government.

In a Burma case *Thaver Brothers v Commissioner of Income tax*, 1934 ITR 230 7 ITC 156 Page CJ observed that the Income-tax Officer ought to approach a subject with an open mind and decide on the materials before him. He must not start with the idea that he is bound by the decision of his predecessors in previous assessments unless the assessee satisfies him that the previous decision was wrong. Admissions made by the assessee however, would be relevant evidence. *Sirdar Indian Singh v Commissioner of Income tax, B & O*, 1943 ITR 16

In *Rai Sahab Lala Junda Ram v Commissioner of Income tax, Punjab* 3 ITC 345 it was held that an Income tax Officer was not estopped from going back on a decision of his own or that of his predecessors which he considered to be wrong.

According to the Calcutta High Court however, ordinarily, once an assessment has been made under section 23 (1), i.e., the Income tax Officer accepting the return of the assessee the assessment is settled, and on the general principles of law governing estoppels neither the assessee nor the Crown ought to be at liberty to go behind the amount of profits and gains when once determined by a competent authority except in circumstances to which sections 34 and 35 apply. *In re Mahaliram Ramjidas* 1938 I.T.R. 265

An Income tax Officer is not bound to accept the conclusions in regard to facts reached by another Income tax Officer even if on the same facts and at the same time in connection with other assessments and even if indirectly concerning the assessee. *L. R. M. S. T. Chettyar Firm v Commissioner of Income tax* 3 I.T.C. 416

In a certain year an Income tax Officer disallowed a bad debt on the ground that the claim was premature and his successor in the next year on the ground that the debt had become bad long before. The High Court held that there were materials for the second finding though the Commissioner agreed *ex parte* to revise the order of the Income tax Officer. *Raja Mal Pahar Chand v Commissioner of Income tax Punjab* 1938 I.T.R. 577. The fact that the Income tax Officer had let off a fund for some years in the mistaken belief that it was a mutual institution was not held to prevent him from holding in a later year that it was not mutual. *Trichynopoly Tennore etc Fund v Commissioner of Income tax Madras* 1937 I.T.R. 703. Where entire proceedings are recommenced e.g. under the orders of the Commissioner under section 33 the officer dealing with the matter afresh is not to shut his eyes to obvious facts and bind himself to opinions expressed by the officer who dealt with the earlier proceedings cancelled by the Commissioner. *V. I. Concern v Commissioner of Income tax Burma* 1938 I.T.R. 518.

An Income tax Officer is only an administrative officer though acting judicially and what he has to do is to ascertain the income of the year and assess it. It is therefore open to him to arrive at a preliminary decision e.g. on a question of law and then arrive at his final assessment later. His first decision will not necessarily be a final determination for the purpose of law. *Eire v Mical Sundie* 17 A.T.C. 599.

Obiter dicta in a judgment on matters not necessary for the purpose in hand have neither binding authority nor operate as *res judicata*. *In re Mahaliram Ramjidas* 1938 I.T.R. 265 (Cal).

Refusal of Registration—The amendment in 1939 fills a lacuna which existed formerly. Before that date there was provision only for cancellation of registration and not for refusal to register.

Cancellation of registration of firms—Proviso to sub-section (4).—It is evidently the duty of the Income tax Officer to consider the objections if any put forward by the firm before cancelling its registration and to hear the firm or its representative if necessary.

No form has been prescribed for the notice. All that the notice need do is to intimate the Income-tax Officer's intention to cancel the registration of the firm and ask it to show cause why the Income-tax Officer should not do so. The notice should like all statutory notices be served in accordance with the provisions of section 63.

The rationale of refusing or cancelling the registration of a defaulting

firm is that since the object of registration is to tax partners on their individual incomes, there is no point in attempting to tax partners on their individual incomes if the firm will not help the Income tax Officer to ascertain its income. On the other hand even if the firm does not wish to be registered the Income tax Officer has power under sub-section (5) to treat the firm as though it had been registered if in the opinion of the Income tax Officer the revenue will benefit by such action on his part.

Cancellation of registration under this section is appealable under section 30.

Revised Return under section 22 (3)—The reference to the revised return has been necessitated as a result of the deletion of the concluding part of section 22 (3) (g & c). As the law now stands the revised return is a valid return only for purposes of assessment and not for the purpose of immunity from a penalty under section 28 if any.

Where there is no proper revised return but only a mere letter that an item of so much has been omitted in the first return the Income tax Officer is under no obligation to issue a new notice under section 23 (2). *Gopaldas Purshottamdas v. Commissioner of Income tax* U P 1941 I T R 130 (All.)

Determine the sum payable—The amendment made in 1939 makes it clear that the Income tax Officer must determine the sum payable thus removing the difficulties raised in *In re Beharilal Chatterjee*, 1934 I T R 377 56 All 415 7 I T C 123 (See below). The word 'assessed' it will be seen is used in the Act now generally in the sense of determining the total income and not in that of computing the taxes.

To make an assessment includes the determination of the amount of tax payable. The presence of the words 'determine the sum payable' in sub-sections (1) and (3) and their absence (before 1939) in sub-section (4) therefore did not make any difference. *Beharilal Chatterji v. Commissioner of Income tax* 1934 I T R 377 56 All 415 7 I T C 123.

Description of assessee—A notice under section 23 (2) need not describe the status of the assessee, i.e. whether individual or Hindu undivided family, etc. and the Income-tax Office need not strike out in the form of notice the capacities which do not apply to the assessee. *Gopaldas Parshottamdas v. Commissioner of Income tax* U P, 1941 I T R 130 (All.) See also *In re Radhey Lal Balmukund* 1942 I T R 131 (All.) *Dr. Singha v. Secretary of State* 2 I T C 462 (referred to under section 22). It is obvious however, that the notice should be intended beyond doubt for the person to whom it is addressed.

Combined notices under different sections—There is nothing in the law to prevent the issue of a single notice under different sections of the Act and in particular under sections 22 (4) and 23 (2) together. *Chandra Sen Jain v. Commissioner of Income tax United Provinces*, 3 I T C 17, 50 All 589 A I R 1928 All 283. *Harmukhrai Dunchand v. Commissioner of Income tax Bengal* 3 I T C 198 56 Cal 39 A I R 1928 Cal 587, *Commissioner of Income tax Burma v. R. M. P. Chettiar Firm*, 3 I T C 335, 7 Rang 26 R M P L S. *Sivasami Chettiar v. Commissioner of Income tax Madras* 4 I T C 207 A I R 1930 Mad 127. It is unnecessary for a notice to say under what section it is issued. All that it need say is what it requires the recipient of the notice to do and where

and when *Kam Khela can Ugamal v Commissioner of Income tax Bihar and Orissa* 3 I T C 225 7 Pat 852

Failure to submit return—What is—It is possible to draw at least two lines of difference between (1) an incomplete but valid return i.e. a return which on the face of it fulfils or purports to fulfil the requirements of the law but owing to some mistake or inadvertence fails to comply with a particular provision or provisions e.g. a return complete in all respects but omitting *bona fide* say a source of income and (2) a totally invalid return i.e. a return which fails substantially to give the information required by the statutory form of return. Thus a form filled up other wise than in accordance with the instructions given in the return or a form not signed or verified or seriously incomplete in respect of the details necessary would be an invalid return. A return which deliberately omitted to give figures relating to branches of business under assessment has been held to be no return. In *re Abheyram Chunnilal* 1933 I T R 126 A I R 1933 All 197 6 I T C 343. A return showing under heading 5—Business Trade etc Profits or income in money lending business about Rs 5000 without any details is required by Note 5 of the Instructions in the return was held to be no return at all. So also a return with no entries in it except Loss about Rs 8000 ledgers not ready and a return with entries about Rs 800 etc without verification and the required details. *Commissioner of Income tax v A R A N Chettiyar and V D M R M Chettiyar* 6 Rang 21 2 I T C 477 A I R 1928 Rang 108. *Mohanlal Hardeodas v Commissioner of Income-tax Bihar and Orissa* 5 I T C 127. *Ial Muhammad Sirdar Muhammad v Commissioner of Income tax, Punjab* 1934 I T R 358 A I R 1935 Lah 858 7 I T C 347. The mere signing of the prescribed form or return without filling in any of the columns in it and with the word 'Blank' written against the item total, accompanied by a letter that the person carries on no business in British India is equivalent to failure to submit a return. *Rattanchand Dunchand v Commissioner of Income tax* 3 I T C 69 9 Lah 188 A I R 1928 Lah 944. If an assessee has no taxable income what he has to do is to make a return in the prescribed form verify it in the prescribed manner and say that he has no taxable income. The signature and verification of the return are by no means mere formalities. *Kunawary Anand v Commissioner of Income tax Bihar and Orissa* 5 I T C 417 11 Pat 187 A I R 1931 Pat 306. A return showing Nil everywhere except some items against which 'Loss' was written, no details or figures being shown either in the body of the return or in the form laid down in Note 5 is not a valid return. *Ramakissandas Bagri v Commissioner of Income tax, Bengal* 2 I T C 325 see also *Ramachandra Kasinath v Commissioner of Income tax, Bihar and Orissa* A I R 1930 Lah 1014, 5 I T C 58 and *Nawalkishore Kharaitilal v Commissioner of Income-tax Delhi* A I R 1930 Lah 1014. On the other hand a letter with a statement of income and a blank return form might amount to the making of a return. *Gangasagar v Commissioner of Income tax* 4 I T C 97 A I R 1929 All 219. This view, however was taken with reference to a prosecution under section 52 and not in reference to section 23 (4). See also the remarks of Lord Stornouth Darling in *Lord Advocate v A B* 3 Tax Case 617 35 Sc L R 190 cited in notes under section 51.

While a failure to furnish a return *suo motu* under section 22 (1) might entail a penalty under section 28 the failure cannot by itself result in an assessment under section 23 (4).

Time given to assessee—The Income tax Officer's refusal to grant time and proceeding *ex parte* will not in themselves raise a question of law, *Sir Hari Singh Gour v Commissioner of Income tax*, C P, 6 I T C 317. An assessee should, however, be allowed reasonable time within which to produce accounts or evidence. Whether the time given is reasonable is ordinarily a question of fact, but it may become a question of law if the time is so short as to be clearly not reasonable. Even assuming that an assessee had all the books at hand and was trying to evade their production before the Income-tax Officer, it is not reasonable for the latter to ask the assessee not only to collect and produce the books but also to produce other evidence on which he might rely—all between 3 P M on one day (when the notice was served) and the next morning. *In re Sadaram Puranchand* (Cal), 5 I T C 459 A I R 1931 Cal 729. Nor is it reasonable to ask an assessee in Bombay to produce within fifteen days the accounts of one of his customers in Hongkong however close the business connection between the two parties, *Commissioner of Income tax Bombay v Bombay Trust Corporation*, 1936 I T R 323. See also *Sacchidananda Sinha's case*, 1 I T C 381 under section 33. On the 8th of August, a notice was issued under section 22 (4) to produce certain books. The jurisdiction of the Income tax Officer was challenged successfully before the High Court, and on the 30th December, the Governor General issued an ordinance nullifying the Court's order. Offices were closed on the 31st December and the 1st and 2nd of January. The Income tax Officer made an assessment on the 3rd January under section 23 (4). It was held that the assessee was prevented by sufficient cause from complying with the notice under section 22 (4) and that the assessment was capricious and not honest.

In re Gozindram Sakseria 1943 I T R 104 (Bom.)

Failure to submit accounts or evidence—As regards failure to comply with a notice under section 22 (4) or 23 (2) the failure must be in respect of one of three things (1) producing evidence itself, (2) producing it at a certain time, and (3) producing it at a certain place, and if the person fails in any one of these things it is open to the Income-tax Officer to assess him under section 23 (4).

Since section 23 (4) refers to 'all' the terms of the notices issued under section 22 (4) and 23 (2) a partial default in respect of any of the notices involves the same consequences as a total default. *Banarsidas v Commissioner of Income tax Punjab*, 1936 I T R 142 A I R 1936 Lah 489.

The inadequacy of the evidence produced or the inability of the assessee to prove his case (not his deliberate omission to do it) will not deprive the assessee of his right to be assessed under sub-section (3), with its consequential benefits though the Income tax Officer would be at liberty to infer adversely from the inadequacy of the evidence or the inability of the assessee to prove his case, *Banarsidas v Commissioner of Income tax, Punjab* 1936 I T R 142, A I R 1936 Lah 489, *Raghunath Mahadev v Commissioner of Income tax, Bihar and Orissa* 2 I T C 94, A I R 1923 Pat 694 S P K A A M Firm v Commissioner of Income-tax, Burma 10 Rang 92 A I R 1932 Rang 52, 6 I T C 49. Whether there has been a compliance with the terms of a notice under section 22 (4) or section 33 (2) is a question of fact. *Muraffar Ali Khan v Commissioner of Income*

tax Oudh 4 I T C 4, A I R 1932 Oudh 164, but whether on the facts section 23 (4) was rightly applied may be a question of law, *A R A N Chettyar Firm v Commissioner of Income tax, Burma 2 I T C 470, 6 Rang 21*

Whether returns or accounts or documents were in fact produced or not or whether the terms of notices under sections 22 (2) 22 (4) and 23 (2) were complied with or not is always a question of fact see *Toharmal Uttamchand v Crown (Lah), 2 I T C 301*. But it would be a question of law whether there was evidence for the findings *Girtan Lal Rasik Lal v Commissioner of Income tax Bombay 7 I T C 209*

Whether books are available or not it is a question of fact. In a case therefore in which the assessee said that certain accounts had been lost or destroyed and the Income-tax Officer did not believe the statement the High Court declined to interfere with the finding of the Income-tax Officer *Sankaralinga Nadar v Commissioner of Income tax Madras 4 I T C 226 53 Mad 420 A I R 1930 Mad 209*. Similarly if the existence of accounts is denied by the assessee it would be open to the Income-tax Officer to hold on evidence that they existed and were being deliberately withheld *Lach mandas Baburam v Commissioner of Income tax 4 I T C 61 A I R 1930 All 49, Virbhan Bansal v Commissioner of Income tax Punjab, 1936 I T R 111*. The Income tax Officer however must not act on mere suspicion. There should be reasons for the Income tax Officer's opinion that the accounts not produced are in existence and are being deliberately withheld *Ragunath Mahadeo v Commissioner of Income tax Bihar and Orissa 2 I T C 94 A I R 1925 Pat. 694 S P K A A M Firm v Commissioner of Income tax Burma 10 Rang 92 6 I T C 49 A I R 1932 Rang 52*. The High Court will not interfere with such a finding unless it is perverse *Raghu Karson v Commissioner of Income tax Bihar and Orissa 5 I T C 389*. The mere fact that the assessee is unable to prove the existence of individuals whose names are shown as transacting business with him and having accounts with him will not in itself justify the inference that the accounts are false or incomplete. All that the Income-tax Officer can do in such a case is to disallow the deductions claimed in respect of the items under suspicion *Ragunath Mahadeo v Commissioner of Income tax Bihar and Orissa 2 I T C 94, A I R 1925 Pat. 694 S P K A A M Firm v Commissioner of Income tax Burma 10 Rang 92 6 I T C 49 A I R 1932 Rang 52*

In a case in which the assessee was asked to produce evidence under section 23 (2) and accounts under section 22 (4) but the assessee merely turned round and said in effect 'We have no evidence to produce and you may decide on the materials before you' without filing any affidavit or making any effort to convince the Income tax Officer of the absence of any evidence in their possession the Patna High Court held that there was non-compliance with section 22 (4) and section 23 (2) and that an assessment under section 23 (4) was legal *Mohanlal Hardeo Das v Commissioner of Income-tax Bihar and Orissa 4 I T C 90, 9 Patna 172*

If a return is made by a person who keeps no accounts and is therefore unaccompanied by the details required by Note 5 (b) in the Return, the return cannot be regarded as invalid because of the omission to furnish them '*Lex non cogit ad impossibilia*'—A person cannot be penalized for not doing what he cannot do. Whether there are accounts is a question of fact on which the Income-tax Officer has to arrive at a finding *Akushiram Karamchand v Commissioner of Income tax 100 I C 774 A I R 1928*

Lah 219, 2 I T C 517 The Income tax Officer cannot assume that there has been a default unless it is clear from the return or from other evidence that the assessee is intentionally omitting to do what he is in a position to do. In doubtful cases, therefore, i.e., where there is not adequate evidence to enable the Income tax Officer to find that accounts are in fact being kept but withheld it is only fair that he should not treat the assessee as in default in respect of the notice under section 22 (4) but give him a chance under section 23 (2) as indeed the Income tax Officer must, if a return has been furnished and if it is subsequently found that the assessee does maintain accounts the Income tax Officer could then assess the person under section 23 (4).

The onus rests on the assessee if he denies the existence of accounts to prove that fact and his attempt to establish that fact can be met by circumstantial evidence to the contrary. The Income tax Officer is entitled to disbelieve improbable statements and ask for something more to satisfy him. Since the Income tax Officer cannot be expected to produce positive evidence as to facts within the special knowledge of the assessee, circumstantial evidence and general probabilities (See section 114 Evidence Act) constitute evidence and materials on which the Income tax Officer can come to a finding just as properly as on positive evidence. *Kanhayyalal Umarao Singh v Commissioner of Income tax, United Provinces* 1941 I T R 225 (Oudh), *Chaterbluj v Commissioner of Income tax United Provinces*, 1941 I T R 286 (Oudh).

It is not open to an assessee to refuse to comply with notices issued under section 22 (4) or section 23 (2) on the ground that the question of the Income tax Officer's jurisdiction is under discussion with reference to section 64. *Lachman Das Baburam v Commissioner of Income tax, United Provinces* 4 I T C 61 A I R 1930 All 49. If an assessee submits returns relating to his branches to the respective Income tax Officers but none to the office at the principal place of business he is in default under section 23 (4) and it is open to the Income tax Officer at the principal place of business to make an assessment without waiting for reports from the officers at the branches who have received the returns, *Mohanlal Hardeo Das v Commissioner of Income tax Bihar and Orissa* 5 I T C 127. On the other hand having waived the demand for the production of branch accounts and agreed to accept the report of the Income tax Officer having jurisdiction over the branch the Income tax Officer of the principal place of business cannot declare the assessee to be in default in not producing the branch accounts unless the Income tax Officer issues a fresh notice under section 22 (4) asking for the branch accounts and this notice is not complied with. *Lachmandas Baburam v Commissioner of Income tax, U P* 4 I T C 61 A I R 1930 All 49. If the Income tax Officer of the principal place of business calls for a return of income of all the branches and the assessee submits the return only for his principal place of business he is in default and an assessment can be made under section 23 (4).

Assessments under wrong sub sections—As already observed the question of the sub-section of section 23 under which an assessment was made was of great importance before 1st April 1939 when assessments made under sub-section (4) could not be appealed against even after 1st April 1939, the question is not entirely without importance because in respect of appeals against orders under section 23 (4), the appellate

authorities might not permit the letting in of evidence not produced before the Income-tax Officer. In any case a manifest mistake on the part of the Income tax Officer cannot operate either to deprive the assessee of a right which he possesses or to confer on him a right which he does not possess.

It is not open to an Income-tax Officer to assess a case under section 23 (4) when it really falls under section 23 (3) or vice versa. In re *Sarjoo Pershad Gouri Shankar* (1931) 132 I C 564 5 I T C 263. It is the duty of the Assistant Commissioner to determine whether really an order has been passed under the sub-section under which it purports to have been passed. *Radhakishan and Sons v Commissioner of Income tax Punjab* 2 I T C 345 A I R 1927 Lah 5. Thus there could be no failure within the meaning of sections 22 (4) and 23 (4) on the part of an assessee who does not keep accounts if he does not produce accounts and such failure cannot be used as a reason for an order under section 23 (4) as below assessed under section 23 (4) as assessee has no account. If such an assessee had filed a return and was prepared to give evidence under section 23 (2) it is the duty of the Income tax Officer to assess him under section 23 (3). Nor can an Income tax Officer compel the assessee to produce a particular kind of evidence which he is unable to produce and penalise him on the ground that he did not comply with the notice under section 23 (2). At the same time an Income-tax Officer cannot condone failure and assess a person under section 23 (3) when he ought to assess under section 23 (4). In re *Sarjoo Pershad Gouri Shankar supra*.

An assessee submitted no return but merely gave a statement of the amount of his business in bills and evaded producing his books. Though the Income-tax Officer assessed him ostensibly under section 23 (3) it was held that the order was really under section 23 (4) (and therefore not appealable i.e. under the pre 1939 law). *Commissioner of Income tax Sind v Ganguram Kanaylal*, 1940 I T R 421.

In a case in which an order has been on the face of it passed wrongly under section 23 (4) instead of under section 23 (3) the assessee need not invoke section 27 but can appeal against the assessment on its merits to the Assistant Commissioner. *Bagarati Prasad v Commissioner of Income tax*, U P 6 I T C 105 54 All 496 A I R 1932 All 390.

It is a question of law whether on the facts a particular assessment should have been made under sub-section (3) or sub-section (4). *Khushiram Karamchand v Commissioner of Income tax Punjab* 2 I T C 517 but it is not a question of law arising out of an order under section 27 or under section 31 in appeal against an order under section 27. *Kanhavalal Umraosing v Commissioner of Income tax U P* 1941 I T R 225 (Oudh).

An assessee called upon by notice under section 23 (2) to substantiate his return told the Income-tax Officer to assess on the materials at his disposal. The Assistant Commissioner on appeal fined the assessee under section 28. Before the High Court the assessee contended that the assessment should have been made under section 23 (4) and that the Assistant Commissioner had no jurisdiction to hear the appeal and none to impose a penalty under section 28. Held, that the assessment was rightly made under section 23 (3) since the assessee put in an estimate of his income. *Pilla Ramaswami v Commissioner of Income-tax*, 49 Mad 831 2.

Assessment by estimate—There is nothing to prevent an assessment by estimate under section 23 (3) if the Income-tax Officer is not satisfied with the evidence produced by the assessee in support of his return. The difference between such an assessment and one under section 23 (4) is that till 1939 the one was appealable and the other not.

Orders in writing—Orders under section 23 (4) having become appealable as from the 1st April 1939 it would appear that the orders should be in writing setting out not only the circumstances that led to the assessment being made under this sub-section but the basis of the estimate even if such basis be only vague and conjectural.

How section 23 (4) should be applied—If an Income tax Officer, regardless of the information at his disposal, quite deliberately, recklessly or fraudulently made an assessment knowing it to be wrong and unjustified, and if there was no other remedy available it might be open to the High Court under its inherent prerogative powers to claim jurisdiction and interfere *sec per Faruq L J* in *Dyson v Attorney General* (1911) 1 K B 410, and *Faruq L J*, in *R v Board of Education*, (1910) 2 K B 478. See also *Abdul Bari Choudhri v Commissioner of Income tax, Burma* 9 R 281 overruling *S P K A A M Chettyar Firm's Case*, 4 I T C 82 7 Rang 669 A I R 1930 Rang 35 P K N P R Firm's Case, 4 I T C 87 and 340 and *A R A N Firm's Case*, 2 I T C 477 6 Rang 21 and *Fattela Panna Lal v Commissioner of Income tax C P*, 6 I T C 299. But, *ex hypothesi*, an assessment under section 23 (4) must be made on inadequate materials and be therefore a mere estimate and to that extent is arbitrary. If the Income-tax Officer acts *mala fide*, the Commissioner will doubtless use his powers of revision under section 33 A but there is clearly no judicial discretion in making an assessment under section 23 (4). The Income-tax Officer has no choice as to action or forbearance and must make an estimate however inadequate the materials the words 'to the best of his judgment' therefore simply mean 'as best he can'. The discretion of the Income-tax Officer is therefore not similar to the discretion of Licensing Justices (see *Sharp v Wakefield* (1891) A C 173). The judicial discretion of a tribunal implies that in certain proved or admitted circumstances the tribunal has power to act or not to act in a particular way. There is no such choice to the Income-tax Officer when making an assessment under section 23 (4). The Rangoon High Court therefore held that no question of law can arise out of the fact that an assessment under section 23 (4) is not founded on adequate evidence. *Abdul Bari Choudhri v Commissioner of Income tax Burma* 9 R 281, overruling *S P K A A M Chettyar Firm's Case*, 4 I T C 182 7 Rang 669 A I R 1930 Rang 35 P K N P R Firm's Case 4 I T C 87 and 340 and *A R A N Firm's Case*, 2 I T C 477 6 R 21. The ruling in *Abdul Bari Choudhri's case* was approved by the Privy Council in *Commissioner of Income tax v Lakshminarain Badridas Agarwal* 1937 I T R 170 reversing 1934 I T R 246, A I R 1934 Nag 183.

A Bench of five Judges of the Lahore High Court held in *Muhamad Hayat v Commissioner of Income tax, Punjab*, 5 I T C 159, 12 Lah

129, A I R 1931 Lah 87, that section 23 (4) does not permit of capriciously arbitrary assessments. If evidence is produced by the assessee and default occurs later the Income tax Officer should not ignore the available evidence. Though the High Court may not have jurisdiction in a case falling under section 23 (4), it is open to the Court to interpret that section. The Court approved of the earlier Rangoon rulings which have been subsequently overruled by the latter Court. In a later case however the Lahore High Court made it clear that it could not ask the Commissioner to state a case as to the arbitrariness of an assessment. *Somchand Malukchand v Commissioner of Income tax Punjab* 1938 I T R 297.

The view of the Calcutta High Court was the same as that of Rangoon since they held in *In re Krishna Kumar Ghose* 5 I T C 295 58 Cal 906, A I R 1931 Cal 513 that an order as follows: Business—Rs 30 000 without any disclosure of the business or of any other details is a valid order the assessment being made to the best of the Income tax Officer's judgment. An assessment under section 23 (4) however is not meant to be a penalty for the assessee's non-compliance with the Income tax Officer's notices. *Jot Ramesher Singh v Commissioner of Income tax, U P* 1934 I T R 129, 6 All 933 A I R 1934 All 559 7 I T C 173. The fact that an assessment is higher than in the preceding year is no ground for holding it to be arbitrary. *Jalet Kishore v Commissioner of Income tax, Bihar and Orissa* A I R 1932 Pat 166 140 I C 712.

The Nagpur Court held that in every case falling under section 23 (4) the Income tax Officer should conduct a local enquiry and place on record notes so that the Commissioner and the High Court can decide whether he acted arbitrarily or not. In reversing this ruling the Privy Council said that it was impossible to extract these requirements from the language of the Act. The Officer is to make an assessment to the best of his judgment against a person who is in default as regards supplying information. He must not act dishonestly or vindictively or capriciously because he must exercise judgment in the matter. He must make what he honestly believes to be a fair estimate of the proper figure of assessment and for this purpose he must be able to take into consideration local knowledge and reports in regard to the assessee's circumstances and his own knowledge of previous returns made by and of the assessee and all other matters which he thinks, will assist him in arriving at a fair and proper estimate and though there must necessarily be guesswork in the estimation it must be honest guesswork. In that sense too the assessment must to some extent be arbitrary. The section places the officer in the position of a person whose decision as to amount is final and subject to no appeal but whose decision if it can be shown to have been arrived at without an honest exercise of judgment may be reversed or reviewed by the Commissioner under section 33 A. There is no justification in the language of the Act for holding that an assessment made under section 23 (4) without a local enquiry and without a record of the details and results of that enquiry cannot have been made to the best of the Income-tax Officer's judgment. *Commissioner of Income tax v Jakhmunnarai Badridas Agarwal* 64 I A 102 1937 I T R 170 (P C) reversing 1934 I T R 246 A I R 1934 Nag 183.

The question whether an assessment is capricious or arbitrary cannot in any event be raised before the High Court unless it has first been raised

before the Income-tax authorities, *Chiranj Lal v Commissioner of Income tax, Bihar and Orissa*, 5 I T C 28

Enquiries by the Income tax Officer—While an Income-tax Officer is at liberty to make private enquires before deciding whether or not to accept a return as correct the proceedings partake of the nature of a judicial enquiry once a notice under section 23 (2) has issued and private enquiries after that stage cannot be used against the assessee without his knowledge. On the other hand it is open to the officer to act upon the assessments in earlier years if no better evidence is available even if the earlier assessments had been made under section 23 (4) *Gopuna Nair v Commissioner of Income tax U P* 1936 I T R 1 (All)

Enquiries under orders of higher authority—Though under section 23 (3) the Income tax Officer is bound to consider the evidence tendered by the assessee he is under no similar obligation in respect of enquiries conducted under the orders of the Assistant Commissioner, *Sheik Abdul Razzak v Commissioner of Income tax Bihar and Orissa* A I R 1935 Pat 425

Disclosure to assessee—There is nothing in the Act requiring the Income tax Officer to disclose to the assessee the materials on which he proposes to act or to refer to them in his order, but natural justice requires that he should draw the assessee's attention to such material and give him a reasonable opportunity to meet the case *Commissioner of Income tax, Sind v Kheserchand Ramdas* 1940 I T R 159, *Seth Gurmukh Singh v Commissioner of Income tax Punjab* 1944 I T R 393 *Lalmohan Krishna Lal Pal v Commissioner of Income tax, Bengal* 1944 I T R 441, *Dalchand and Sons v Commissioner of Income tax Punjab*, 1944 I T R 458

So long as there are materials apart from confidential enquiries by the Income tax authorities not communicated to the assessee the High Court will not interfere with findings of fact, *Seth Gurmukh Singh v Commissioner of Income tax, Punjab*, 1944 I T R 393

The assessee should have some opportunity to rebut the information or evidence on which the Income-tax Officer proposes to rely, *Sheik Abdul Razzak v Commissioner of Income-tax B & O*, A I R 1935 Pat 425

In *Commissioner of Income-tax v Chanlo Chawin and Tong Hock Hin* 3 I T C 397 7 Rang 281 A I R 1929 Rang 102 the Rangoon High Court held that the Income-tax Officer is not bound to inform the assessee of the specific grounds on which he disbelieves the latter's accounts or other evidence produced. The Court suggested however that ordinarily as a matter of fairness the Income tax Officer should inform the assessee of such grounds. See also notes under section 13

Where an assessee declined to account for certain interest bearing capital that was in his possession in previous years, and the Income tax Officer, after giving him an opportunity to prove the contrary, estimated his income on the assumption that the missing capital was still earning interest it was held that there was evidence on which the Income tax Officer could make the assessment *Commissioner of Income-tax v Sankara Aiyar*, 2 I T C 73

Judicial spirit—Exercise of—Silence on the part of the assessee in the face of opportunity given is often the most cogent evidence against him see per Sargant L J in *Haythornthwaite and Sons v Kelly*, 11 Tax Cases 657

The Income-tax Officer should be governed in his procedure by judicial considerations. He should base assessment on legal and not mere hearsay evidence which may be the evidence of his officers or of members of the public but without evidence that items which do not appear in an account should find a place therein he is not entitled to assume on mere general hearsay that those items should appear in the account. Should he however find on good evidence that even one substantial item is missing he would be entitled to treat the whole account as unreliable. *Bajnath v Commissioner of Income tax Punjab* 2 I T. C 176 A I R 1926 Lah 233

At the same time as the Income-tax Officer, though not a Court of law has to act in a quasi judicial capacity he should conform to the elementary rules of judicial procedure and in particular should conduct the proceedings himself and not allow any one else even his official superior to take the conduct of the case out of his hands. *D D Shroff v Commissioner of Income tax Bombay (Central)* 1943 I T R 172

They (proceedings before Income tax authorities) are judicial proceedings in the colloquial sense because the Income tax authorities have to make up their minds judicially with fairness to the public and to the assessee between whom they stand after taking all the facts or such facts as they can into account but they are not judicial proceedings in the strictly scientific sense of the term so as to raise questions in appeal to some higher tribunal as to whether the gentleman making the assessment has decided against the weight of evidence or has disregarded evidence which he ought to have taken into account.

he (the Income tax Officer) must use his best judgment first to obtain and secondly to weigh the available evidence. It is to some extent a private inquisition it is confidential it is not supposed to be disclosed to the public and it is certainly not open to review especially because frequently the Income tax Officer is compelled to draw inferences and to consider evidence which might not be justified by the Evidence Act.

As was once said in a case by a well known Judge in England there is no rule of law compelling a Judge to accept evidence even though it is uncontroverted which he believes to be a pack of lies. *Bhagwat Haldar v Commissioner of Income tax* 3 I T C 48

When the assessee gives a false and unbelievable explanation of an item in his books the Income-tax Officer is under no obligation to prove by positive evidence that the item is taxable. The Income tax Officer is entitled to act on circumstantial evidence. *Lalmohan Krishn Lal Pal v Commissioner of Income tax Bengal* 1944 I T R 441

An Income-tax Officer is invested with plenary powers in the matter of assessment and drastic though at first sight these powers may appear to be they are designed to impress on the minds of the assessee that if they expect equity from the Income tax authorities they must do equity themselves and come with clean hands before them. the proceedings before the Income-tax Officer are not judicial proceedings in the sense in which that term is ordinarily used and all that is required of him is to proceed without bias and give sufficient opportunity to the assessee to place his

case before him or in other words to conduct himself in accordance with the rules of justice, equity and good conscience, *Gangaram Balmukund v Commissioner of Income tax, Punjab* 1937 I T R 464, A I R 1937 Lah. 397

It is open to the Income-tax authorities to go behind the consideration of a settlement of a debt as stated in a registered deed, it is all a question of there being materials before the Income tax authorities to justify their findings *Dalchand and Sons v Commissioner of Income tax Punjab*, 1944 I T R 458

An Income-tax Officer can refuse to allow the production of evidence which is *prima facie* worthless. In a case in which the assessee alleged that his important books of account had been lost and the Income-tax Officer disbelieved this the High Court held that the Income-tax Officer was justified in refusing to admit evidence offered by the assessee from his other books of account and regarding the profits of other assessees *Manoharlal Dev Karandas v Commissioner of Income tax, Punjab*, 3 I T C 317, 10 Lah 691, A I R 1929 Lah 173

Evidence led on behalf of an assessee and not cross examined need not be accepted as conclusive. It may be dissected and inferences drawn from it, *Aldwarke Co Ltd v Commissioners of Inland Revenue*, 18 Tax Cases 125

The Income-tax Officer's personal knowledge would be perfectly good evidence *Bhagwat Halwai v Commissioner of Income tax*, 3 I T C 48

Even if the Income-tax Officer's inferences are based on the assessee's own admissions, it may sometimes be necessary to give the assessee an opportunity to show that the inferences are wrong. In a case therefore in which the Income-tax Officer started on the footing that certain individuals were not members of a joint Hindu family but assessed them as a family on the strength of certain admissions made by them, the assessees successfully argued before the High Court that the Income tax Officer gave them no opportunity to disprove his conclusion by evidence which they had at their disposal. The requisite evidence was tendered before the Assistant Commissioner on appeal who refused to admit it on the ground that it should have been tendered before the Income tax Officer, *Radhey Lal Balmukund v Commissioner of Income tax, United Provinces*, 52 All 991, 4 I T C 454 *Ibrahim Bhai etc v Commissioner of Income tax C P*, 5 I T C 302

An assessee when given an opportunity under section 23 (2) failed to produce his books which would have thrown light on certain bad debts, the deductibility of which was in doubt. Held, that the Income tax Officer was justified in disallowing the deduction claimed on account of the bad debts, *Deokimandan and Sons v Commissioner of Income tax, Delhi*, 126 I C 786, 4 I T C 398

In the words of the Privy Council in *Lapointe v L'Association, etc, Montreal*, (1906) A C 535 a case of a police pension fund—the Income-tax Officer, though a Revenue Officer should act like "a judge, not an inquisitor"—though he is not bound by the forms and procedure of law courts.

As to the general principles that should be followed by the Income-tax authorities in making a fair and equitable assessment attention is also invited to the following decisions some of which however, do not relate to revenue matters

Per *Lord Loreburn* — "Comparatively recent statutes have extended, if they have not originated, the practice of imposing upon departments or officers of State the duty of deciding or determining questions of various kinds. In the present instance, as in many others, what comes for determination is sometimes a matter to be settled by discretion, involving no law. It will, I suppose, usually be of an administrative kind, but sometimes it will involve matter of law as well as matter of fact or even depend upon matter of law alone. In such cases the Board of Education will have to ascertain the law and also to ascertain the facts. I need not add that in doing either they must act in good faith and fairly listen to both sides, for that is the duty lying upon every one who decides anything. But I do not think they are bound to treat such a question as though it were a trial. They have no power to administer an oath and need not examine witnesses. They can obtain information in any way they think best always giving a fair opportunity to those who are parties in the controversy for correcting or contradicting any relevant statement prejudicial to their view, *Board of Education v Rice*, (1911) A C 179.

Per *Viscount Haldane*, L C — "When the duty of deciding an appeal is imposed those whose duty it is to decide it must act judicially. They must deal with the question referred to them without bias and they must give to each of the parties the opportunity of adequately presenting the case made. The decision must be come to in the spirit and with the sense of responsibility of a tribunal whose duty it is to mete out justice. But it does not follow that the procedure of every such tribunal must be the same. In the case of a Court of law, tradition in this country has prescribed certain principles to which in the main the procedure must conform. But what the procedure is to be in detail must depend on the nature of the tribunal. In modern times it has become increasingly common for Parliament to give an appeal in matters which really pertain to administration rather than to exercise of the judicial functions of an ordinary court, to authorities whose functions are administrative and not in the ordinary sense judicial. Such a body as the Local Government Board has the duty of enforcing obligations on the individual which are imposed in the interests of the community. Its character is that of an organization with executive functions. In this it resembles other great departments of the State. When therefore Parliament entrusts it with judicial duties, parliament must be taken in the absence of any declaration to the contrary, to have intended it to follow the procedure which is its own and is necessary if it is to be capable of doing its work efficiently', *Local Government Board v Arlidge*, (1915) A C 120.

Per *Lord Shaw* — The words 'natural justice' occur in arguments and sometimes in judicial pronouncements in such cases. My Lords, when a central administrative Board deals with an appeal from a local authority it must do its best to act justly and to reach just ends by just means. If a statute prescribes the means it must employ them. If it is left without express guidance it must still act honestly and by honest means. In regard to these, certain ways and methods of judicial procedure may very likely be imitated, and lawyer-like methods may find especial favour from lawyers. But that the judiciary should presume to impose its own methods on administrative or executive

officers is a usurpation. And the assumption that the methods of natural justice are *ex necessitate* those of Courts of Justice is wholly unfounded. This is expressly applicable to steps of procedure or forms of pleading. In so far as the term 'natural justice' means that a result or process should be just, it is a harmless, though it may be a high-sounding expression, in so far as it attempts to reflect the old *jus naturale* it is a confused and unwarranted transfer into the ethical sphere of a term employed for other distinctions, and, in so far as it is resorted to for other purposes, it is vacuous', *Ibid*. See also *Russel v Russel*, (1880) 14 Ch D 471 and *Wood v Wood*, 1874 L R 9 Ex 190.

"The Commissioners have a very large liberty as regards the materials on which they may act in coming to a figure. They might take the lease with or without considering the premium paid by the original lessee. They might take into consideration, if they thought it affected the matter, the premiums paid by the successive assignees. They might act upon evidence as to the *de facto* annual value of the premises. They might act upon their own knowledge of what the annual value ought to be. I could not quarrel with any decision they might come to, not being a decision in point of law, on such matters as that.

The authorities are given wide powers in matters of that kind. It is essential in the highest interest of the revenue, which interest is that the public should have confidence in the authorities, that these powers should be exercised fairly carefully and indeed almost judicially. It is disquieting to find that an assessment is put forward which the Inspector, on being confronted with on appeal at once says he is willing to reduce practically by half, and it is very regrettable that that half—whether it could be justified upon some totally different kind of reasoning I do not propose to inquire—upon the principle which was adopted, and which was accepted, should be supported by a use of figures which I can only describe as obviously fallacious. —Per Roulatt, J, in *Davis v Abbot*, 11 Tax Cases 575.

Indian Evidence Act—Applicability of.—Under section 3 of the Indian Evidence Act (I of 1872), a 'Court' includes all persons except arbitrators legally authorised to take evidence. In view of section 37 of the Income tax Act, therefore, Income tax Officers, Assistant Commissioners and Commissioners are all a 'Court'. See also the notes under section 52. But the Evidence Act applies only to "all judicial proceedings in or before any Court." The question therefore arises whether the proceedings before the above-mentioned officers under the Income-tax Act are 'judicial proceedings'. There is no general definition of the expression 'judicial proceedings'. According to the Criminal Procedure Code, section 4 (1) (m), 'judicial proceeding' includes any proceeding in the course of which evidence is or may be legally taken on oath. Just as in section 37 of the Income-tax Act, proceedings before various Revenue Officers have been specially declared in various Acts to be 'judicial proceedings' for the purpose of sections 193 and 228 of the Indian Penal Code. Whether, from the fact that proceedings before the officers of the Income-tax Department have been specially declared to be 'judicial proceedings' only for the purpose of sections 193 and 228 of the Indian Penal Code, it is a reasonable inference or not, on the principle of *expressio unius est exclusio alterius*,

to hold that for other purposes such proceedings are not 'judicial proceedings' there seems to be little doubt that the detailed provisions of the Evidence Act will not apply to such proceedings automatically and without qualification. Obviously the same person cannot be party, judge and witness. Nor can the applicability of the Evidence Act conceivably arise when the Income tax Officer has perforce to assess under section 23 (4) to the best of his judgment the assessee not having complied with the requirements of the Income tax Officer. Similarly beyond the limited provisions referred to in section 37 the provisions of the Civil Procedure Code also will not apply to proceedings before Income-tax authorities.

The general principles of how inferences may be drawn will however apply. The presumption to be drawn from the non production of account books by an assessee who keeps them will be governed by section 114 of the Evidence Act. Ordinarily the inference will be that the books if produced will go against assessee *Sankaralinga Nadar v Commissioner of Income tax Madras* 4 I TC 226 A I R 1930 Mad 209. Evidence as used in this section (23 of the Income tax Act) includes circumstantial evidence and is not confined to direct evidence. Where therefore the accounts of the assessee are found to be false or unreliable and he is unable to account satisfactorily for certain items of income not to be found in the accounts the Income tax Officer will be justified in making an estimate on general considerations even when making an assessment under section 23 (3). *Paras Dass Munjal v Commissioner of Income tax Punjab* 1937 I T R 523.

Adequacy of notice under sections 22 (4) and 23 (2).—See *Iach nandas Baburam v Commissioner of Income tax* 2 I T C 35 under section 27. The adequacy of notices will arise only under section 27 in determining whether the assessee was prevented by sufficient cause from complying with the notices.

Assessment wrongly made under section 23 (4).—Where the proper authority the High Court the Commissioner of Income tax or the Assistant Commissioner as the case may be has declared that an assessment which has been made under section 23 (4) should have been made under section 23 (3) or 23 (1) the assessment it is submitted is not necessarily completely set aside and it is not necessary in all cases for the Income-tax Officer to start *ab initio* with a notice under section 22 (2). All that is required may be to treat the assessment as one made under section 23 (1) or (3) and allow an appeal against the assessment and the further rights if any arising out of the appeal. Questions of this kind do not often arise since 1939 because orders under section 23 (4) are now appealable. See also notes under section 66.

Supply of assessment orders.—When an assessment order has been passed under section 23 an assessee who applies to the Income tax Officer for a copy of the order will be supplied by the Income-tax Officer with a copy free of charge subject to the following conditions: (a) not more than one copy of an assessment order will be supplied free and (b) a copy of an assessment order applied for more than one year after the order was passed will not be supplied free of charge unless the applicant satisfies the Income-tax Officer that it is required for his use in some proceedings which are pending under the Indian Income-tax Act 1922 with reference to the particular assessment covered by the order and which are not time-barred.

Proposed representations to higher authority which are not covered by any provision of the Act will not be regarded as proceedings pending under the Act (Income tax Manual)

United Kingdom Law—The Commissioners are not bound to accept the return nor are they bound even to look into all the evidence offered by the assessee if they think that the evidence will not help them. See *R v Offlow Commissioners* (1911) 27 T L R 353. In this respect the law in the United Kingdom is more unfavourable to the assessee than in India as under section 23 (2) and (3) the Income-tax Officer is bound to hear and consider—whether he accepts it or not—the evidence produced by the assessee. If the assessee does not produce accounts the Commissioners can, as they indeed must tax according to an estimate, see *In re Fletcher*, 3 Tax Cases 289. In *Grahamston Iron Company v Crawford* (1915) S C 536, 7 Tax Cases 25 the Commissioners asked the Company, who were members of an association of producers formed to keep up prices and who claimed as a deduction the subscriptions to the association, to produce a copy of the accounts of the association so that the Commissioners could see how the money was actually spent by the association. The Company could not produce the accounts and the Commissioners rejected the claim of the Company. It was held by the Scottish Court of Session that the Commissioners were entitled to demand production of the accounts in question. A similar decision was arrived at in *Adam Steamship Company v Matheson*, 1 A T C 149, 12 Tax Cases 399, (1921) Sess Cas 141. In a case of succession, the plea that the successor could not produce the books of the predecessor in order to rebut the estimates made by the assessing authority was not accepted. *Thomson and Balfour v Le Page*, 8 Tax Cases 541, (1924) Sess Cas 27. The successor must take the consequences if he fails to take over the predecessor's books or to arrange access to them. The point of these decisions is that the onus of proving that an item is deductible rests on the assessee—cf *Nopechand Maguram v Commissioner of Income tax*, 2 I T C 146 and other rulings under 'Burden of proof' in the preceding notes on this section.

In *Tudor and Omions v Ducker*, 8 Tax Cases 591, the accounts of the assessee were prepared by an Accountant who had afterwards been prosecuted by the Board of Inland Revenue for perjury and convicted. The accounts in question were therefore rejected by the Commissioners. The books of the assessee had been destroyed and the assessment was therefore made by estimate. The assessee contended that the accounts produced by the convicted Accountant should be accepted but were unable to produce any evidence to support the correctness of those accounts. Held, that in the absence of evidence the Commissioners were right in computing the assessments by estimate.

In *Gundry v Dunham*, 7 Tax Cases 12, 32 T L R 142, the authorities of a Poor Law Union had all the 'on licence' houses re-valued by an expert in a year succeeding that in which the quinquennial review of assessments under Schedule A had been made. In a case in which the re-valuation had resulted in an increase the Surveyor of Taxes made an additional assessment. The question was raised that the assessment should not have been based on the Poor Law valuation but on an independent investigation. It was held by *Roulatt, J*, that

"It is a reasonable and proper thing, because the Surveyor has not to act by legal evidence, for the Surveyor to assess on the basis of the Poor Law if he sees no reason to the contrary. Then when it comes before the Commissioners that assessment is not to be distrusted unless the Appellant shows that it is wrong. . . . If the Commissioners had refused to receive evidence to show that the Poor Law valuation was not correct then they would have been wrong."

In the Court of Appeal, *Lord Justice Swinfen Eady* said

'In my opinion the Commissioners were not in fact controlled by the Poor Rate Valuation, they had regard to it as they were entitled to, they were not bound. They were bound to receive any further evidence duly tendered and they appear to have received all the evidence that was in fact tendered."

The evidence produced by the assessee is not conclusive and it is open to the Commissioners to accept it or not. The Commissioners are also entitled to avail themselves of their personal knowledge, see *Stocks v Sulley*, 4 Tax Cases 98, 36 Sc L R 902.

Where an assessee sprang a surprise at the last moment by claiming that the business was not his own but that of his daughter and there was no evidence to that effect except an old bank pass book in the daughter's name relating to a back period, and the assessee withheld his own pass books, it was held that the business was that of the assessee himself, and the Court held the decision to be entirely one of fact, *Berry v Commissioners of Inland Revenue*, 13 A T C 673, 18 Tax Cases 193.

Mandamus—Non-production of books, etc.—An assessee appealed to the Special Commissioners against an assessment and sent in a schedule of accounts and offered to verify them on his oath, but declined to produce his books and vouchers. The Commissioners refused to put him on oath and confirmed the assessment with which they were satisfied. Held, by the Court of Appeal, that no mandamus could be granted because (1) the Commissioners were not bound to accept the schedule of accounts merely because the assessee offered to verify them on oath, (2) it was a matter for discretion whether they should be so verified, and therefore it was a decision of the Commissioners on a question of fact and not of law, (3) even if it was a point of law whether the Commissioners were bound to put the appellant on oath and the oath was conclusive, it was not a case in which a mandamus should be granted, *R v Special Commissioners* (In re *Fletcher*), 3 Tax Cases 289.

Unintelligible accounts.—The Commissioners are not bound to accept the accounts irrespective of their intelligibility. In a case in which the accounts were voluminous and kept in shorthand, *Rowlatt, J.*, held that the Commissioners were justified in refusing to look at the accounts until the assessee had them prepared by a professional accountant, *Hunt v Joly*, 14 Tax Cases 165. It was held by the Court of Appeal in *Wall v Cooper* 14 Tax Cases 552, that the Commissioners as the final judges of facts had to decide whether the accounts were intelligible or not and that therefore they could ask an assessee to get his accounts recast and certified by a professional accountant.

Estimated assessments.—"who if they do not choose, as they have not chosen, to state an account so that the amount of profits may be strictly determined, cannot complain if a random assess-

ment is made upon them by the Crown, per the Lord President in *Macpherson & Co v Moore* 6 Tax Cases 107, (1912) Sess Cas 1315

"If the Act of Parliament says the amount of profits is to be ascertained they must be whether that can be done in a satisfactory method or not per Lord Mackenzie *ibid*

Firms—The addition of subsection (1) constitute the most important change made in this section in 1939. It lays down that (a) subject to two provisos in the case of a registered firm only the partners after including their shares of profits of the firm and not the firm by itself should be taxed and (b) the Income-tax Officer may at his option tax an unregistered firm as though it was registered if thereby the Revenue would be greater in the aggregate.

Clause (a) merely crystallises previous departmental practice (which had the approval of the Calcutta High Court in *Neemchand Daga's case* 58 Cal 1204 A I R 1931 Cal 696) of taxing only the partners of registered firms and not the firms as such. The first proviso has been put in evidently out of abundant caution not only to remove possible doubts as to whether a share of income would necessarily include share of loss but also as a consequence of the changes made in section 24 withdrawing the privilege of set-off formerly allowed to partners of unregistered firms in accordance with the Madras ruling in *Commissioner of Income tax v Rm Ar Ar Rm Arunachalam Chettiar* 1934 I T R 401 and later approved by the Privy Council in *Rm Ar Ar Rm Arunachalan Chettiar v Commissioner of Income tax* 1936 I T R 173.

Second proviso—The firm will be taxed only in respect of non resident partners as though the latter were assessed personally. If a resident partner defaults or for any reason tax cannot be recovered from him the amount cannot be recovered from the firm. The word "personally" clearly means individually [cf clause (b)] since only individuals can be members of a firm [see notes under section 2 (6-B)].

Foreign income of firms—There are two steps in the assessment of partners in a registered firm: (a) first the ascertainment of the total income of the firm and (b) next the ascertainment of the total income of each partner—including other income if any of his.

Under section 4 the exclusion of Rs. 4500 of the unremitted foreign income must first be applied to the firm if the firm has foreign income and it is not open to the partners to claim that each of them is entitled in respect of the firm's foreign income to an allowance of Rs. 4500. *Mohanlal Hirral v Commissioner of Income tax C P* 1943 I T R 259.

Presumably, each partner will be entitled to a further allowance of the difference between Rs. 4500 and his share of the allowance in respect of the firm if he has other foreign income (than through the firm) not brought into British India.

On the same reasoning as in *Mohanlal Hirral's Case* it was held that a partner resident but not ordinarily resident of a resident registered firm can not claim that his share of the foreign profits of the firm should be excluded under the second proviso to section 4 (1). *Seth Badridas Daga etc v Commissioner of Income-tax C P*, 1944 I T R 468. It would seem similarly that a non resident partner in a resident registered firm could not in respect of his share of profits in the firm claim to fall entirely under clause (c) of section 4 (1) and thus to be exempt from tax on his

share of profits but this question is one between the partners *inter se* because under the second proviso to clause (a) of sub section (5) of section 23, the tax due from a non resident partner in a registered firm is recovered from the firm itself.

Unregistered firm—The option given by clause (b) is one sided in that while the firm cannot claim to be treated as registered except by registering itself, the Income tax Officer can at his option treat it as registered for this purpose. He is not concerned with the motives of the partners and all that he is concerned with is which course would be more advantageous to the revenue. If his estimate or opinion is wrong revenue suffers and he has no right it is submitted to correct his mistake under section 34 and go back on his option at a later stage.

It should be noticed that clause (b) applies only to unregistered firms falling under the Partnership Act and not to other associations.

Sub section (8)—Inserted in 1941 fills a lacuna in the Act. The formal communication to the firm is necessary for appeal purposes. Section 30 was also simultaneously amended.

23 A (1) Where the Income tax Officer is satisfied that in respect of any previous year the profits and gains distributed as dividends by any company up to the end of the sixth month after its accounts for

Power to assess individual members of certain firms as associations and companies

that previous year are laid before the company in general meeting are less than sixty per cent of the assessable income of the company of that previous year, is reduced by the amount of income tax and super tax payable by the company in respect thereof he shall, unless he is satisfied that having regard to losses incurred by the company in earlier years or to the smallness of the profit made, the payment of a dividend or a larger dividend than that declared would be unreasonable, make with the previous approval of the Inspecting Assistant Commissioner an order in writing that the undistributed portion of the assessable income of the company of that previous year as computed for income tax purposes and reduced by the amount of income tax and super tax payable by the company in respect thereof shall be deemed to have been distributed as dividends amongst the shareholders as at the date of the general meeting aforesaid, and thereupon the proportionate share thereof of each shareholder shall be included in the total income of such shareholder for the purpose of assessing his total income.

Provided that when the reserves representing accumulations of past profits which have not been the subject of an order under this sub section exceed the paid up capital of the company, together with any loan capital which is the pro-

perty of the shareholders, or the actual cost of the fixed assets of the company whichever of these is greater, this section shall apply as if instead of the words 'sixty per cent' the words 'one hundred per cent' were substituted

Provided further that no order under this sub section shall be made where the company has distributed not less than fifty five per cent of the assessable income of the company, as reduced by the amount of income tax and super tax payable by the company in respect thereof unless the company, on receipt of a notice from the Income tax Officer that he proposes to make such an order fails to make within three months of the receipt of such notice a further distribution of its profits and gains so that the total distribution made is not less than sixty per cent of the assessable income of the company of the previous year concerned as reduced by the amount of income tax and super tax payable by the company in respect thereof

Provided further that this sub section shall not apply to any company in which the public are substantially interested or to a subsidiary company of such a company if the whole of the share capital of such subsidiary company is held by the parent company or by the nominees thereof

Explanation—For the purpose of this sub section—

a company shall be deemed to be a company in which the public are substantially interested if shares of the company (not being shares entitled to a fixed rate of dividend, whether with or without a further right to participate in profits) carrying not less than twenty five per cent of the voting power have been allotted unconditionally to, or acquired unconditionally by, and are at the end of the previous year beneficially held by, the public (not including a company to which the provisions of this sub section apply), and if any such shares have in the course of such previous year been the subject of dealings in any stock exchange in British India or are in fact freely transferable by the holders to other members of the public

(2) The Inspecting Assistant Commissioner shall not give his approval to any order proposed to be passed by the Income tax Officer under this section until he has given the company concerned an opportunity of being heard

(3) (i) * * *

(ii) Where the proportionate share of any member of a company in the undistributed profits and gains of the company has been included in his total income under the provisions of sub section (1), the tax payable in respect thereof shall be recoverable from the company if it cannot be recovered from such member

losses and the smallness of current profits it is not clear whether he can be compelled to have regard to other relevant considerations e.g., non availability of resources for distribution Cf *Fattorini Ltd v Inland Revenue* (H L.), 1943 I T R Sup 50 in which on account of a previous loan from a bank (which was *bona fide* and not for avoiding tax) practically all the income had to be made over to the Bank in payment of the loan and the House of Lords held that the onus lay on the Crown to show that it would have been reasonable for the company to have contracted another loan in order to distribute dividends which onus had not been discharged. Similarly as a result of capital losses the company may have no funds to distribute as profits. Section 23 A seems to contain lacunae in these directions.

Undistributed portion—While if not less than 60 per cent of the assessable income (less tax) has been distributed the section does not come into operation the whole of the undistributed income will be deemed to have been distributed in cases in which less than 60 per cent. have been distributed and the Income-tax Officer decides to apply the section. The scheme of the law is to divide companies into two classes those who distribute reasonably (i.e. in India the specified percentage) and those who do not. The former are let alone while the latter are treated like partnerships of *Colville Estates, Ltd v Inland Revenue* 15 Tax Cases 485.

The allocation will be made between the shareholders as on the date of the relative general meeting. The status of the shareholder is whether an individual firm company Hindu undivided family or any other association is immaterial. The Income-tax Officer so far as this section is concerned will go merely by the Register of Shareholders of the company as on the date of general meeting and will not be concerned with beneficial interests with which he will deal if necessary under sections 40 and 41 cf *Marquis of Tickfield v Inland Revenue* 1941 K B D.

A distribution of dividend on condition that an equivalent loan is made by the shareholder to the company is not a distribution of profits *Inland Revenue v Marbob Co Ltd* 18 A T C 257 (K B).

Limitation—While an Income tax Officer cannot set this section in motion before a certain date as laid down in the section there is no time limit to the date after which he is prohibited from taking action except what is laid down in section 34.

If there is delay in calling a general meeting and placing the accounts before it action can be taken if at all only under the Companies Act. The Income-tax Officer cannot act under section 23 A of the Income tax Act until the specified period has elapsed after the general meeting.

First proviso—The limit of 60 per cent laid down in the main part of the sub-section is to be raised to 100 per cent in the two cases referred to in this proviso.

The words representing accumulations of past profits exclude capital sources including appreciation thereof. The past profits for this purpose are evidently to be taken as computed for income-tax purposes from year to year.

The words loan capital which is the property of the shareholder are intended according to the proceedings in the legislature to refer to debentures and loans held by shareholders.

The 'actual cost of the fixed assets' is evidently the original cost and not the depreciated or written down cost.

Fixed assets is not defined but it will, according to commercial usage, include buildings, plant, machinery, etc., but not stocks of raw materials of finished goods stores, etc. or securities.

The comparison is to be made between (a) the sum of the paid up capital and the loan capital raised from the shareholders and (b) the original cost of the fixed assets. The greater of the two is to be taken and if the reserves out of accumulated profits exceed this greater figure, the company should distribute its entire profits thereafter. If the reserves exceed the original cost of the fixed assets it follows that the paid up capital and other resources are available for floating assets and the company is, therefore, in affluent circumstances. If on the other hand the reserves exceed the paid up capital plus shareholders' debentures it means in substance that the reserves exceed the shareholders' true capital and such reserves ought to be ample.

Companies in which the public are substantially interested—Under explanation to sub-section (1) a company shall be deemed to be a company in which the public are substantially interested (1) if shares of the company (not being shares entitled to a fixed rate of dividend whether with or without a further right to participate in profits) carrying not less than 25 per cent of voting power have been allotted unconditionally to, or acquired unconditionally by, and are at the end of the previous year beneficially held by, the public (not including a company to which the provisions of this sub-section apply) and (2) if any such shares have in the course of the previous year been the subject of dealing in any stock exchange in British India or are in fact freely transferable by the holders to other members of the public. Two sets of conditions have to be satisfied while there are alternatives in each set.

It will be noted that preference shares are excluded in determining the 25 per cent voting power held by the public; i.e., they should have 25 per cent voting power in the shares other than preference shares.

The date with reference to which the criteria have to be applied is the last day of the accounting year the profits of which are under assessment, though section 23-A itself cannot be set in motion until several months after the general meeting and the profits of the company, if the section is applied, are allocated to shareholders as on the date of that meeting.

Under the United Kingdom law which in this respect closely corresponds to the law as it stood in India before 1939 and in which the statute creates a presumption of control if a 'relative' holds shares and for this purpose a 'relative' is defined as meaning a husband or wife, ancestor or lineal descendant, brother or sister, the question arose whether a 'niece' was a member of the 'public' and it was held (by the Court of Appeal) that she was. There was no reason why the ordinary meaning of the word 'public' should be cut down, and it was irrelevant that in the particular case the niece had received the shares as a gift from her uncle. *Tatum Steam Navigation Co v Inland Revenue* 1942 I T R (Sup) 85.

In India under section 23-A it now stands without any reference either to 'control' or to 'relatives', the word 'public' might conceivably include even husband or wife, ancestor, lineal descendant, brother or sister except to the extent some of them may be caught by section 16 (3) in certain circumstances. On the other hand it could be said that a word like

'public, in the context of section 23 A refers only to persons not under the control of the dominant shareholders in the company. The word needs clarification.

Previous approval of Assistant Commissioner—Sub section (2)—The Inspecting Assistant Commissioner is associated with action under this section from the very beginning of such action. An appeal lies to the Appellate Assistant Commissioner *see* section 30.

Even under the section as it was before April 1939 the previous approval of the Assistant Commissioner was required to bring a case under section 23 A and as the same Assistant Commissioner exercised both appellate and inspecting functions the appeal against the Income-tax Officer's order lay to a Board of Referees through the Commissioner.

Recovery of Tax—From whom—Sub section (3)—This clause has been altered in 1939 shifting the primary liability for tax from the company to the member; i.e. whereas formerly the tax was recoverable from the member if it could not be recovered from the company it is now recoverable from the company only if it cannot be recovered from the member.

Expenses in contesting the application of section 23 A—Following the practice in the United Kingdom in similar cases the Central Board of Revenue has directed that the expenses of an appeal to the Appellate Assistant Commissioner or to the Tribunal against the application of this section will be allowed if the company succeeds in the appeal.

Enforcement of demand—Clause (iii) of sub section (3) extends the machinery of Chapter VI to the assessments made under this section.

Relief from taxation twice—Sub section (4) provides that if undistributed profits and gains have been once taxed under this section they shall be ignored when they are actually distributed subsequently.

Sub section (5)—This was added in 1939 as a consequence of the new principle that the distribution of less than 60 per cent of the income is the main condition precedent to the application of this section.

United Kingdom Law—The corresponding law in the United Kingdom which is contained in various Finance Acts from 1922 onwards and has been amended many times since is in outline the same as in old section 23 A as it was before April 1939 but with many important points of difference in detail. These details are of little interest in applying present section 23 A which has adopted a simple arithmetical basis of a fixed percentage of profits being distributed.

With the radical change in the section made in 1939 rulings in the United Kingdom are of little guidance except to a limited extent in connection with cases which still remain to be dealt with under old section 23 A.

Rulings in the United Kingdom—A husband and wife owned 999 out of 10,000 shares in a private company. The company though not formed as an insurance company did nothing but issue what were called endowment policies to the husband and wife in return for lump sum premia in National War Bonds equal in face value to the amounts assured under the policies. There was no provision either in the policies or in the company's articles giving a claim to the policyholders to a share in the

profits of the company, though the policies stated that the company would pay the amounts assured *plus* any bonus which at the time of payment will be attached to the policy. The directors periodically appropriated to the credit of each policy an amount roughly equal to the interest on the bonds delivered as premium, and the amount so appropriated was reinvested in War Bonds. No notice of appropriation was communicated to the policy holders. It was contended by the company that the appropriations were binding on it and that the sums so appropriated were not available for the payment of dividends. *Held* that the sums were available for distribution as dividends for the purpose of section 21 of the Finance Act of 1922. *Endowment Company Ltd v Commissioners of Inland Revenue*, 14 Tax Cases 353.

Whether object of evasion of tax to be proved—The following dicta may be noted

It is true that the mischief for which the section provides a remedy is the avoidance of a liability to super tax by the accumulation of the profits in the hands of the companies.

But the application of the remedy does not I think depend on the proof of motive on the part either of the company or its shareholders unless indeed in this sense the object to avoid payment of super tax is an inferential presumption from the fact that the restriction of dividends cannot be accounted for either by the current or prospective requirements of the company or by the maintenance or development of its business. That fact must be proved to the satisfaction of the Commissioners but if it is established they have neither right nor duty to carry their investigations into matters of intention or motive any further.

—Per *L. P. Clyde*

the direction is plain and is not subject to the qualification that the Commissioners must be satisfied that the motive was the avoidance of super tax.

Human motives are obscure and difficult of ascertainment sometimes conjectural and their ascertainment cannot appropriately be allowed to enter into the matter of collection of public revenue.

It is quite open to the shareholders to satisfy the Special Commissioners that they have a reasonable cause for withholding from distribution a considerable part of the profits. If they fail to do so then in the view of the Legislature there is a presumption of law that avoidance of super tax is the object of the retention of undistributed profits and it is unnecessary in a particular case that the Commissioners should so find. —Per *Lord Sands*

If the language of the enacting part of section 21 is clear, as I think it is then in the absence of any ambiguity in the enacting words it follows that the preamble of section 21 cannot either restrict or extend the enacting provisions in the section. —Per *Lord Ashburn* in *David Carlaw and Sons Ltd v Commissioners of Inland Revenue* 11 Tax Cases 96 (1926) Sess. Cas. 870.

Though under old section 23-A (before 1939) it was one of the conditions precedent to the application of the section that the company or firm should have been formed or was being used for the purpose of evading tax it was held in *Harvey v Commissioner of Income-tax Madras* 1935

I.T R. 311, that an express finding to the effect that the failure to distribute profits was for the purpose of evading tax was not necessary

Current requirements—The fact that a Company chooses to enter into an agreement to sell all its assets retrospectively to another does not preclude the former from distributing as dividends the profits made by it from its business after the specified back date, and section 21 of the United Kingdom Finance Act of 1922 can be applied to such a case, *John White's Trust, Ltd v Commissioners of Inland Revenue*, 16 A.T.C 183 (K.B.) With reference to a provision which extends the above section to companies going into liquidation in respect of periods for which accounts have not been closed and profits taxed it has been held that if the liquidation and sale are so arranged that the profits of an intervening period are withheld from distribution, such profits are not returned for the current requirements of the business *Austins of East Ham, Ltd, (in liquidation v Commissioners of Inland Revenue*, 16 A.T.C 344 (K.B.)

Liquidation of companies—A company which goes voluntarily into liquidation while the 'reasonable time' contemplated by the law within which profits should have been distributed is still running comes within the mischief of the section. By its action, it terminates the "reasonable time" within which it should have distributed a reasonable part of its profits and in view of the intended liquidation it is reasonable to infer that it should have distributed the whole of the available income, *Lionel Sutcliffe, Ltd v Commissioners of Inland Revenue*, 14 Tax Cases 171

Control—The question of 'control', which arose before the amendment of the section in 1939, does not arise now. Excess Profits Duty rulings like *Noble Co v Inland Revenue*, 12 Tax Cases 573, and the ruling under the Income-tax Act in *Himley Estates Ltd v Inland Revenue*, 17 Tax Cases 367 (C.A.) may be seen in this connection with reference to old section 23 A.

A company sold its business leaving certain items to another by an agreement in November, 1928. The old company retained possession till completion of sale but from August 1928 it was to be deemed to carry on the new company's business. The old company went into voluntary liquidation in December 1928. The company argued that its income for the period ending August, 1928 was not available for distribution, and that because of the sale there was no income for the period August to December. The Board of Referees rejected the arguments and the Court of Appeal upheld the Board *Collier and Sons, Ltd (in liquidation) v Commissioners of Inland Revenue*, (1933) 1 K.B. 488, 18 Tax Cases 83.

Tenants for life under a trust are 'members' of a company for the purposes of this section, upon the liquidation of company, the undistributed profits become its income available for distribution *Alexander Drew and Sons, Ltd v Commissioners of Inland Revenue*, 17 Tax Cases 140.

In India cases of this kind would be caught by the special definition in section 2 (6-A) which includes, in 'dividend' distribution in liquidation of past accumulated profits. There is no such definition in the United Kingdom law.

Tax—By whom to be borne—Where super tax levied under these provisions is paid by a company on its winding up the amount should not go to diminish the amount available for distribution but be allocated against

it as a whole has distributed a reasonable part of its income and in doing so one has to examine the reasons for not distributing. In the *Glazed Kid* case there was a contract with an outsider under which the company was bound to pay all the profits to an outsider and if the company did not, it would have been restrained by injunction at once. In this case on the other hand the shareholders merely did not want the profits to be distributed and gave effect to this intention through the articles.

The Board of Referees are entitled to look not only into the history of the company, its stability, its real position and so forth but also the truth and substance (apart from the form) of its various transactions. The finding of the Board however is a question of fact, the justification of the Court being limited to seeing that there was evidence, *Montague Burton, Ltd v Commissioners of Inland Revenue*, 20 Tax Cases 48 (H.L.), 154 L.T. 355. And in particular, the fact that at least as much as the profits of the year have been spent on the maintenance and development of the business will not in itself exclude it from the operation of this section.

A dividend paid on condition that an equivalent amount is lent to the company is not a distribution of profits, *Inland Revenue v. Marbob, Ltd*, 18 A.T.C. 257 (K.B.D.).

24. (1) Where any assessee sustains a loss of profits or gains in any year under any of the heads mentioned in section 6, he shall be entitled to have the amount of the loss set off against his income, profits or gains under any other head in that year:

Set-off loss in computing aggregate income

Provided that where the loss sustained is a loss of profits or gains which would but for the loss have accrued or arisen within an Indian state and would, under provisions of clause (c) of sub-section (2) of section 14, have been exempted from tax, such loss shall not be set off except against profits or gains accruing or arising within an Indian state and exempt from tax under the said provisions:

Provided further that where the assessee is an unregistered firm which has not been assessed under the provisions of clause (b) of sub-section (5) of section 23 in the manner applicable to a registered firm, any such loss shall be set off only against the income, profits and gains of the firm and not against the income, profits and gains of any of the partners of the firm; and where the assessee is a registered firm, any loss which cannot be set off against other income, profits and gains of the firm shall be apportioned between the partners of the firm and they alone shall be entitled to have the amount of the loss set off under this section.

(2) Where any assessee sustains a loss of profits or gains in any year, ~~fixing~~ a previous year not earlier than the previous year for the assessment for the year ending on the 31st day of March, 1940, under the head 'Profits and gains of business, profession or vocation', and the loss cannot be wholly set off under

sub-section (1), the portion not so set off shall be carried forward to the following year and set off against the profits and gains, if any, of the assessee from the same business, profession or vocation for that year; and if it cannot be wholly so set off, the amount of loss not so set off shall be carried forward to the following year, and so on; but no loss shall be so carried forward for more than six years, and a loss arising in the previous year for the assessment for the years ending on the 1st day of March, 1940, the 31st day of March, 1941, the 31st day of March, 1942, the 31st day of March, 1943, and the 31st day of March, 1944, respectively, shall be carried forward only for one, two, three, four and five years respectively:

Provided that:—

(a) Where the loss sustained is a loss of profits and gains of a business, profession or vocation to which the first proviso to sub-section (1) is applicable, and the profits and gains of that business, profession or vocation are under the provisions of clause (c) of sub-section (2) of section 14, exempt from tax, such loss shall not be set off except against profits and gains accruing or arising in an Indian state from the same business, profession or vocation and exempt from tax under the said provisions;

(b) where depreciation allowance is, under clause (b) of the proviso to clause (vi) of sub-section (2) of section 10, also to be carried forward, effect shall first be given to the provisions of this sub-section;

(c) nothing herein contained shall entitle any assessee, being a registered firm, to have carried forward and set off any loss which has been apportioned between the partners, under the proviso to sub-section (1), or entitle any assessee, being a partner in an unregistered firm which has not been assessed under the provisions of clause (b) of sub-section (5) of section 23 in the manner applicable to a registered firm, to have carried forward and set off against his own income any loss sustained by the firm;

(d) where an unregistered firm is assessed as a registered firm under clause (b) of sub-section (5) of section 23, during any year, its losses shall also be carried forward and set off under this section as if it were a registered firm;

(e) where a change has occurred in the constitution of a firm, nothing in this section shall be deemed to entitle the firm to have set off so much of the loss proportionate to the share of a retired or deceased partner computed in accordance with the provisions of clause (b) of sub-section (1) of section 16 as exceeds his share of profits, if any, of the pre-

vious year in the firm, or to entitle any partner to the benefit of any portion of the said loss which is not apportionable to him under the said clause (b), and where any person carrying on any business, profession or vocation has been succeeded in such capacity by another person, otherwise than by inheritance, nothing in this section shall be deemed to entitle any person other than the person incurring the loss to have it set off against his income, profits or gains

(3) When, in the course of the assessment of the total income of any assessee, it is established that a loss of profits or gains has taken place which he is entitled to have set off under the provisions of this section, the Income-tax Officer shall notify to the assessee by order in writing the amount of the loss as computed by him for the purposes of this section

History—Under the Act of 1918 the aggregate amount chargeable under each of the separate heads mentioned in sections 7 to 12 of the Act determined the total and taxable income of an assessee, so that when a person carried on a trade or profession and also had income from house property, if he had actually incurred a loss from the trade or profession, the figure adopted under that head in arriving at the aggregate amount of the income chargeable to tax was *nil* and not a *minus* sum. Since 1922 a loss under one head of income could be charged against profits under another in the same year

Sub-section (2) was amended in 1933 so as to extend the concession to minors admitted to the benefits of partnership. Before the amendment of sections 24 and 48 in 1933, the departmental practice was to treat such minors as partners of a firm except for the purposes of these two sections

Several important changes were made in 1939 as explained in detail below, and further amendments made in 1941 and 1944 respectively, the former filling gaps in the section relating to the priority of set off of carry-forward under section 24 before set off of unabsorbed depreciation under section 10 and to the rights of firms to carry forward when there is a change in their constitution, and the latter being consequential on the exemption from tax of unremitted Indian state income

Set-off—The provision to sub-section (1) newly put in in 1939, [which partly incorporates old sub section (2)] involves in the other part a radical change in the law. Formerly, on the basis of *Rm Ar Ar Rm Arunachalam Chettiar's case*, 1 I C 278, (approved by the Privy Council in 1936 I T R 173), a partner in an unregistered firm was allowed to set-off his share of loss in the firm against his other income, this concession is no longer claimable. It is only the unregistered firm as such that can set off its own losses against its own income

The concession is applicable, however, to partners of unregistered firms taxed as registered firms under section 23 (5)

In the case of a registered firm, the net loss of the firm will be first worked out, i.e., by first setting off its own losses against its income, and the share of this net loss apportioned among the partners, each of whom can set off such share of loss against his other income

See also section 16 (1) (b)

The words 'they alone' in the proviso, which seem to be superfluous, are evidently intended to emphasise that no other person than the partners, *e.g.*, successors, can claim the concession. See *Gokaldas Lakhmichand v Commissioner of Income-tax, Bombay*, 1937 I T R 519, and *Bhogulal Hargovindas Patel v Commissioner of Income tax Bombay*, 1937 I T R 555

Carry forward of losses—Sub section (2) was inserted for the first time in 1939. It permits losses to be carried toward and set off but only against the profits of the *same* business, profession or vocation. The period of carry forward will be eventually six years in the meantime the period will be gradually extended as follows—

Profits of previous year assessed in		Stopping with assessment for the year
1939-40	1 year	1940-41
Do. 1940-41	2 years	1942-43
Do. 1941-42	3 years	1944-45
Do. 1942-43	4 years	1946-47
Do. 1943-44	5 years	1948-49
Do. 1944-45	6 years	1950-51

'Six years' mean evidently six years following, and exclusive of the previous year in which the loss arises. In the United Kingdom, where the corresponding words are 'Six following years of assessment' the question arose whether in these years should be included years in which there was no assessable income and it was held (by the Court of Appeal) that the words merely refer to the six years immediately following the year in which the loss was incurred, irrespective of whether there was any assessable income in them or not. *Harling v Celynen Collieries Workmen's Institute* 1940 (C A)

Net losses—What is to be carried forward is the net loss after set off under sub-section (1), cf *Inland Revenue v Scott Adamson*, 17 Tax Cases 679

Same business, etc—It will be noted that the words 'the same source' are not used as in section 2 (11). Whether an assessee has a single business or many businesses is a question of fact, see section 2 (4) and notes thereunder

Difficult problems will arise when an assessee's status changes over from resident to non resident and *vice versa*, or ordinarily resident to not ordinarily resident and *vice versa*, and at the same time, his foreign business is an integral part of the British Indian business. Evidently, in a year in which foreign profits are taxable, even without being brought into British India, foreign losses can be set off against British Indian profits and carried forward under section 24. If, in a later year, but before the expiry of six years, the status of the assessee changes into that of non resident or not ordinarily resident, the unabsorbed loss, whether in British Indian profits or in foreign profits, it is considered will not lapse but remain in abeyance and can be set off or carried forward within the period of six years, if and

when such set off is otherwise permissible. In other words, non-taxability in an intermediate year will not destroy the already existing right to carry forward but only postpone that right. Section 24 is silent on this point and other similar points that can arise. It is obvious that, for the purpose of the claim in British India under section 24, it is irrelevant how the losses have been set off or carried forward in the other country, i.e., of origin of profits.

Income in Indian States—The first proviso to sub-section (1) and proviso (a) to sub-section (2), both inserted in 1944, are consequential on the amendment in 1941, of section 14, under which the income of a resident in British India accruing in an Indian State is ordinarily not taxable until it is brought into British India. These two provisos seek to prevent set off and carry forward of losses as between taxed and untaxed income and segregate the income into separate blocks for this purpose.

Unabsorbed depreciation—Proviso (a) of sub-section (2)—There is no limit of time within which unabsorbed depreciation carried forward under section 16 (2) (vi) must be absorbed, whereas losses can be carried forward under section 24 only for six years. Proviso (a) makes it clear that where both losses and unabsorbed depreciation are carried forward, the losses must first be set off and extinguished so that the balance of unabsorbed depreciation may be carried forward without limit of time. Moreover, if unabsorbed depreciation was first set off, the assessee might lose his right to carry forward losses, such losses not being set off before six years. The proviso avoids this result also.

Under section 19 of the United Kingdom Finance Act of 1932, if a loss cannot be set off within six years because the profits of those years are utilised in setting off unabsorbed depreciation the unabsorbed loss can be carried forward indefinitely without limit of time, to the extent that relief could not be given because of unabsorbed depreciation.

Partners of firms proviso (c)—This proviso makes clear out of abundant caution (1) that losses of a registered firm already apportioned among the partners cannot be carried forward by the firm itself, and (2) partners of unregistered firms cannot carry forward shares of losses of the firm (they have no right even of set off in the course of the current assessment in respect of such losses).

There is, evidently, no difference in meaning between the verb 'sustain' used in this proviso and the verb 'incur' in the proviso (e).

If the excess loss of a registered firm is apportioned among partners under the second proviso to sub-section (1), they can have the benefit of set off in future years only if the same business, i.e., of the registered firm continues, and there are profits in it, otherwise the carry forward will lapse.

Unregistered firms assessed as registered—Proviso (d)—The unregistered firm in question will be treated as if it was a registered firm that is, its net losses (after set off against its own income) shall be apportioned among the partners under sub-section (1), who shall have the right of carry forward. An unregistered firm assessed as such will on the other hand itself carry forward its losses the partners not being given the right, see the second proviso to sub-section (1) and proviso (c) of sub-section (2).

Change in partnership—Proviso (e)—This proviso was amended in 1941, so as to make it clear that only the partners who actually incurred the loss should be allowed the carry forward and set-off. This proviso has to be read with section 26 (1). In effect this part of the proviso will apply mostly to unregistered firms taxed as such, for partners of registered firms get an apportionment of their losses every year and carry forward these losses themselves, but it will apply to partners of registered firms also to the extent that as a consequence of disallowing salaries, interest commission etc., paid to partners (see sub section (1) of section 16), a share of loss is apportioned to the partners. The essential point of the proviso is that a partner will have no right to carry forward for his own benefit a loss not actually incurred by him.

The law in the United Kingdom, see *Batty v Baron Schroder*, 23 Tax. Cas. 1 is that if the partners in a firm the constitution of which is changed agree to a computation as if there had been a discontinuance followed by a new setting up, a partner cannot carry forward his share of losses to be set off against his profits under the new constitution.

Succession—Proviso (e)—This is part of the plan of taxing cases of succession to a business, etc., on the footing that the person who actually earns profits or incurs loss takes also the consequences, see section 26 and notes thereunder as to the various questions that arise in connection with succession.

Inheritance—The words 'otherwise than by inheritance' were added in order to permit a successor by inheritance to carry forward the losses of the predecessor. But, can a mere exception to a restrictive proviso confer such a positive right when according to the main part of the subsection an 'assessee' is permitted to carry forward and set off only against his own future profits and clearly, a successor is not the same 'assessee' as the predecessor?

Determination of loss—Sub section (3)—This is a new provision added in 1939. 'Set off' in the context clearly means 'carried forward and set off in future years'.

"Notify"—The Income tax Officer should act in accordance with section 63. His order should be in writing.

As regards right of appeal against such orders, see section 30.

Assessment of total income means determination of total income cf section 23.

Identity of business—Same business means the identical business, otherwise, the words would have been the 'Same head of income' or 'same source', moreover the word 'same' would be otiose and meaningless if all the business of an assessee were to be taken together as one. *Commissioner of Income tax, C P v Ramkrishna Ramnath*, 1944 I T R 21. So, where a trader in *ben* who also speculated in cotton and was allowed to set off the losses in the latter against profits in the former, gave up speculation in the next year, and still claimed to carry forward the unexhausted loss in speculation the claim was disallowed on the ground that the business had been given up.

In *United Steel Co v Cullington*, 23 Tax. Cas. 91 in which a new company had been formed by the amalgamation of two old companies, and the old companies had unexhausted losses and depreciation allowance, the

new company, was not allowed to carry forward either the losses or the depreciation allowance of the old companies.

Where an assessee a company owning and publishing a newspaper agreed with another newspaper company that the two newspapers, run by the two companies, be published jointly by the latter, the former receiving only a fixed monthly payment and not participating in the profit or loss, it was held that the first company did not carry on a trade after the amalgamation of the newspapers and that consequently it could not carry forward its previous losses and set them off against the monthly sums received. *Morning Post Ltd v George*, 1942 I T R (Sup 20 (K B D)). Whether different trading operations constitute a single business or different businesses is largely a question of fact but the proper legal inference from proved facts is essentially a matter of law. In the words of Rowlatt, J, in *Scales v George Thompson and Co, Ltd*, 13 Tax Cas 83, the question is "was there any interconnection, any inter-lacing, any interdependence, any unity at all embracing the two businesses?"

In a case in which a moneylender in British India (who also dealt in securities as an integral part of the moneylending) had also moneylending business abroad which was conducted by agents, who though given discretion to lend had to submit regular accounts to the principal in British India and were under his close supervision and there was a flow of remittances both ways according to needs and the final trading result was incorporated in the accounts at headquarters, it was held that the foreign money lending was not a separate business from that in British India, and carry forward was allowed of losses both in respect of the moneylending and of dealing in securities in British India, in order to be set off against foreign profits, *Chundambaran Chettiar v Commissioner of Income tax, Madras*, 1945 I T R 177.

Losses in Burma in 1936-37—As to such losses being set off against other income in British India in that year, see notes under section 3 also *Commissioner of Income-tax, Madras v Valliammai Achi*, 1938 I T R 720. In re *Ratoji Dhanji & Co*, 1940 I T R 1 (Bom).

Decisions under the old law—A firm carrying on business in piece goods was a major partner in two other firms carrying on the same business. The other partners in the two other firms had a nominal share in order to encourage them to take an interest in the business. Held that the losses in the other two firms could be set off against the profits in the first. This decision was given under the 1918 Act which contained no provision corresponding to section 24 of the present Act, and the ratio decidendi was as below—

When the subsidiary business engaged in is connected with the main business and is a proper employment of the assessee's capital or labour, it is, in my judgment for the purpose of assessment, to be treated as part of the business of the firm. If the firm in one branch makes a loss, that loss may be set off against the profits made in its head office or other branches"—Per *Schwabe, C J Board of Revenue v Munsami Chetty and Son*, 1 I T C 227 47 Mad 653, A I R 1924 Mad 205.

In *In re Arjun Khemji & Co*, 1 I T C 249, A I R 1925 Nag 65—also under the 1918 Act—it was held by the Judicial Commissioner of Nagpur that the share of a partner's loss in an unregistered firm can be

deducted from his other income. The same Court also held in *Seth Balkishan Nathani v Commissioner of Income tax*, 1 I T C 248, A I R 1924 Nag 153 the losses suffered by an assessee as a member of a firm are to be taken into account in fixing the amount of his taxable income—under section 12 (1) of the 1918 Act (corresponding to section 14 of the present Act). As already observed there was no section in that Act corresponding to section 24 in the present Act.

The question again arose, this time under the 1922 Act in *Commissioner of Income tax v M Ar Arunachalam Chettiar*, 1 I T C 278, A I R 1924 Mad 474 47 Mad 660. The assessee carried on two different businesses, one individually and the other as a partner in an unregistered firm. Held, that the loss in the partnership could be set off against the profit in the individual business.

I can find nothing to justify the argument that each partner in a firm is not an assessee for he is a person by whom the income-tax is payable, nor can I find anything to justify the argument that this assessee being a partner is not a person carrying on the business in question.

The words 'any business' being open to either construction, I must take that construction which looking at the whole Act, is the more rational, and must construe 'any' to mean 'each and every'. It follows that an assessee is entitled to set-off profits in one business against losses in another.

A partnership is not an entity known to the law. Its name is merely a convenient method of describing its partners each of whom is jointly and severally liable for its debts and for income tax purposes it is a convenient body to assess.

For this purpose no distinction can be made between registered and unregistered firms for whether a firm is a legal entity or not does not depend on registration.

Section 24 (1) is dealing with something quite different, namely the allowance of set off between different heads mentioned in section 6 and not the allowance of set off between different businesses coming under one head. Section 24 (2) again dealing with set-off between different heads allows the partners of a registered firm where that firm has made a loss under one head and has not sufficient income under another head, to avail themselves of this set off to use the loss to set-off against their own individual incomes arising under other heads. Whether this must be taken by implication to prevent such set off in the case of partners of an unregistered firm is a different question which does not arise here.—Per Schwabe, C J.

The Privy Council approved of the above decision and reasoning in *Rm Ar Ar Arunachalam Chettiar v Commissioner of Income tax, Madras*, 1936 I T R 173 (P C). The amendments in 1939 however make this decision obsolete.

In a later case, *Commissioner of Income tax, Madras v Siddha Gowdar and Sons*, 55 M 818, 6 I T C 78, but before the above decision of the Privy Council, the same High Court questioned the correctness of the above view and held that there is nothing in section 24 to prevent the set-off of loss in one business against the profits in another of the same

assessee though you cannot set off capital loss in winding up a business against profits in another

Though a firm as such, not being a legal entity, cannot enter into a partnership with another firm, it can set off against its own profits its share of the loss in the bigger firm since what has to be taxed is the actual income of the assessee irrespective of the legality or illegality of the transaction from which the income is derived, *Chandrika Prasad Ramswarup v Commissioner of Income tax, U P*, 1939 I T R 269. See also notes under section 2 (6 B). It would appear that this decision also has been neutralised by the amendments to section 24 in 1939, for, *ex hypothesi*, the bigger firm could not be a registered firm and a partner in an unregistered firm is expressly precluded from setting off against his own profits any share of the loss of the firm.

Capital losses—As to capital loss in winding up, see *Burrell's case* (1924) 2 K B 52, 9 Tax Cases 27, *In re Armitage*, (1893) 3 Ch 337 and *In re Crichton Oil Co* (1902) 2 Ch 86.

It had been held that an assessee cannot set off (as loss or) bad debts (amounts) due from an ex partner in a business against profits in another. The loss on account of the ex partner is not a bad debt of the second business. *Commissioner of Income tax, Madras v Rm Ar Ar Rm Arunachalam Chettiar*, 1934 I T R 401, A I R 1934 Mad 557, 7 I T C 287 (P C). A contrary view was taken in *Commissioner of Income tax Bombay v Khemchand Ramdas*, (Sind), 1933 I T R 309, A I R 1933 Sind 148, 6 I T C 360 but the doubt was set at rest by the Privy Council in 1936 I T R 173.

It is not the business of the Income-tax Officer to cast an account between the partners *inter se* but merely to compute the proportionate share of profits or loss of the firm. Though, in certain circumstances (in 1936, a partner in any firm, whether registered or not could set off his share of profits or losses in the firm against his other losses or profits) 'a partner's share of loss in the firm can be set off against his other profits if any, he cannot claim such set off in respect of his liability to bear or pay more than his share of loss so as to entitle him to a contribution from an insolvent partner. Though, logically, the solvent partner may have to bear the whole loss and not merely his share it has to be remembered that a partner in a continuing partnership cannot at the end of a year's trading, claim to set off the whole of the firm's loss in the previous year treating the other partner as insolvent. He is not entitled to do so on the dissolution of the firm, nor can he later, when the other partner's insolvency is established, set off in one year the whole of the other partner's share of loss for several years. In 1934 I T R 401 above, the assessee the sole owner of a money lending business and the capitalist partner in a cotton business with another partner closed down the latter on 31st March, 1930. The other partner being without means the entire loss was borne by the assessee but in the partnership accounts the share of loss of each partner was shown separately. On 1st April, 1930, the debit against the other partner was transferred to the moneylending business as though a loan had been made to the other partner to bear the loss. In March 1931 the assessee wrote off this loan as a bad debt, and claimed it as a bad debt or as a set-off. The set off was disallowed for the reasons stated above and the write off as a bad debt on the ground that

the debt had been bad even before it was transferred to the moneylending business *Rt Ar Ar Rm Arunachalai Chettiar v Commissioner of Income tax Madras* 1936 I T R 173 A partner cannot single out a particular bad debt as relating to his share. He can only take the result of the firm's getting a bad debt allowance *Motilal Onkara v Commissioner of Income tax C P* 6 I T C 16

The operations of winding up a business may be carried on in such a manner as themselves to constitute a business and thus attract tax, or in a different manner so as not to constitute a business and thus avoid tax. In the latter case no losses can be claimed in realising assets since such losses will be of a capital nature. So where a partnership was dissolved and the assets thereof taken over at a reduced value (mostly by the partners) the loss was held to be of a capital nature *O RM OM RM PL Muthukaruppan Chettiar v Commissioner of Income tax Madras* 1943 I T R 540

Where an assessee on the dissolution of a Hindu undivided family of which he was a member took over as his share of the assets certain debts which became irrecoverable later it was held that the loss was a capital loss *Commissioner of Income tax Burma v S P K A R M Family* 1941 I T R 685 A similar case relating to a partnership is 1943 I T R 540 referred to above. If on the eve of the dissolution the outstandings had been valued and the Profit and Loss account of the family (or firm) made up the family (or firm) could no doubt have claimed the loss (as an allowance for bad debts) though after dissolution the members (or partners) could have no claim to any such allowance.

Where there are two separate businesses and one of them is discontinued it is not open to the assessee to claim in a subsequent year to set-off against the profits of the remaining business the expenses of collecting the outstandings of the closed business. *In re Hiralal Kalyanmal* 1943 I T R 128 (Bom)

Where a money lending firm jointly with another firm, leased a building and sublet it and eventually there was litigation over the lease and loss was incurred it was held that the leasing and subletting were outside the business of the firm which was therefore not entitled to set-off the loss against its other profits *PR AL M Muthukaruppan Chettiar v Commissioner of Income-tax, Madras* 1943 I T R 38 Set-off can be allowed only as between taxable sources of income the loss on a 'hobby' is personal expenditure and cannot be set off against profits from taxable sources. Whether an alleged 'hobby' is really such or a business is a question of fact and in a case in which a physician also ran a dramatic troupe the Income tax authorities were unsuccessful in trying to find that the dramatic troupe was only a 'hobby' and not a source of income *P S Varier v Commissioner of Income tax Madras* 1940 I T R 628

Where a firm made a loss in a particular year at the end of which one of the partners left the firm and later on executed a document to make good to the other partners a part of the loss, it was held that the whole loss should

be taken into account in the assessment of the year in which the loss occurred and that the partial recoupment of the loss if any, can be brought into account only in later periods as the loss was recovered *Bhudarmal Chandiprasad v Commissioner of Income tax B & O 8 I T C 249*

Where a son succeeded to his father's estate by inheritance and losses arose in certain business assets coming on from the father's time the question arose whether such losses were capital or revenue losses no allowance for bad debts having been claimed in the father's time. The losses were allowed as revenue losses. The *ratio decidendi* which is not clear would seem to be that the business of the father was a single business which continued in the accounting year when the son made the claim *Commissioner of Income tax B & O v Maharaja of Dharbhanga 1944 I T R 116*

There is nothing to prevent losses—set off under section 24—from including an allowance for bad debts if on merits such allowance for bad debts is admissible under section 10 (2) (xi) and the business continues *In re Huls Lal Ramdayal 1941 I T R 635 (All)*

Set off—Between different unregistered firms—The question whether an unregistered firm can set off against its profits a loss sustained by another firm in which two members of the unregistered firm (and not the unregistered firm itself as such) are partners has been raised and held to be inconceivable *Commissioner of Income tax v Muthu K A R M Ramanathan Chetty and Karuppan Chetty 2 I T C 194*. The law clearly does not permit an assessee to set off his profits against the loss of some other assessee *Shivnaram & Sons v Commissioner of Income tax Punjab 1935 I T R 402 A I R 1935 Lah 896 8 I T C 117*. Since a firm as such cannot be a partner in another firm it cannot set off its losses or gains against the gains or losses of another firm in which some of its partners happen to be partners.

Succession—Set off—A firm of three partners carried on business in Ellore. On 16th February 1925 they started business in Madras in partnership with a fourth partner. On 30th November 1926 the fourth partner retired and the other three who had the same shares in the Madras business as in the Ellore business carried on both the businesses. It was held that on the facts the two firms were identical and that under sections 26 and 24 set-off should be allowed in respect of the assessment for 1926-27 (on the accounting year 1925-26) on the loss of the business in Ellore against profits in Madras *M K M Mahomed Hassana Labai & Co v Commissioner of Income tax Madras 3 I T C 431*

The question whether under the pre 1939 law an assessee could claim set-off of losses in a partnership (or in a sole business) which he had left (or sold) between the period of loss and the date of assessment was decided in the affirmative by the Sind Court *Gokaldas Lakhmichand v Commissioner of Income tax Bombay 1937 I T R 519* on the ground that section 26 did not prohibit such set off and in the negative by the Bombay High Court, *Bhogilal Hargobindas Patel v Commissioner of Income tax Bombay 1937 I T R 555* who considered that the person entitled to the set off was the

successor The former was dissented from and the latter followed in *In re David Sassoon & Co*, 1944 I T R 7 (Bom). These decisions, however, have all become obsolete in view of the amendment of section 26 in 1939.

Fractional Periods—If an assessee has more than one business or source of income and one of them in which a loss occurs had been with him only for a part of the year, he can still claim that loss to be set off against profits from other sources. *In re Hulasul Ramdayal*, 1941 I T R 635 (All)

Unabsorbed depreciation—See rulings under section 10 (2) (xi) permitting the set off or carry forward of unabsorbed depreciation under business against profits under other heads of income

Assessee—Meaning of—It will be noticed that in this section the word 'assessee' is not used in the strict sense of the definition in section 2 (2) but loosely in the sense of the person who is being assessed. Obviously until set-off has been allowed it is not possible to determine whether or not a person is liable to pay tax

Loss of 'profits'—As distinguished from loss of Capital—The reference to 'profits' is superfluous and was added in order to make it clear that no loss of capital could be taken into account. See also *Siddha Goudar & Son's case*, 55 M 818, 6 I T C 78. As regards capital losses, see rulings under section 10 (2) (xv)

Defunct business.—As regards the inadmissibility of set-off of loss on defunct businesses *c g*, interest on loans, see also notes under section 10 (2) (iii)

24-A. (1) When it appears to the Income-tax Officer that any person may leave British India during the current financial year, or shortly after its expiry, and that he has no present intention of returning, the Income-tax Officer may proceed to assess him on his total income of the period from the expiry of the last previous year of which the income has been assessed in his hands to the probable date of his departure from British India, or where he has not been previously assessed, on his total income of the period up to the probable date of his departure from British India. The assessment shall be made on the total income of each completed previous year included in such period at the rate at which such income would have been charged had it been fully assessed, and as respects the period from the expiry of the last of such completed previous years to the probable date of departure the Income-tax Officer shall estimate the total income of such person during such period and assess it at the rate in force for the financial year in which such assessment is made:

Provided that nothing herein contained shall authorise an Income-tax Officer to assess any income, profits or gains which have escaped assessment or have been underassessed, or have been assessed at too low a rate, or have been the subject of

excessive relief under this Act, but in respect of which he is debarred from issuing a notice under section 34.

(2) For the purpose of making an assessment under sub-section (1), the Income-tax Officer may serve a notice upon such person requiring him to furnish, within such time not being less than seven days as may be specified in the notice, a return in the same form and verified in the same manner as a return under sub-section (2) of section 22, setting forth (along with such other particulars as may be provided for in the notice) his total income for each of the completed previous years comprised in the relevant period referred to in the first sentence of sub-section (1) and his estimated total income for the period from the expiry of the last such completed previous year to the probable date of his departure; and the provisions of this Act shall so far as may be, apply as if the notice were a notice issued under sub-section (2) of section 22.

History and object—This section was inserted in 1933 in order to fill a lacuna. To quote the Select Committee, the section "provides for the assessment up to the moment of departure of the income of a person leaving British India during the currency of a financial year or within so short a period of its end as to prevent the normal assessment of his income and enables the Income tax Officer to assess within the limits permissible by section 34 of the Act any income for which he is liable to pay but has not paid income tax"

Minor changes were made in 1939 to remove certain lacunæ and in particular to make it clear that the section applies to a person not previously assessed. Verbal changes were also made in the proviso consequentially on the changes made in section 34.

'The period' means evidently the total period for which no assessment had been previously made and in respect of which assessment is permitted by the proviso.

'Fully assessed', i.e., in the appropriate year, the word 'fully' is otiose, merely being equivalent to 'if no part had escaped assessment'.

The proviso makes it clear that the limitation imposed by section 34 will apply in cases falling under this section.

See also notes under sections 22, 23 and 34.

It will be noted that there is no reference in terms to total *world* income in this section, the reference, however, to a return in the *same* form as one under section 22 (2), would seem by implication to refer to total *world* income also.

If the assessee returns to British India in the next year, and if the rates of taxation have been altered by the next Finance Act, there is no provision for revision of the assessment already made but, presumably Section 48 can be applied to such cases.

24-B. (1) Where a person dies, his executor, administrator or other legal representative shall be liable to pay out of the estate of the deceased person to the extent to which the estate is capable of meeting the charge the tax assessed as pay-

Tax of deceased person payable by representative

able by such person, or any tax which would have been payable by him under this Act if he had not died.

(2) Where a person dies before the publication of the notice referred to in sub-section (1) of section 22 or before he is served with a notice under sub-section (2) of section 22 or section 34, as the case may be, his executor, administrator or other legal representative shall, on the serving of the notice under sub-section (2) of section 22 or under section 34, as the case may be, comply therewith, and the Income-tax Officer may proceed to assess the total income of the deceased person as if such executor, administrator or legal representative were the assessee.

(3) Where a person dies, without having furnished a return which he has been required to furnish under the provisions of section 22, or having furnished a return which the Income tax Officer has reason to believe to be incorrect or incomplete, the Income tax Officer may make an assessment of the total income of such person and determine the tax payable by him on the basis of such assessment, and for this purpose may by the issue of the appropriate notice which would have had to be served upon the deceased person had he survived, require from the executor, administrator or other legal representative of the deceased person any accounts, documents or other evidence which he might under the provisions of sections 22 and 23 have required from the deceased person.

History—This section was inserted in 1933 to fill a gap in the Act. The Bombay High Court had held in *Ellis Reid v Commissioner of Income-tax* 5 I T C 100 35 Bom 312 A I R 1931 Bom 333 that no assessment could be made on a deceased person in the absence of express provision to that effect.

Limit of liability—To quote the Select Committee the liability of the executor administrator or other legal representative is confined to the payment of tax to the extent to which the estate is capable of meeting the charge. It is not our intention that the payment of income tax due by the deceased should rank in any way prior to other charges to which the estate may be liable.

Penalties—A regards penalties for default by executors see notes under section 28.

Appropriate notice—See sections 22 and 23.

Posthumous income—This section relates to the income of the deceased i.e. which accrued to him. The assessment of the executor, etc. on the income that accrued to him i.e. to the estate is a different matter altogether to be regulated by sections 3 and 41. Section 24-B applies only to income which would have been taxed on the deceased had he been alive cf *Inland Revenue v Henderson's Executors* 16 Tax Cases 282 *Wood v Owen* 23 Tax Cases 241 and *Bryan v Cassin* 24 Tax Cases 468, cases in the United Kingdom in which claims by executors to repayment of tax paid by the deceased were disallowed.

Salary due to a deceased received by his legal representatives is taxable on the latter under the last part of sub-section (1). In re *Usharani*, 1942 I T R 199 (Cal).

Assessments under section 23 (4)—It will be seen that sub section (3) places the executor etc., in the same position as the deceased would have been in. It is irregular to assess a deceased person as such *Maharaja of Patiala v Commissioner of Income tax, Bombay (Central)*, 1943 I T.R. 202, but the irregularity may be condoned if the legal representative had notice at all stages and supplied all the information required. (*Ibid*)

Old rulings—The sect on renders obsolete the old rulings *vis. Ellis Reid's case* above referred to *Mitchell v Macneill & Co* 2 I T C 298 103 I C 120 A I R 1927 Cal 518 and *Govinda Saran v Commissioner of Income tax U P* 2 I T C 480 3 Luck. 237 A I R. 1927 Oudh 465

Succession—Section 24-B is intended to supplement section 26, and does not therefore override it. So if the facts of the case justify the application of section 26 it is that section which is to be applied and not section 24-B. If the case does not relate to succession to a business profession or vocation section 26 is not applicable at all and only section 24-B will apply. *Rajawamy Iyengar v Commissioner of Income tax Madras* 1943 I T R 610. In this case on the death of the deceased his widows and his son's widow succeeded to his business and carried it on. Later on there was litigation between the widows and a receiver was appointed who was assessed under section 24-B. The Appellate Tribunal held that section 26 applied and the High Court agreed with the Tribunal.

Assumptions to be made—Where a managing director was entitled to payment to himself or to his executors of £10 000 on the termination of his service otherwise than by wilful default in performing his duties and his executors received £10 000 on his death it was held under section 45 (5) of the United Kingdom Finance Act 1927 (roughly corresponding to this section) that the executors were taxable. The Revenue authorities must go by the actual facts of the case and make no other assumption than that the tax payer had not died. *Allen and Murray v Trehearne* 16 A T C 87 (K B)

25 (1) Where any business, profession or vocation, to which sub section (3) is not applicable, is discontinued in any year, an assessment may be made in that year on the basis of the income, profits or gains of the period between the end of the previous year and the date of such discontinuance in addition to the assessment, if any, made on the basis of the income, profits or gains of the previous year.

(2) Any person discontinuing any such business, profession or vocation shall give to the Income tax Officer notice of such discontinuance within fifteen days thereof, and where any person fails to give the notice required by this sub section the Income tax Officer may direct that a sum shall be recovered from him by way of penalty not exceeding the amount of tax subsequently assessed on him in respect of any income, profits or gains of the business, profession or vocation up to the date of its discontinuance.

(3) Where any business profession or vocation, on which tax was at any time charged under the provisions of the Indian

Income-tax Act, 1918, is discontinued then, unless there has been a succession by virtue of which the provisions of sub section (4) have been rendered applicable, no tax shall be payable in respect of the income profits and gains of the period between the end of the previous year and the date of such discontinuance, and the assessee may further claim that the income, profits and gains of the previous year shall be deemed to have been the income, profits and gains of the said period. Where any such claim is made, an assessment shall be made on the basis of the income, profits and gains of the said period, and if an amount of tax has already been paid in respect of the income, profits and gains of the previous year exceeding the amount payable on the basis of such assessment, a refund shall be given of the difference.

(4) Where the person who was at the commencement of the Indian Income tax (Amendment) Act, 1939, carrying on any business, profession or vocation on which tax was at any time charged under the provisions of the Indian Income tax Act, 1918, is succeeded in such capacity by another person, the change not being merely a change in the constitution of a partnership no tax shall be payable by the first mentioned person in respect of the income, profits and gains of the period between the end of the previous year and the date of such succession, and such person may further claim that the income, profits and gains of the previous year shall be deemed to have been the income profits and gains of the said period. Where any such claim is made, an assessment shall be made on the basis of the income, profits and gains of the said period, and if an amount of tax has already been paid in respect of the income, profits and gains of the previous year exceeding the amount payable on the basis of such assessment, a refund shall be given of the difference.

Provided that sub-sections (3) and (4) shall not apply (a) to super tax except where the income, profits and gains of the business, profession or vocation were assessed to super tax for the first time either for the year beginning on the first day of April, 1920, or for the year beginning on the 1st day of April, 1921,

(b) to a business, profession or vocation on where income-tax was at any time charged in the hands of a company under the Indian Income tax Act 1886, or on which income tax would have been charged in the hands of a company for the assessment year ending on the 31st day of March, 1918, if the company, having been in existence in that year had also been in existence in the year ending on the 31st day of March, 1917.

(5) No claim to the relief afforded under sub section (3) or sub section (4) shall be entertained unless it is made before the expiry of one year from the date on which the business,

profession or vocation was discontinued or the succession took place, as the case may be

(6) Where an assessment is to be made under sub-section (1), sub-section (3) or sub-section (4), the Income tax Officer may serve on the person whose income, profits and gains are to be assessed, or in the case of a firm, on any person who was a member of such firm, at the time of its discontinuance, or in the case of a company, on the principal officer thereof, a notice containing all or any of the requirements which may be included in a notice under sub-section (2) of section 22, and the provisions of this Act shall, so far as may be, apply accordingly as if the notice were a notice issued under that sub-section

History—There was no corresponding section in the earlier Acts. Before 1924 the section provided for (1) the taxation of a discontinued business which was begun after 31st March 1922 and (2) the taxation of a discontinued business which was in existence on the 31st March 1922 and was at any time taxed under the Act of 1918 but not for taxation on discontinuance of a business which though in existence on the 31st March 1922 was never taxed under the Act of 1918. Since that date it has provided for the taxing of discontinued businesses (a) which were not taxed under the Act of 1918 and (b) which were taxed under the Act of 1918. Sub-sections (4) and (5) were added in 1939.

The proviso to sub-sections (3) and (4) were added in 1941 and the words to which sub-section (3) is not applicable substituted for the words on which income tax was not at any time charged under the provisions of the Indian Income-tax Act 1918 in 1944.

New business—Under section 3 assessments under the Act are made on the profits of the previous year. When a new business is started therefore no assessment will as a rule be made in the first year and the assessment in the second year will be made on the profits of the preceding year. Sections 24-A and 25 provide exceptions for this rule.

Business profession or vocation—Note that this section applies only to cases assessed under section 10 and not to other heads of income. It does not for example apply to salary earners. *Commissioner of Income tax Madras v Fletcher* 69 M L J 611. Therefore a company whose business was not that of buying and selling securities cannot claim the benefit of this section if it had paid tax under the 1918 Act only on interest on securities and not on its profits from business. The fact that the memorandum of the company allows it to invest money in securities is not sufficient. *Commissioner of Income tax Sind v Larkana Jacobabad Railway* 1946 I T R 395. The status of the assessee is immaterial in construing the words carrying on business. (*Ibid*)

Businesses not taxed under the 1918 Act—Sub-sections (1) and (2)—In order to guard against a possible loss of revenue owing to delay in making assessments on the profits of businesses professions or vocations that close down during the course of a financial or commercial year it is provided that in such cases in addition to the assessment on the income of the preceding year a further assessment may be made in the year in which a business profession or vocation is closed down on the income of that year. Sub-section (2) imposes a statutory obligation on persons

discontinuing a business, profession or vocation to give notice of such discontinuance within fifteen days of the discontinuance

Discretionary—The power to make the additional assessment under section 25 (1) is a *discretionary power which may be exercised whether the business, etc., is a purely temporary business commencing and closing down in the same year, or whether it is a business that has been in existence and has been previously taxed under the present Act*. It will be used in cases where there is reason to anticipate that the tax may not be collected unless the assessment is made in the year in which the business, etc., closes down. Where no difficulty in making the assessment and collecting the tax in the usual manner is anticipated, the special powers conferred by this sub-section will not be used (*Income tax Manual*). This sub-section does not preclude an assessment under other sections of the Act (e.g., sections 34, 42,) if permissible. In *re Kamdar*, 1946 I T R 10 (Bom.)

Profits taxable and rate of tax—The profits to be taxed under the provisions of section 25 (1) are the profits accruing between the end of the last 'previous year' of which the profits have been taxed and the date of the discontinuance of the business. Further, the rate to be applied in taxing the discontinued business under sub-section (1) is the rate in force in the year in which the assessment is made.

Businesses taxed under the 1918 Act—Under sub-section (3) where tax has been charged on a business, profession or vocation under the provisions of the Income tax Act of 1918, no liability to tax exists in respect of profits or gains for the period between the end of the last 'previous year' and the date of discontinuance unless sub-section (4) applies. The assessee is in such a case also entitled to substitute the profits of that period for the profits of the last 'previous year'. For example, in the case of a business whose 'previous year' ends on 31st March, if it closed down on 31st March, 1940, its assessment for 1939-40 will be on the profits for the year ending 31st March, 1939 or at its option, on the profits of its year ending 31st March, 1940, and no assessment will be made for 1940-41. If such a concern closed down on 30th April 1939, it would still be assessed in the year in which it closed down (1939-40), but the assessment would be on the year's profits to 31st March, 1939, or at its option on the profits of the month of April, 1939, and no assessments would be made for the year, 1940-41. If, however, the concern's 'business year' ends on 30th April and it closes down on 30th September, 1939, its assessment in the year 1940-41, would be on the profits of its year to 30th April, 1939, or at its option on its profits from 1st May, 1939 to 30th September, 1939, no assessment would be made for the year 1941-42. This special provision applies only to a business profession or vocation on which tax was charged under the Act of 1918, and when a claim for this concession is made, it must be supported by proof that tax had been charged under the Act of 1918 in respect of that very business, profession or vocation.

An assessee will be allowed the benefit of section 25 (3) if (a) he has (for example) both a business and a profession and discontinues only one of them, or (b) has more businesses than one and discontinues one or more, but not all of them, provided that they are genuinely distinct businesses for which separate accounts are maintained, and not mere branches of a single business. The section should, of course, only be applied to the income of any profession or business that is actually discontinued (*Income tax Manual*).

Discontinuance different from succession.—The provisions of sub-sections (1) and (3) apply to the complete stoppage or discontinuance of a business, profession or vocation and do not apply to any change in the *proprietorship*. Where there is any change in the proprietorship merely, the provisions of sub-section (4) and section 26 apply. As to the meaning of succeeded in such capacity by another person, the change not being merely a change in the constitution of a partnership",—see section 26 and notes under it, as also *Ellis Reid v Commissioner of Income tax* 5 I T C 100, 55 Bom 312, A I R 1931 Bom 333 and other decisions referred to later under this section

Responsibility of partner for tax—Where a business profession or vocation is completely discontinued and is not merely transferred from one proprietor or set of proprietors to another, the person who carried on the discontinued business is responsible for the payment of the tax, unless he is exempt under sub section (4), and where the proprietorship was vested in a firm, section 44 specifically provides that the persons who were members of the firm on the date of such discontinuance, are jointly and severally liable to any tax due from the firm

Succession to businesses taxed before 1918—Changes were made in 1939 [by amending sub-section (3) and adding a new sub-section (4),] so as to give to the immediate predecessor (on the occasion of the first succession after 1st August, 1939) to a business, profession or vocation the benefit previously given by sub-section (3) to the owner of a discontinued business assessed under the 1918 Act. That benefit, viz., being allowed to substitute the profits from the end of the previous year up to the date of discontinuance for the profits of the previous year, was given because otherwise those assessed under the 1918 Act would be assessed for one year more than the number of years the business was in existence. Since section 26 now provides that whenever there is a succession the predecessor shall be assessed on what he got of the previous year's profits it became necessary to give this relief to the predecessor in the case of succession to a business assessed under the 1918 Act

The words 'then unless' in sub section (3) merely mean 'except when', discontinuity can refer both to the business and to the person, and these words mean that the cases in view should be regulated under sub section (4) being exceptions to the discontinuity contemplated in sub-section (3). The words do not mean that every case that is not one of succession must be one of discontinuance. *Appellate Tribunal v Buchraj Nathani* 1946 I T R 191 (Nag)

Limitation—Sub section (5) added in 1939 merely codifies departmental practice, no limitation having been laid in the statute before. Of the two reliefs, viz., not taxing profits after the end of the previous year and the adjustment of tax of the previous year, the assessee has to claim only the latter, the former has to be done by the Income-tax Officer himself. Consequently limitation applies only to the claim for adjustment of tax and not to the non taxability of profits after the end of the previous year. The reference to the "claim to relief afforded under sub-section (3)" is to the relief by way of adjustment of tax of the previous year and the resultant refund, if any, and not to the exemption of tax from the end of the previous year onwards. *Commissioner of Income tax, Madras v O R M M SP SV Meyyappa Chettyar*, 1943 I T R 247. It was held however in

In *re the Hon Mr Justice Iqbal Ahmad*, 1942 I T.R. 152 (All), that it was the duty of the Income-tax Officer to take action *suo motu* in respect of relief under section 25 (3) if there were materials before him to suggest that the business, etc., had been discontinued and that therefore no limitation of time will operate against the assessee in such a case. The correct position would seem to be that taken in 1943 I T.R. 247 referred to above, except that in cases in which the assessee, while informing the Income-tax Officer of the discontinuance, does not in terms ask for the adjustment of tax of the previous year but merely asks for relief due under the law or makes some such vague claim it may be proper to hold that the further steps are for the Income-tax Officer to take and that the limitation will apply only to the intimation of discontinuance.

Proviso to sub sections (3) and (4)—The purpose of the above proviso will be understood from the history of the law since 1886 as stated below. The adjustment system introduced in respect of income-tax by the Income-tax Act of 1918, was not retrospective. Under section 19 of that Act, no adjustment was to be made in respect of tax paid or assessed before the Act came into force. Consequently, so far as income from business (in fact all income not assessed at source) was concerned, in a sense, the income of the year 1917-18 ultimately escaped assessment altogether. That is to say, no one ultimately paid tax calculated on the basis of the actual income of that year. The tax for the year 1918-19 was assessed provisionally on the basis of the income of 1917-18. But when the actual income for the year 1918-19 was known, in the year 1919-20, this provisional assessment was adjusted by collection of the deficiency, or refund of the excess, in the provisional assessment, and thus tax was finally suffered on the actual income of the year 1918-19. In the year 1917-18 under the Act of 1886 the tax (though regarded as paid 'for' the year 1917-18) was assessed on the income of the year 1916-17. As there was no adjustment in respect of this assessment, tax was finally borne on the income of the years 1916-17 and 1918-19, but no tax was ultimately suffered on the actual income of the year 1917-18. But under the Act of 1886 the assessment was made each year on the (statutory) income of the year of assessment (actually the income of the previous year). In the first year in which a business became liable to assessment—there being no "previous year", the assessment was made on an estimate [section 15 (2)]; and the law (section 33, Act II of 1886) provided for an adjustment with reference to the actual income of the year of assessment, when a business was discontinued or its owner died, or became insolvent or owing to other "specific cause" was deprived of or "lost" the income on which the assessment was made. The result was that, since no final assessment was made in 1918-19, and the income of 1918-19 was not finally assessed till 1919-20, the final assessments had by the latter year fallen one year behind hand. A business opened in 1914-15, e.g., would, up to and including 1919-20, have been assessed finally only 5 times on 6 years' working. When therefore the adjustment system was abandoned on the passing of the Act of 1922, it was agreed that one final adjustment should be made in the year 1922-23, and both a final assessment or adjustment under the old system (retained for one year by section 68, second proviso, of the Act of 1922) and an assessment under the new system were made on the income of the year 1921-22. The result was that the assessments which had been lagging a year behind (so far as final assessments were concerned) were brought up abreast of the

income again. The *assessment* under the new Act in the year 1922-23 was made for the year 1922-23.

A company, however, did not pay tax in the first year of its existence, and stood therefore to gain a year's tax relatively to other businesses—see sections 11 and 15 of the 1886 Act.

In regard to salaries, the position is as below. Under the Acts of 1886 and 1918, as under the present Act, the tax on salaries was deducted month after month as they were paid. When the adjustment system was introduced all that had to be done each year was to collect any deficiency or refund any excess tax on the previous year's salary, with reference to the amount actually deducted at source. The tax on the salary of 1917-18 was deducted in 1917-18. In 1918-19, no provisional assessment was made on the salary of 1917-18 for the year 1918-19. Excess or deficient deductions were adjusted and the tax for 1918-19 was deducted in 1918-19. Similarly, when the adjustment system was abandoned on the introduction of the Act of 1922, there was no need to make an assessment to income tax on the salaries drawn in 1921-22 in addition to making an adjustment in respect of them. In 1922-23 any excess or deficiency in the deductions made from salaries in 1921-22 was adjusted and tax was deducted as usual from the salaries actually paid in 1922-23. In fact so far as salaries are concerned, the system has remained the same under the three Acts of 1886, 1918 and 1922, except that under the present Act the collections on salaries, etc., are advance collections on account of the next year's liability to tax. (As to the consequences of this position, see notes under the Finance Acts.)

The situation in regard to super tax is as below. Super tax was introduced in the year 1917-18. It was not at first liable to adjustment. It was levied on the income of the previous year. The adjustment system was first applied to super tax in 1920-21. Ultimately, the income of one year, *viz.*, 1919-20, was never taken as the basis for a final assessment to super tax owing to the adjustment system. A provisional assessment was made on it in 1920-21, and in 1921-22 a final assessment was made by adjustment with reference to the income of the year 1920-21. The tax was thus shifted forward from the income of the year 1919-20 to the income of the year 1920-21. But, whereas in the corresponding year 1918-19 (the year in which the adjustment system was first applied to income-tax) the income-tax assessments became one year behindhand as explained above, in consequence of the new system, the situation in regard to super tax was different. Since this had always been a tax on the previous year's income, it was *always* a year behindhand from the very start.

When the Act of 1922 came into force, and the final adjustment under the Act of 1918 (section 68 of the Act of 1922) and the first assessment under the new Act were made in 1922-23, salaries, like business incomes, of 1921-22 suffered super tax twice, once by way of adjustment and once by way of assessment. The income-tax assessments on salary income thus once again drew abreast of the income, but the super tax assessments were still a year behind.

Under section 25 (3) a person discontinuing a business, profession or vocation, if he was at any time assessed under the Act of 1918, is entitled to claim that he shall not be assessed at all on the income of the period between the date on which he closes down and the end of the preceding 'previous

year', or, if he prefers, that the income of that period shall be substituted for the income of the preceding previous year, and assessed as such and an adjustment made. Thus, if a man closed his business on 31st March, 1925, he could claim not to be assessed on the income of the year 1924-25 or to have his assessment for 1924-25 (on the income of 1923-24) adjusted with reference to the income of 1924-25. The justification for this is as follows. So far as persons assessed at any time under the Act of 1918 are concerned, the "double assessment" in 1922-23 brought the assessments abreast of the income as already explained. At the end of any year such a person has been assessed for precisely the same number of years as his business has been running. If therefore, he were assessed in the year after closing down, on the income of the last working year he would be assessed for one year in excess. But in the case of a business taxed for the first time under the Act of 1922 the tax collector is lagging a year behind because in the Act of 1922 there is no provision for assessment, on estimate, in the year in which a business is opened, as there was under the previous Acts. Consequently, unless an assessment were made in the year after closing down on the income of the last year's working, the number of assessments would be one short. It is clear that for the reasons stated, there was no need to extend the concession to salaried assessees so far as income tax was concerned. Their assessments kept pace with their incomes all along and all that was done after the close of a year was to adjust any excess or deficiency. So far as super tax is concerned, there does not appear to have been any real justification for extending the section to super tax at all. The difference between income tax and super tax explained above seems to have been overlooked, till the proviso was added in 1941. As already explained, a business assessee who started business in 1916-17, and was assessed in that year, and closed down in 1924-25, will be found to have been assessed to income-tax once for each year from 1916-17 to 1924-25, both inclusive, and hence it would be wrong to assess him in 1925-26 on the income of 1924-25. But a super-tax assessee in similar circumstances would have enjoyed nine years' income and been assessed only eight times including the assessment in 1924-25. Clearly, therefore, he should be assessed in 1925-26 on the income of 1924-25. The extension of this section to super tax on income from business appears to have been due to misunderstanding or oversight. For the exact wording of this section the Joint Select Committee of 1922 is responsible.

In all that has been said above it should be remembered that for the purpose of income-tax, companies taxed under the 1886 Act gained the tax on the first year of existence relatively to other businesses.

These unintended advantages have been withdrawn by the proviso inserted in 1941.

Effect of change of accounting year and discontinuance.—This section leads to anomalous results in cases in which the assessee changes his accounting period and later on closes down his business. Ordinarily, when an Income-tax Officer permits an assessee to change his accounting year under section 2 (11), he would insist on the assessee not escaping tax for any period. Thus, taking the example of an assessee who keeps accounts by the year ending, say, 30th April and changes them to the financial year, the position will be as below (ignoring the period before 1921-22).—

Year of assessment i.e., year for which tax is paid	If accounting year unchanged Tax paid on income of			If accounting year changed Tax paid on income of		
1921—22	12	months ending	30-4-21	12	months ending	30-4-21
1922—23	12	" "	30-4-21	12	" "	30-4-21
1923—24	12	" "	30-4-22	12	" "	30-4-22
1924—25	12	" "	30-4-23	12	" "	30-4-23
1925—26	12	" "	30-4-24	12	" "	30-4-24
1926—27	12	" "	30-4-25	12	" "	30-4-25
1927—28	12	" "	30-4-26	23	" "	31-3-27
1928—29	12	" "	30-4-27	12	" "	31-3-28
For broken period—dis- continued on, say 30-9-1928	Nil,			Nil		
i.e., Profits for 17 months escape taxation, it will not pay to substitute his 17 months' profits for 12 months ending 30-4-27 (A)				i.e., profits for six months escape, and assessee can get refund for six months, i.e., 12 months in all can escape (B)		

Therefore, by changing the accounting year, the assessee pays extra tax on five months' profits. It is assumed in the argument throughout that a month's profit is constant.

Though the figures given above refer to a particular case, general formulæ can be deduced for (A) and (B) above. (B) must always be 12 months while (A) cannot be less than 12 months nor more than 24 months according to the circumstances of each case. An assessee who closed the accounts on 1st April and discontinued business on 30th March would escape tax for 23 months and 29 days. Therefore he has nothing to gain and something to lose by changing over to the financial or other year.

Such absurdities do not arise under section 25 (1), i.e., in businesses not taxed under the 1918 Act. The probability seems to be that in framing section 25 (3) regard was had only to accounts being maintained by the financial year, or it may be that the loss of tax in respect of discontinuance of businesses not keeping accounts by the financial year was deliberately accepted as the price for purchasing the consent of the commercial community to the abandonment of the adjustment system. As already observed the Select Committee of 1922 is responsible for the wording of this section of the Act.

Bearing on section 25-A and section 26—There is no inconsistency, repugnancy or conflict between sections 25 (4), 25 A (2) and 26 (2), for each deals with a different group of circumstances, and in spite of partition, a Hindu family should, under section 25 A be treated as joint for the purposes of assessment, which will include relief under section 25 (4). *Commissioner of Income tax, Punjab v. Saran Singh Ram Singh*, 1946 I T R 152, *Kotha Govindarajulu Chettiar v. Commissioner of Income tax Madras*, 1944 I T R 97.

Relief under section 60—As a consequence of the insertion in 1928 of the words 'at the time of such assessment' at the end of clause (b) of section 14 (2) (the section has since been recast) an unintended hardship was produced in the case of partners of firms discontinuing business. To remove this hardship the Governor General in Council exempted under section 60 from income tax 'such part of the profits or gains of a firm which has discontinued its business, profession or vocation as is proportionate to the share of an assessee in the firm at the time of such discontinuance, if tax has at any time been charged on such business profession or vocation under the Indian Income-tax Act, 1918 (VII of 1918) or if an assessment has been made on the firm in respect of such profits or

gains under sub-section (1) of section 25 of the Indian Income-tax Act, 1922 (XI of 1922) Provided that such part of the profits or gains shall be included in computing the total income of the assessee'

This notification was interpreted by the Madras High Court to refer to exemption from income tax only and not from super tax. The proviso according to the same ruling includes the exempted income not only for the purpose of arriving at the appropriate rate of tax but for that of determining whether the income is sufficient to make it chargeable to super tax. *A C T Nachappa Chettiar v Commissioner of Income tax*, 1933 I T R 241, 11 Rang 380, A I R 1933 Rang 229 7 I T C 1

Is 'discontinuance' consistent with succession?—In *In re Polson* 1942 I T R 52, the Bombay High Court held that in sub-section (3) as amended in 1939, the word 'discontinued' referred both to cases of cessation of business and of its disposal otherwise, for were it not so neither the predecessor nor the successor could get the benefit of section 25 (3), as a consequence of section 26. Further, section 26 having been brought in line with the rest of the Act (in 1939) *i e*, to tax the person who actually gets the income, it is the individual (or person) that should be taxed and not an abstract thing called business'. This decision was dis-sented from in *O R M M SP SV Meyyappa Chettiar v Commissioner of Income tax Madras*, 1943 I T R 247. The word 'discontinuance' is also used in section 44, and there is nothing in the context in section 25 compelling the adoption of a different meaning of the word there. Moreover, the words 'succession' and 'discontinuance', the distinction between which was, at one time, very important under the United Kingdom law had been interpreted in that country as excluding each other, and the Indian law must be presumed to have adopted these meanings. Again as between the different sub-sections of section 25, different meanings cannot be given to the same word, and if in sub-section (1), the word is to include succession, which is the section to be applied to such cases section 25 (1) or section 26? The amendment of sub-section (3) of section 25, in 1939 is merely intended to provide against double relief, once to the predecessor at the time of succession and again to the successor when the latter closes down. Moreover in the United Kingdom also a system of apportionment of profits between predecessor and successor has existed side by side with relief in cases of discontinuance, and this did not justify the construction of the word 'discontinuance' so as to include 'succession'. The Privy Council reversed the judgment of the Bombay High Court in *Polson's case* and approved of the Madras decision in *Meyyappa Chettiar case*. The amendment in 1939 did not change or widen the meaning of the word 'discontinuance', all that the amendment did was to introduce a qualification that if there was succession in respect of which relief was given, there should be no relief on discontinuance. *Commissioner of Income tax, Bombay v Polson*, 1945 I T R 384 (P C). In *Nihal Chand Kisorilal v Commissioner of Income tax, U P*, 2 I T C 338 (All), it was thought that 'discontinuance' as used in section 44 may consist of various forms. It may mean total abandonment or extinction, it may mean self extinction for the purpose of reconstruction in another form. This does not, however, mean that there is no difference between 'discontinuance' in section 25 and 'succession' in the same section and in section 26.

In the case of a firm carrying on a profession, if the firm is dissolved by the death of a partner, it is not necessary, for the purpose of constituting discontinuance, that the remaining partners also should abandon the profession, therefore the benefit of section 25 (3) is available in such a case *In re Motichand v Devidas*, 1946 ITR 534 (Bom)

Reference to High Court—Where an order under section 25 is set aside by the Commissioner under his revisional powers on the ground that discontinuance has not been established and the Income tax Officer assesses the successors in business after finding facts about the latter independently the previous owners have no right of reference under section 66 (2) against the orders of the Commissioner since they are not prejudiced by such orders, *Dhaniram Ramgopal v Commissioner of Income tax, Punjab*, 1936 ITR 384. In this case, the Commissioner had decided that no tax was payable by the predecessor, and the latter had not made, any claim for refund under sub section (3).

Where the assessee makes a claim for refund under sub-section (3), and the Income tax Officer fails or refuses to take action on the claim, there is no explicit provision for a right of appeal. The intention of sub-section (6) is evidently that in all such cases a formal assessment shall be made under section 23, proceedings being started with notices under section 22, but sub-section (6) is permissive and not mandatory. Sub-sections (3) and (4) on the other hand are mandatory so that "an assessment shall be made. But section 30 provides only for appeals against orders under sub-section (2) and not for refusal to make an assessment under sub-sections (3) and (4). It is possible however by a generous interpretation of section 48—and particularly of the words 'properly chargeable' occurring there—to found an appeal under that section in such cases.

Ephemeral associations—This section is frequently applied, in practice, to assess touring companies, Liquor shop syndicates, Toll gate syndicates, etc., which generally consist of comparatively short lived businesses and which are not actually transferred from predecessor to successor. This section coupled with section 34 gives the Income-tax Officer the necessary powers to assess such incomes. Such cases are not likely to fall under sub section (3) or (4) but under sub-section (1).

Temporary discontinuance—The law does not recognise temporary discontinuance. Either a business is discontinued or it is not.

'Business is not confined to being busy', per Lord Sumner in *Commissioners of Inland Revenue v South Bihar Railway Co*, 12 Tax Cases 657 (1925) A C 476.

The non existence of profit does not in itself imply that a business has been discontinued, *Henry v Galloway*, 17 Tax Cases 470, 49 T L R 191.

There is a certain amount of overlap in the decisions relating to what is 'discontinuance'—section 25—and what is 'succession'—section 26. The question is generally one of fact.

For convenience, all the decisions are referred to below, though some of them relate more closely to section 26 than to this section.

The question of succession or discontinuance was of special importance under the English law in view of the system of taxing on the average of three years' profits, which has been discarded, and many of the cases cited below arose in that connection.

Running steamships was part of the undertaking of a railway company. The steamships ran at a loss and the railway decided to discontinue them. *Held*, that there was no discontinuance—the steamships being part and parcel of the railway system. *Highland Rail Co v Special Commissioners*, 2 Tax Cases 151. 23 Sc L R 116.

The conversion of a private partnership into a company with limited liability creates a succession. *Ryhope Coal Co v Foyer* 1 Tax Cases 343. 7 Q B D 485. The point is that there is continuity of the business to which the new person i.e. the company succeeds. In such a case there is no 'discontinuance'.

Similarly if a business is sold by an individual to a company, there is a succession—*Bartlett v Commissioners of Inland Revenue* (1914) 3 K B 686. 7 Tax Cases 229.

Where a business changes hands or a partner ceases to be a partner, there is no discontinuance of business but only a change in its ownership. *Hanutram Bhuramal v Commissioner of Income tax B and O* 1938 I T R 290.

Business—Identity of—Question of fact—Criteria—A company took over the business of a firm of whisky distillers, blenders, etc. For some time before, the firm had not worked any distillery. The company worked a distillery and the accounts of the company for a period of about 14 months after its formation included the results of the business carried on at such distillery as well as those of the business carried on elsewhere. The Commissioners held that the concern carried on by the company was not a succession to the concern carried on by the firm. On appeal by the Crown, it was held by the Scottish Court of Exchequer that the question as to the identity of the two concerns was one of fact, not of law, and that there was nothing to show that the decision of the Commissioners was wrong. *Alexander Ferguson & Co, Ltd v Atkin* 4 Tax Cases 36.

A company owned and traded with one steamship; it afterwards acquired fifty-nine sixths of a second steamship, taking over the management and keeping the accounts thereof, and claimed to be assessed as a single concern taking the two ships together. *Held*, that the second steamship was a concern carried on by two or more persons jointly, and that its profits must be assessed separately. In such a case, the old business is neither discontinued nor merged in the new; the two continuing to exist side by side. *Farrell v Sunderland Steamship Co Ltd* 4 Tax Cases 605, following *Attorney General v Borrodale* (1814) 1 Price 148.

In a case of sale of a tramp steamship in which no books, accounts, or list of customers were transferred or sold with it, it was *held* that the new owners were not entitled to be assessed as successors in the business of the previous owners.

Per the Lord President—

any trade, manufacture, adventure, concern, or profession. There is simply the purchase of a corporeal moveable which may or may not carry on the same business, which may be put equally well to a different trade. If the contention were to apply, it would equally apply to a house bought in open market or to a carriage knocked

down at a sale . . . ", *Watson Brothers v. Lothian*, 4 Tax Cases 441, 39 Sc.L.R. 604.

A tramway company was incorporated under a local Act. Later on, this was taken over by another company which also ran an omnibus service. Finally, the local authority acquired the tramway and extended it and substituted electric for horse drawn vehicles. *Held*, that the tramway succeeded to the business of the company.

Per *Bray, J*— "Railway companies are always spending capital and extending their railways and some of them have substituted electrical powers for steam but it could not be suggested that by doing this they were commencing or setting up a new business. It so happens here that the extension and modification was very great and that it occurred just at the time when the respondents had bought the original undertaking but I do not think this alters the case. There seems no reason why the revenue should be benefited by the accident of transfer at the time", *Stockham v. Wallasey District Council*, (1906) 95 L.T. 834.

There can be no succession to a part of a business, though there may be to a separate branch of the business, and the Indian rule on this point is the same as the English one, *Commissioner of Income-tax, Burma v. Zavers*, 1937 I.T.R. 664. This does not imply however that if what is succeeded to is not the same extent of trade or even does not include a particular line of customers, it necessarily follows that there cannot be a succession to the trade. *Held*, accordingly in a case of a trading-company which took a lease of the brewery of another company and their tied houses but did not take their free trade or goodwill that the decision of the Commissioners that there was a succession could not be upset, *Shipstone and Sons v. Morris*, 14 Tax Cases 413. See also rulings referred to under section 26 under "partial succession" and *In re Gregory & Co*, 1937 I.T.R. 12.

The National Provincial Bank purchased the business of the County of Stafford Bank. The former had several Branch Establishments in England and Wales while the latter had only one Office at Wolverhampton. A large sum was paid for goodwill, premises, furniture, etc., and the Manager and the former staff of the Stafford Bank were taken over by the National Bank. Profits earned at the Wolverhampton Branch were merged in and formed part of the general profits of the National Provincial Bank without distinction as to source or origin of profits. *Held*, that there was a "succession" by the National Provincial Bank to the business of the Stafford Bank.

Per *M of R*—" (Mr. Danckwerts) relies upon the authority of a case decided in Scotland of *Ferguson v. Aikin* as showing that it is and must be a question of fact whether there has in point of fact been a succession or not. It may be in many cases, or in some cases at all events, a question of fact. But it seems to me for the reasons I have already given that if it was a question of fact for the Commissioners in this case they have deliberately not decided it. They have presented to us a problem of law, and they have given us the benefit of their opinion upon it, and if we do not agree with that we are entitled to say so. In my view if this is a finding, as I think it must be, of law that there is no succession within the meaning of the Rule, I find myself unable to agree with it for the reasons I have given. The fact that in a particular case, which was a rather exceptional case, in Scotland (which I need

not go into) the Court held that the Commissioners having found that there was no succession in point of fact, they were bound by that decision and disinclined to go behind it, in my opinion presents no difficulty in this case", *Bell v The National Provincial Bank of England, Ltd*, 5 Tax Cases 1, (1904) 1 K B 149

To constitute succession the new business and the old one should be identical and not merely similar. Where X and Y who had been supplying dock labour to a port trust joined their resources on the termination of their respective contracts and supplied labour thereafter to the port trust jointly, though using the name, premises and employees of X, and there was no transfer of assets or liabilities it was held the new joint business was not identical with the previous one of X or of Y. In *Bell v National Provincial Bank, supra*, and in *Best & Co v Commissioner of Income-tax, Madras*, 55 Mad. 832 A I R 1932 Mad 484, the previous business which included premises, clients, goodwill, etc., passed over to the successor whereas in this case neither X nor Y had any assets or goodwill to hand over to the joint business, *Kannappa Naicker & Sons v Commissioner of Income tax, Madras*, 1937 I T R 49

Under its Articles of Association a Steamship Company could own only one ship at any one time, but was empowered on the loss or disposal of such ship to acquire and trade with another ship. The "Merchiston", the first ship owned by the Company, was lost in April, 1906, and in the following month an order was given for another ship, the "Veraston", which commenced her first voyage in October, 1906. Held, that the business of the Company was continuous.

Per *Bray, J*—"I only say with regard to the finding of the Commissioners that it seems to be based entirely upon a misapprehension, and therefore I cannot look upon their finding as a distinct finding upon a question of fact upon which there is no appeal. I think I have all the facts before me and can determine what is the proper conclusion of law to be drawn from them." *Merchiston Steamship Co, Ltd v Turner*, 5 Tax Cases 520 (1910) 1 K B 713

Before the outbreak of the Great War in 1914 a Company had been engaged in completing old contracts entered into by a firm of contractors whose business it had been formed to take over in 1912. The Company had obtained no fresh contracts itself. The business premises of the Company were closed down during the year 1913 and offered for sale, but without success. The premises were eventually taken over and ultimately purchased by the War Office in December, 1914. From December, 1914, until February, 1920, the Company had neither works nor plant, but during that period persistent and continuous efforts were made by its directors on its behalf to obtain contracts. Their efforts however were unsuccessful until early in 1920 when, as the result of the introduction of fresh capital into the Company and the adoption of a different business policy, a number of profitable contracts were obtained and fresh plant acquired. All through, the Company had retained its registered office and held its annual statutory meetings regularly and paid the secretary's salary and directors' fees. It had also spent substantial sums, including those incurred by the directors in connection with their abortive efforts to obtain contracts. The Commissioners held that there was no trade carried on by the Company between 1914 and 1920 that the trade which was taken over by the Company was discontinued in 1914, and that a fresh trade was set up and commenced in

1920 *Held*, that the question involved was one of law, and that there was no discontinuance of its trade

Per Rowlatt, J—"Because in the middle of a great career a Company or still more an individual professional man, might have a year when he was holding himself out for business or the Company was holding itself out for business but nothing came, yet that would not effect a break in the life of the company for Income tax purposes. It is not a question that the field of business was not precisely the same. I think that really it is a question of law in the sense that the Master of the Rolls laid down in *Bell's case* (*Bell v National Provincial Bank of England*, 5 Tax Cases 1, (1904) 1 K.B. 149), the finding is that upon the construction of the Rule the case is not within it. It is not really a question of fact or even of mixed law and fact", *Kirk and Randall, Ltd v Dunn*, 8 Tax Cases 663.

A steam drifter employed in herring fishing was taken over by the Admiralty compulsorily on hire, and it was held that notwithstanding the different use to which the ship was put by the Admiralty the owner carried on the same business as before, *viz*, using the ship for profit in ordinary shipowning business. *Sutherland v Commissioners of Inland Revenue*, (1918) S C 788, 12 Tax Cases 63

A firm of timber merchants and saw millers bought a saw mill which also did joinery business and transferred to that place the direction of their own business. At the time the saw mill was acquired, there was acute trade depression and there were no current orders with the mill. The purchasing firm took over no books, no list of customers and none of the staff, except a few woodmen. The new firm could not even identify whether orders came from the customers of the vending firm or not. The price paid for the concern was based only on the value of the tangible assets but the contract of sale referred to it as including goodwill. Also, a joint circular was issued by the purchasing and selling firms together that the purchasing firm succeeded to the business. *Held*, that the question whether there was a succession was a question of fact, the Commissioners having held that there was a succession in respect of the joinery business.

Per the Lord President — I do not propose to attempt a definition of 'succession' but it is, I think, safe to say two things about it. In the first place, it does not include the accidental acquisition by a trader, who continues in business, of the custom left by another who goes out of business. A trader might give up or go out of the trade for some reason without attempting to realise or transfer goodwill and the result of that might be the capture of some custom theretofore attached to him by one or more of his competitors who continued to trade. On the other hand—and in the second place—I think the word 'succession' does cover any case of the transfer by one trader to another of the right to that benefit which arises from connection and reputation. The question whether there is in any particular case a 'succession' or not is a question of fact," *Thompson and Balfour v Le Page*, 8 Tax Cases 541, (1924) Sess Cas 27

In *Fullwood Foundry Company v Commissioners of Inland Revenue*, 9 Tax Cases 101 (see also *Humphries v Cook*, 13 A T C 649 (K.B.D.), 19 Tax Cases 121), also it was held that succession was a question of fact and that the Court could not interfere if there was any evidence before the Com-

missioners to support their finding. Whether on the facts as found there is a succession within the meaning of statute is, however, a question of law, *Narandas & Co v Commissioner of Income tax, Bombay*, 1937 I T R. 116, *Commissioner of Income tax v Zaveri*, 1937 I T R. 664 A.I.R. 1937 Rang 102

A Company which was started in 1919 went into voluntary liquidation at the end of 1922. On 21st February, 1923 the liquidators agreed to sell to a new company all the assets, and the agreement to transfer the business was effected on the 20th July, 1923. The new company was taxed for the period 1st of April, 1922 to the 31st March, 1923. *Held*, that, on the facts, there was no 'discontinuance' of the business but only a 'transfer or succession', and that section 25 (3) did not apply, *Commissioner of Income-tax, Bombay v M H Sanjana & Co, Ltd*, 2 I T C 110 50 Bom 87, A.I.R. 1926 Bom. 129

A partition took place in a Hindu family doing business the sons separating from the father. The account books of the family business remained with the father, who continued the business in its old name and had the right to realise old outstandings. No branch was closed. *Held*, that there was a succession and not discontinuance, *Kalu Mal Shori Mal v Commissioner of Income tax, Punjab* 3 I T C 341, A.I.R. 1929 Lah 461. This ruling and that in *Sanjana & Co's case* above referred to as also that in *Hanutram Bhuramals case*, 1938 I T R. 290, referred to under section 25, were approved by the Privy Council in *Commissioner of Income-tax, Bombay, v Polson* 1945 I T R 384

On the other hand where in a firm with six partners and four businesses, there was a dispute among the partners and one of them locked up two of the shops, and the other five started two firms in different places, and the dispute was eventually settled by arbitration the sixth partner being bought out by the other five, who were to restore the assets and discharge the liabilities, and the old trading name was not to be used by any one, it was held that the old firm had discontinued its business and that there was no succession thereto. *Hariram Gopinath v Commissioner of Income tax, Punjab*, 1944 I T R 357

To 'succeed' another within the meaning of this section it is necessary that the successor should succeed to the business as a whole, if the business is split up and a part thereof carried on by some one else the latter does not succeed to the business, *Commissioner of Income tax, Burma v N N Chettyar Firm*, 1934 I T R 83, A I R 1934 Rang 13. Where a Hindu undivided family of two brothers with its headquarters in British India carried on moneylending in several places in Burma, Malaya and India, and the family was partitioned and a partnership composed of the two divided brothers took over the moneylending business in Burma, the Income-tax authorities claimed that there had been a succession. This claim was negatived by the Rangoon High Court on the ground that all the facts—and not merely those relating to Burma—were to be considered. The continuity related only to a part of the family business, which was not 'succession' under section 26. In this case it would seem, the business of the family in Burma was not a separate business by itself apart from its business elsewhere. *Commissioner of Income-tax, Burma v A L V R P Firm*, 1940 I T R 531. In other words when only a part of the business is taken over, no one can be said to succeed the predecessor "in such capacity" as required by the statute, *Commissioner of Income-tax, Burma, v. Zaveri*, 1937 I T R 664,

A.I.R 1937 Rang 102 Where, however, a business is run in several branches independently of each other, though under a single ownership i.e., of a partnership and the business is divided between the quondam partners, the business in each branch being continued without interruption, the case would be one of succession, *Income tax Appellate Tribunal v Bachraj Nathani*, 1946 I T R 191 (Nag) If there is no continuity in the business, and if one business has come to an end and another starts after some time, the latter is not a 'succession' even though the new business may be in the same premises and with the same assets, *Commissioner of Income-tax, Burma v N N Chettyar Firm*, 1934 I T R. 83, A I R 1934 Rang 13 This criterion of continuity however, is not an unfailing or universal test, *Commissioner of Income tax, Burma v Zaveri*, supra

The interval or delay is really a question of degree and it may well be that the delay means merely a cesser of profit making operations and not of the business as such. The real test is the identity of the two businesses, and the reasons for closing down and for re opening would often indicate the solution. Accordingly, where a firm of two partners was dissolved owing to financial difficulties and one of the partners (assessee) carried on, without any serious interruption the same kind of business on a smaller scale in the same premises, there being, however, a slight change in the name of the business and the settlement by the firm of the major creditors, while at the same time the other partner gave up all claims to outstanding, stock in trade, furniture and trade marks in favour of the assessee, it was held that there was a succession, *Commissioner of Income tax, Burma v Zaveri*, supra

On the other hand, where a sole agent and distributor of a manufacturer for an area took over the sole agency of a contiguous area from another agent with the permission of the manufacturer and in doing so took over stocks and rights under hire purchase agreements and paid the manufacturer outstanding royalties and the previous agent for the goodwill, it was held that the goodwill being really that of the manufacturer who alone could appoint agents the case was not one of succession but of a simultaneous cessation of a business and the opening of a new one, *Tolaram Ramdas v Commissioner of Income tax, Bombay*, 1937 I T R 680 (Sind)

This does not however, mean that the transfer of an agency business cannot form a succession in any circumstances e.g., even if the business was transferred as a going concern including all assets. So, when an agent of General Motors (India) Limited took over the agency of other areas and along with the latter, the rights stocks outstandings etc for all of which he paid the previous agent a substantial price, it was held that there was a succession *Commissioner of Income tax v Naraindas and Co*, 1939 I T R 305 (Sind)

A business formed largely of employees of a previous business, and conducted in different premises, the former business having been given up by the owner and the premises pulled down, the new business not taking over any assets, stock or book debts contracts or liabilities of the old business, nor having paid anything for the goodwill but dealing mainly with the customers of the former business, was held to be a case of discontinuance and not of succession. One test, suggested by Rowlatt, J, was whether a business is split up according to categories or according to customers in the latter case the business is dissipated *Mills from Emelie, Ltd v Commissioners of Inland Revenue*, 12 Tax Cases 73

One cannot separate business simply because customers are separate or they pay on different bases. The more important tests are whether the accounts are the same and include all the transactions, whether the actual management and control are the same. There may be a succession to a business even though one of the previous partners takes away part of the custom.

A business in the hands of a company was advertised for sale and went into liquidation. A firm connected with the old directorate bought the stock in trade and premises but, for certain collateral reasons, placed a very small value on the stock in trade. There was no interregnum and the old servants continued under the new employers. Nothing was said about bad debts and trade liabilities. The Commissioners held that "the appellants acquired no more than certain premises together with a very small amount of stock and proceeded to carry on therein a trade similar to but not identical with that formerly carried on by the company." *Rowlatt, J.*, declined to interfere. *Wilson and Barlow v Chibbett*, 8 A T C 174, 14 Tax Cases 407.

To constitute succession, it is not necessary that the assets of the predecessor should be acquired by the successor. On the other hand even though goodwill be one of the assets so acquired the case is not necessarily one of succession. There is no conclusive test and it is of a question of fact in each case with reference to all the circumstances. The gap in time between the old and the new businesses may sometimes be an important clue. *Reynolds v Ogston (C of A)*, 9 A T C 8, 15 Tax Cases 501, on the other hand, the interval must be considered with reference to all the circumstances, and the mere length of the interval cannot be conclusive. It is a question of degree and therefore of fact. In *Wild v Madam Tussaud's Ltd*, 17 Tax Cases 127, the Court refused to interfere with the finding of the Commissioners that even though the interval between the closing of the exhibition to the public and its re opening under a new management was about three years, there was a succession to the business in view of other facts in the case *e.g.* the continuous restoration of the models, the transfer of the staff to the new management, etc.

It is not necessary however that the successor should take over the selling organisation and book debts of the predecessor, what is necessary is that the business should be taken over as a going concern and this is a question of fact. *Malayalam Plantations v Clark*, 19 Tax Cases 314.

"If any person succeeds to a trade" means "if any person takes over and continues a trade as that trade", and the words therefore cannot cover a case of incorporation of a wholesale (or manufacturing) trade in a retail one. The fact that the wholesale (or manufacturing) trade before the alleged succession was carried on entirely with a parent company by its subsidiaries is not relevant to the question of whether the parent company has succeeded to the trade of its subsidiaries. *Laycock v Freeman Hardy and Willis* 17 A T C 287 (K B). If, in this case, the subsidiaries had bought all the leather from one source, and if the leather maker had acquired the business of the subsidiaries and carried it on it might have been possible to hold that there was a succession. See *Briton Ferry Steel Co v Barry* 1941 I T R (sup) 122 (C A). In the case of *Freeman Hardy and Willis* all that was left of the activities of the subsidiaries was mere manufacture, (without sale), which by itself, could not produce profits, there was no profit providing activity to succeed to whereas in *Briton Ferry Steel Co's* case in which

the manufacturer of raw materials acquired the subsidiaries which had previously bought from him and converted the raw materials into finished bars he succeeded to a profit earning activity. It would have made no difference to the business of the subsidiaries if they had made the steel bars themselves instead of buying them from the parent Company.

Where an individual sold his jute mill to a private company in which he held almost all the shares and claimed that the business had been discontinued because (a) there was a gap of a few days between the cessation of his business as an individual and the commencement of business by the company, and (b) the outstandings and liabilities of the business (which, incidentally, nearly cancelled each other) had not been taken over by the company, the Commissioner held that there had been a succession, there having been no winding up of the old business which was carried on in the same way as before and with the same name and practically the same staff, the High Court declined to interfere, *In re Babulal Ray Garhwa*, 1936 I.T.R. 148 (Cal).

There may be a succession even though there is no document transferring the goodwill etc. Again the fact that business intended to be carried on by the predecessor in two places is carried on by the successor at one place only will not in itself make the new business a different one from the old. What is required is positive evidence that they are different. *In re Gregory & Co*, 1937 I.T.R. 12 (Cal). The question of succession is at bottom a question of fact, though whether a particular set of facts constitutes succession within the meaning of the statute is a question of law.

G an expert jute buyer carried on the business of G and Co for some years with R as partner and then for some years with R's son as partner. In 1928-29, J K a firm came in as partner in place of R's son and this continued till July, 1931, when C another firm took J K's place. The partnership agreement was renewed every year. G was the expert and working partner and the other was the financier. The business always used the name and mark of "G & Co". In its dealings with the Income-tax authorities as with other outsiders, the firm had always acted as though the business was a continuous one. In connection with its assessment for 1932-33 the firm contended that there had been no succession because, (a) there was no formal transfer, (b) the business was intended to be done at two places under the preceding partnership whereas the succeeding one did business only at one, and (c) there could be no succession to a part of a business. *Derbyshire, C J*, held that the case fell neither under section 26 (1) nor under section 26 (2), and *Costello, J*, held that it fell under the former while *Panckridge, J*, held that it fell under the latter since the former applied only when a change occurred in the constitution of the firm or a new firm was constituted during the currency of the partnership. In this case the new firm came after the termination of the old one. *In re Gregory & Co*, 1937 I.T.R. 12 (Cal).

A receiver on behalf of debenture holders who takes possession of the property charged by the debentures and carries on (or concurs in carrying on) the business of the Company does not succeed to the business of the company since there is no cessation by the latter, *Commissioners of Inland Revenue v Thompson*, 20 Tax Cases 422 (K.B.), (1937) 1 K.B. 290.

Where an assessee conducting a hire purchase business sold his business to a company and the company agreed to collect on his behalf the sums

already due and sums becoming due thereafter on the already existing hire-purchase transactions it was held that the assessee had set up a new trade *Parker v Batty*, 1942 I T R (sup) 162 (K B D)

Evidence—Whether on the facts there is succession within the meaning of section 26 is a question of law *Naraindas v Commissioner of Income tax Bombay*, 1937 I T R 116 *Commissioner of Income tax, Burma v Zaveri*, 1937 I T R 664, *Hariram Gopinath v Commissioner of Income tax, Punjab*, 1944 I T R 367 To enable a successor to be taxed, there must be some evidence to show that he succeeded it is not sufficient that the predecessor carried on the business and that the alleged successor has not produced evidence that he is not carrying on the business *Haj Ghulam Hussain v Commissioner of Income tax N W F P* 1942 I T R 405

Discontinuance—Part of business—Question of fact—Discontinuance like succession is a question of fact Whether a firm carried on one business or more than one—which is often a preliminary issue in determining whether there has been discontinuance or not—is also necessarily a question of fact to be determined by the Income-tax authorities In *Houden Boiler and Armaments Company v Stewart*, 9 Tax Cases 205, (1925) Sess Cas 110, the Company originally a firm of boiler makers manufactured armaments and gave up the latter business after some time The General Commissioners held that it was all one business though with two departments (as all the accounts were brought into a single account) and the High Court declined to interfere on the ground that the question was one of fact

Part of business—Discontinued—How treated—Set off—If there are two separate businesses or professions carried on by the assessee and one is discontinued this section should evidently be applied as though there were two separate assesseees conducting each business but at the same time the assessee should evidently not be deprived of the right of set off under section 24 That is two separate assessments should be made as though there were two assesseees and the assessments consolidated

Profession—Discontinuance of—A barrister does not discontinue his profession and commence a new one by becoming King's Counsel *Seldon v Thomas*, 16 Tax Cases 740 (1932) 1 K B 759

25-A (1) Where, at the time of making an assessment under section 23, it is claimed by or on behalf of any member of a Hindu family hitherto assessed as undivided that a partition has taken place among the members

Assessment after partition of a Hindu undivided family

of such family, the Income-tax Officer shall make such inquiry thereinto as he may think fit, and, if he is satisfied that the joint family property has been partitioned among the various members or groups of members in definite portions, he shall record an order to that effect

Provided that no such order shall be recorded until notices of the inquiry have been served on all the members of the family.

(2) Where such an order has been passed, or where any person has succeeded to a business, profession or vocation formerly carried on by a Hindu undivided family whose joint family property has been partitioned on or after the last day on which it carried on such business, profession or vocation, the Income-tax Officer shall make an assessment of the total income received by or on behalf of the joint family as such, as if no partition had taken place, and each member or group of members shall in addition to any income tax for which he or it may be separately liable and notwithstanding anything contained in sub section (1) of section 14, be liable for a share of the tax on the income so assessed according to the portion of the joint family property allotted to him or it,

and the Income tax Officer shall make assessments accordingly on the various members and groups of members in accordance with the provisions of section 23

Provided that all the members and groups of members whose joint family property has been partitioned shall be liable jointly and severally for the tax assessed on the total income received by or on behalf of the joint family as such

(3) Where such an order has not been passed in respect of a Hindu family hitherto assessed as undivided, such family shall be deemed for the purposes of the Act to continue to be a Hindu undivided family

History.—This was first inserted in 1928 to fill a lacuna in the Act. Certain drafting amendments intended to make the section more accurate and clear were made in 1930

Two important changes were made in 1939 viz (a) all reference to the separation of members was omitted reference being retained only to the partition of the joint property and (b) it was made clear that if a business etc. of a joint family had been succeeded to by some one else before its joint property was partitioned this section should be applied. The latter is consequential on the alteration of section 26 which taxes predecessors and successors on what they respectively receive

Object.—In the absence of this section it is not possible to assess a Hindu undivided family on the profits of the period dating from the last day up to which the family has been assessed up to the date of partition. This is because while section 14 exempts the members the family as such cannot be got at having ceased to exist

Question when to be raised.—The question of status of the family or of a member should be raised at the time of assessment and can not be raised for the first time before the Assistant Commissioner on appeal (still less before the Commissioner or Appellate Tribunal or the High Court) *Karamchand v Commissioner of Income tax Punjab* 5 I T C 313 12 Lah 714 A I R 1931 Lah 601

Procedure—Since the enquiry is such as the Income-tax Officer 'may think fit', he has a discretion as to how to conduct it in the best manner in the circumstances of the case and as to the evidence to be heard. His decision is a question of pure fact, *Bansidhar & Sons v Commissioner of Income tax, Burma*, 1938 I T R 95, A I R 1938 Rang 154.

It is open to the Income-tax Officer to suspend orders on an application under section 26-A by members of a Hindu family until the assessment proceedings are held. If at that time, a claim is made under section 25-A, it is the duty of the officer to decide whether there has been a separation of the members and a partition of the property within the meaning of that section. If his finding is in the affirmative, and if he then finds that a firm has been formed by the separated units which have come into existence he will proceed under section 26 and register the firm under section 26-A. In *re Sundar Singh Majithia*, 1938 I T R 336, A I R 1938 All 452. If on the other hand his finding about the separation is in the negative, or to the effect that no new firm has come into existence, he can refuse to recognise the alleged firm, *Lachiram Baldeodas v Commissioner of Income-tax, B & O*, 1936 I T R 279.

Until an order has been passed under sub-section (1), the family is deemed under sub-section (3) to be joint and no order will be made under sub-section (1), unless a claim is made by a member of the family, *Chhedial Nandkisor v Commissioner of Income tax, U P* 1942 I T R 61 (Oudh), *Sirdar Indra Singh v Commissioner of Income tax, B & O*, 1943 I T R 16. An assessment under section 23 (4) in earlier years will not render section 25 A inapplicable, i.e., will not alter the presumption of jointness under sub-section (3). *Chhedial Nandkisor v Commissioner of Income tax, U P*. Before the Income tax Officer recognises a partition he should give an opportunity to all the members of the family (including member groups). The Income-tax Officer need not take the initiative in the matter. As regards the service of notice, see section 63.

Liability to tax—It should be noted that each member of the family has to bear his share of the tax payable by the family in respect of the broken period in addition to any tax payable by him otherwise than as a member of the family.

It will be observed that though each individual member or family has to pay his or its share of the tax of the undivided family, the rate of tax in respect of that share is that applicable to the undivided family. The share of income from the family can not be aggregated with other income in order to fix the rate of tax payable by the members.

This section applies only where the family as such ceases to exist and not where there has been only a division of part of the property. In *re Sirdar Singh Majithia*, 1942 I T R 457 (P C). See notes below as to what constitutes 'partition' for the purpose of this section. Where there is only a partial partition, and a part of the property continues to belong to the family, while the rest belongs to a partnership composed of the members, section 25 A will not apply, since the family continues to exist. There are two entities, viz., the family and the firm, and separate assessments have to be made on them. The firm if genuine, cannot be ignored. *R B Dandhanu v Commissioner of Income tax, B & O*, 1944 I T R 126. There is nothing in law to prevent the members of a family who are disrupted from parting with undivided assets either to L.

stranger, and where businesses are individually allotted to and carried on by divided members, the fact that the partition was ultimately settled by an arbitration award of a later date will not necessitate the income of their businesses being assessed on the family even after they have been made over to individual members. *Waman Satwappa Kalghatgi v Commissioner of Income tax Bombay*, 1946 I T R 116

Partition synchronous with succession by firm—The section provides only for cases of partition as such and where partition is simultaneously accompanied by other incidents e.g., succession to a business, other sections e.g., section 26 have to be considered but where partition synchronises with succession sections 25 A and 26 read together make it clear that the profits of the aggregate period of assessment have first to be apportioned between the predecessor family and the successor firm and that the tax on the profits of the former are to be recovered rateably from the divided members.

The combined effect of sections 25 A and 26 has been the subject of divergent views as the following summary of rulings will show —

If the partition of a Hindu family is accompanied by a succession in the family business the section to be applied is clearly section 26 and not section 25 A. The person succeeding to the business cannot escape liability unless he can bring himself within some exempting section. *V R S A R Arunachalam Chettiar v Commissioner of Income tax, Madras*, 57 M L J 300 A I R 1929 Mad 769 3 I T C 441. Where simultaneously with the break up of a Hindu undivided family the separated members form themselves into a firm, the case is regulated by section 26 and not by section 25 A so far as the separated members are concerned, *Beliram Bros v Commissioner of Income tax*, 1935 I T R 243, A I R 1935 Lah 278 8 I T C 380.

In another case the Madras High Court held that the word 'succession' as used in section 26 (2) connoted a transfer of ownership, there was, therefore no succession where the business of a Hindu undivided family devolved on a coparcener by survivorship under Hindu Law. *Jupudi Kesava Rao v Commissioner of Income tax*, 1935 I T R 339, 9 I T C 64. The same principle was followed by the Madras High Court in another case and also by the Bombay High Court, *Chinna Pullayya v Commissioner of Income tax*, 1937 I T R 132 9 I T C 377. *Commissioner of Income tax Bombay v Jesinghbai Ugarchand*, 1938 I T R 25 A I R 1938 Bom 350 in both of which cases firms were formed by members of a Hindu family after disruption and the Courts directed assessments under section 25 A and not under section 26 even though the Income-tax Officer was satisfied that new firms had been formed. The Bombay High Court while doubting the correctness of the Madras rulings followed them more for the sake of uniformity.

This view however was dissented from by the Lahore and Allahabad High Courts. *Ramrakhamal v Commissioner of Income tax Punjab* 1937 I T R 137, A I R 1937 Lah 830. *Jugal Kishore Mukatlal v Commissioner of Income-tax*, 1938 I T R 494. In the case before the former, the members of a family, without effecting a complete partition among themselves formed themselves into a company, and it was held that the latter could be assessed under section 26 (2) while, simultaneously the family also could be assessed on the rest of its income i.e. from other sources than the business etc. succeeded to by the company. It is not

possible for a firm or a company to succeed a Hindu undivided family as a whole so long as the latter has not been completely disrupted but it is possible to have partial succession, *i.e.*, in respect of a particular source of income by a company or other association. According to this view, section 25 A applies only when the case is one of pure and simple disruption of a family without the formation of a firm or other association for profit. If a firm or other association has been formed, it does not matter whether the firm owes its origin to certain individuals, strangers to one another, entering into a contractual relationship and agreeing to constitute a firm, or to a joint Hindu family, whose members divided among themselves and who then decided to form themselves into a firm. In either case, if at the time of assessment a firm or other association has come into existence, section 26 will apply.

The Madras High Court, however, in a later case, *Kotha Govindarajulu Chettiar v. Commissioner of Income tax, Madras*, 1944 I T R 97 overruled the two earlier rulings. When a Hindu undivided family separates and its members carry on the family business in partnership the business is no longer owned by the family but by the firm. The case is therefore one of succession under section 26 (2), and consequently the benefit of section 25 (4) is admissible. See also *Commissioner of Income tax, Punjab v. Saran Singh Ram Singh*, 1946 I T R 152.

Date of partition.—The date of partition for the purpose of section 25 A is the date when partition of the properties in definite portions has been completed until then, the family is deemed to continue joint for the purpose of this section. *Medam Gurusurthi Chetti v. Commissioner of Income tax, Madras*, 1944 I T R 176. Where the Income-tax Officer accepts the fact of partition but not the date thereof, it is open to the assessee to raise the question on appeal against the assessment as a whole, *i.e.*, in Form B of appeal since he cannot appeal in Form C, there being no refusal on the part of the Income-tax Officer to recognise the fact of partition, *Commissioner of Income tax, B & O v. Lachhminarain Bhadani*, 1944 I T R 355.

Families wrongly assessed.—Section 25-A can be applied to cases in which previous assessments had been made wrongly as if on a Hindu undivided family and there having been in truth no such family, the property having been self acquired and individual, if the Income-tax Officer is satisfied that there is a partition and a claim is made under section 25-A by the persons concerned, *Sardar Bahadur Indra Singh v. Commissioner of Income tax, B & O*, 1943 I T R 16. Section 25-A does not come into the picture when the Income-tax Officer wishes to act under section 34 in order to assess a person who has been wrongly assessed in the first instance as a Hindu undivided family, but ought to have been assessed as an individual. There is, therefore, no need for the Income-tax Officer to issue any notice under section 25-A. *Ramaswami Iyengar v. Commissioner of Income-tax, Madras*, 1944 I T R 29. Nor does section 25-A apply when a trust has been created out of the property of a Hindu undivided family, even though some of the beneficiaries may be members of the family. *Estate, Harendra Kumar Roy v. Commissioner of Income tax, Bengal*, 1944 I T R 68.

Onus of proof.—The members of a Hindu family claiming to be treated as a partnership must first establish that the family has been dissolved. If they admit that for all purposes other than the business in question they continue to be joint, evidence that they had no ancestral property or that

the father built up the business by himself are irrelevant, *Bansidhar & Sons v Commissioner of Income tax, Burma*, 1938 I T R 95

The fact that at an earlier stage, the so called partition was a carnou flag will not justify the Income-tax Authorities completely ignoring a subsequent suit for partition in the family and an award in that suit. In re *Gulab Singh Johri Mal* 1946 I T R 246 (Lah.)

Separation or partition—Sub section (1)—as it stood before 1939—required that there should be a separation in status and also a partition of property in definite portions. The reference to definite portions was construed in one case to refer to division by metes and bounds. *Saligram Ramlal v Commissioner of Income tax*, 7 I T C 354 1934 I T R 448 (Lah.) On the other hand it was considered in another case that it was immaterial whether the property was held in defined shares or divided by metes and bounds, so long as there was a complete disruption of the family. *Biralkhmal Lodha v Commissioner of Income tax U P* 1934 I T R 164 56 All 504 A I R 1935 Lah 81. In re *Sir Bissessar Das Daga and others*, 1936 I T R 66. The question came before a Full Bench of the Lahore High Court in *Sher Singh Nathuram v Commissioner of Income tax, Punjab* 1934 I T R 479 who ruled that a division by metes and bounds was not necessary and that the words 'partitioned in definite portions' really meant 'partitioned in definite shares'. It was not sufficient for the purposes of this section that there had been a mere disruption of the family on the other hand it was not necessary that there should be a division by metes and bounds. What was required was disruption of the family plus the definite ascertainment of the shares of the members whether by consent or otherwise. *Sher Singh Nathuram v Commissioner of Income tax, Punjab* 1934 I T R 479. The ruling in *Saligram Ramlal's case* 1934 I T R 448 *supra* was not discussed and was therefore not formally overruled. According to the Patna High Court the Income tax Officer had not to enquire into the separation or disruption of the family notional or otherwise. He merely had to enquire into the question of whether the family property had in fact been divided. *Lachiram Baldeodas v Commissioner of Income tax B & O* 1936 I T R 279. This last decision has been modified by the amendment in 1939.

In a Mitakshara family by a mere claim to partition a division of interest may be effected among coparceners so as to disrupt the family and extinguish all right of succession by survivorship. Till the shares are determined or partition made by metes and bounds which may take time the family property will belong to the members as in a Dayabhaga family i.e. in effect as tenants in common. If the property has been partitioned in definite portions assessment will be apportioned and made individually on the members notwithstanding section 14(1) but holding all the members jointly and severally liable for the total tax of the family if not so partitioned the family is deemed to continue. *Sirdar Sundar Singh Majhi v Commissioner of Income tax U P*, 1942 I T R 457 (P C.)

In *Gordhandas Mangaldas v Commissioner of Income tax Bombay* 1913 I T R 183 the Bombay High Court dissented from *Sher Singh Nathuram v Commissioner of Income tax Punjab* 1934 I T R 479. In reference to property, the words portion and share are not synonymous. The former refers to a part of the property itself while the latter refers to the interest of an individual in the property. A room is a portion of a house not a share in it. Though physical division may not be

possible in all cases : e , a business there should be a division into definite portions : e , clearly identifiable portions

Res judicata—The recognition by the Revenue in a given year of partion of the family does not preclude the Revenue from treating the family as joint in later years if there is evidence for such a finding *Mathradas & Sons v Commissioner of Income tax Punjab* 1933 I T R 212 A I R 1933 Lah 815 Similarly the failure of the assessee to seek the help of this section in one year will not prevent his seeking it in a later year *Biradimal Iodha v Commissioner of Income tax U P , (All)* 1934 I T R 164 56 All 504 *Sher Singh Nathuran v Commissioner of Income tax Punjab* 1934 I T R 479 A I R 1935 Lah 81 In re *Sir Bissessar Das Daga and others* 1936 I T R 66 See also rulings under section 23 as to *res judicata*

Received in sub section (2) does not necessarily mean cash receipt nor does it exclude accrue or arise The actual quantum of total income would be determined with reference to sections 4 13 16 and other relevant sections

By or on behalf of the joint family as such—The words are intended to draw a clear line between the joint income and other income

Questions of fact and law—See notes under section 2 (a) as to how far the status of a Hindu family is a question of fact or law

26 (1) Where, at the time of making an assessment under section 23 it is found that a change has occurred in the constitution of a firm or that a firm has been newly constituted, the assessment shall be made on the firm as constituted at the time of making the assessment

Provided that the income, profits and gains of the previous year, shall for the purpose of inclusion in the total incomes of the partners, be apportioned between the partners who in such previous year were entitled to receive the same

Provided further that when the tax assessed upon a partner cannot be recovered from him it shall be recovered from the firm as constituted at the time of making the assessment

(2) Where a person carrying on any business, profession or vocation has been succeeded in such capacity by another person, such person and such other person shall, subject to the provisions of sub section (4) of section 25, each be assessed in respect of his actual share, if any, of the income, profits and gains of the previous year

Provided that, when the person succeeded in the business, profession or vocation cannot be found, the assessment of the profits of the year in which the succession took place up to the date of succession, and for the year preceding that year, shall be made on the person succeeding him in like manner and to the same amount as it would have been made on the person succeed-

ed or when the tax in respect of the assessment made for either of such years assessed on the person succeeded cannot be recovered from him, it shall be payable by and recoverable from the person succeeding and such person shall be entitled to recover from the person succeeded the amount of any tax so paid

History—This section has been completely recast twice since 1922, once in 1928 and again in 1939. A major change was made in 1939 introducing the principle of taxing predecessors and successors on what they respectively were entitled to receive.

The amendments in 1939 restore the main part of sub section (1) to substantially what it was before 1928, but the question raised in *Mellor's case*, 1 I T C 320 (Bom), *vis*, whether the apportionment between partners should be with reference to the position on the date of assessment or to the position in the previous year when the profits under assessment were earned will not now arise since the proviso makes it clear that the apportionment should be made with reference to what each partner was entitled to receive during the previous year.

The question which arose formerly with reference to succession *vis*, whether tax should be levied from the successor (in respect of the profits of the period relating to the predecessor) with reference to the predecessor's status, (*vis*, registered or unregistered firm, individual, company, etc.) or the successor's status—a matter of considerable importance with reference to Company super tax and taxation of unregistered firms, does not arise now because both predecessor and successor will now be taxed each in respect of his actual share. The rate of tax to be borne will depend on the respective statuses of the predecessor or successor, *e g*, whether unregistered firm or company or individual or Hindu joint family. The rate will obviously be the rate laid down by the Finance Act in force at the time of the assessment. Formerly the whole question was one of difficulty. The Allahabad High Court held in *Begg Sutherland & Co's case*, 2 I T C 30, 47 All 715, A I R 1925 All 535 and *Nehalchand Kisorilal's case*, 2 I T C 338, A I R 1927 All 327, that the old section was only bare machinery and that tax was to be recovered from the successor with reference to the status of the predecessor while the Bombay High Court held in *Western India Turf Club's case*, 2 I T C 227, 52 Bom 640, A I R 1928 P C 1, that the tax was to be recovered with reference to the status of the successor. The Privy Council in the *Western India Turf Club's case* supported the Bombay view on the ground that tax is imposed only by the Finance Act which may be long after the date of succession and no one can say at the latter date what tax will be payable on a future date after a new Finance Act is passed. Old sub section (2) incorporated this decision (see also *Hutkar Bros v Commissioner of Income tax, Punjab*, 1936 I T R 135 and *Commissioner of Income tax, Madras v P R A L M Muthukarappan Chettiar*, 1939 I T R 29, the latter extending the principle of assuming that the successor had owned the business in the previous year), but as already stated, this question does not arise now.

'At the time of making an assessment'—These words simply mean 'in the course of process of assessment', and do not refer to the 'previous year'. *Commissioner of Income tax, B & O v Maharaja of Darbhanga*, 1944 I T R 116.

Computation of income—Section 26 is not concerned with the computation of income but with who is liable to pay the tax. The relevant sections have to be applied for the purpose of computation, and in respect of set off and carry forward of losses, section 24 should be applied. *Commissioner of Income tax B & O v Maharaja of Darbhanga*, 1944 I T R. 116

Change in constitution—Firm.—The first sub section applies only to those cases in which a change has occurred in the constitution of the firm or a new firm has been constituted. Other cases fall under the second sub-section

‘Change in the constitution of a firm means a change in the personnel of the partners and not merely a change in the proportions of the shares of the partners, *In re Moolji Sicks* 1938 I T R 234 (Cal)

The date on which a partnership is dissolved is a question of fact. Even though an agreement may provide for the dissolution on a certain date, the partnership may in fact continue beyond that date, *Faraday (Michael), Rodgers and Eller v Carter*, 11 Tax Cases 565

Regarding the assessment, on majority, of minors admitted to the benefits of partnership, *see* notes under section 16 (3) and in *re Chimanbhai Lalbhai*, 1944 I T R 199 (Bom)

Assessment—In sub section (1) the word refers evidently to the determination of total income though the word assessed has been used with reference to tax in the second proviso. The recovery of tax will be determined by the provisos read with section 23. Thus, if either firm is unregistered and treated as such, tax will be recovered from the firm itself, the partners getting immunity under sections 14 and 56 from taxation a second time. Or, if the tax cannot be recovered from a partner in a registered firm (or unregistered firm treated as registered), it will be recovered from the firm as such

Previous year—Both the sub-sections assume continuity of the firm's previous year and if the change in the firm or succession synchronises with a change in the accounting year, the case will be dealt with by the Income tax Officer under section 2 (11), who will record an order regarding the conditions on which the change was permitted *see* notes under section 2 (11)

Apportionment—Under the first sub section the function of the Income-tax Officer is first to determine the total income of the firm during the period covered by the assessment, *i.e.*, from the last date of the last previous year already assessed to the end of the previous year under assessment (this period may be more or less than 12 months if a change of previous year has been permitted) and then to ascertain the amounts which each partner (or either old or new firm if unregistered and treated as such) was entitled to receive

If the firm is throughout unregistered or both the firms are unregistered, the question of apportionment between partners will arise only with reference to sections 14, 16 and 56, since the firm or firms and not the partners would be themselves taxed. If both the firms are unregistered, the profits of the period must obviously be apportioned between them in the first instance before the respective shares of the partners are determined for the purpose of sections 14 and 56

Under the second sub-section also, the position is the same if both the predecessors and successors are firms

Whether a change in personnel of the partners is merely a change in the constitution of the firm or amounts to succession by a new firm is a question of fact. On the death of a partner new partners were taken and the same business was continued in the same premises under the same name and management. The assets and liabilities of the old firm were however taken over by the new firm only after nineteen months. The Appellate Tribunal agreed with the Income tax Officer that there had only been a change in the constitution of the firm and the High Court declined to interfere. *Ghella Dayal v Commissioner of Income tax Bombay* 1945 I T R 133

Actual share—i.e., what he is entitled to irrespective of what he may have actually received the share is of the profits of the previous year (as computed for income-tax purposes) of the business etc

Thus if a registered firm consisted of partners A B & C with equal shares and carried on business throughout the year ended 31st January, 1939 (the previous year for 1939-40 assessment) its total profits amounting to Rs 30 000 and if on 1st May 1939 A retired and D came in as a partner taking over A's share the assessment for 1939-40 would be made on this firm B C D because that is the firm as constituted at the time of assessment but the profits of the previous year having been determined these profits would be divided for assessment purposes between A B & C (and not between B C & D). A B & C would each be assessed on Rs 10 000 while D will pay no tax in respect of the profits for the year ended 31st January 1939 assessed in 1939-40

In the assessment for 1940-41, if there were no further change in partnership up to 31st January 1940 the profits would be divisible as follows—

A— $\frac{1}{3}$ proportion of the profits firm 1st February to 30th April 1939

B— $\frac{1}{3}$ of the profits of the whole year ending 31st January 1940

C— $\frac{1}{3}$ of the profits of the whole year ending 31st January 1940

D— $\frac{1}{3}$ proportion of the profits for the period 1st May, 1939 to 31st January 1940

(Income tax return)

Hindu undivided family—Associations of individuals etc.—Section 25 A deals with the assessment of Hindu undivided families immediately after partition. Section 26 (1) deals with changes in the constitution of a firm and section 26 (2) with all cases of succession to a business profession or vocation. There is no provision for cases of changes of membership or constitution of other associations of individuals

As regards the scope of the two sections when members of a Hindu family divide and then form a firm or other association see notes under section 25 A

Business profession or vocation—As regards the meanings of these expressions see notes under sections 2 (4) and 4 (3) (vi). Though the first half of the section viz. that which relates to the change in the constitution of a firm applies to all cases irrespective of what are the activities of the firm and its sources of income it must be remembered that a firm's activities can only embrace business profession or vocation see the Indian

Partnership Act, 1932 The second part of the section applies in terms only to cases of succession to business, profession or vocation. Where a person succeeds to income under other heads than from a business, profession or vocation this section will not apply, and the taxing authorities can only tax the actual person who received the income in question or to whom it accrued and not the person who has succeeded to the property or securities or income from other sources as the case may be.

In such capacity—These words are important and when, on the facts, any difficulty arises as to the legal construction of the words 'succeeded in such capacity' a question of law arises. See rulings referred to under section 25.

Subject to the provisions of section 25 (4)—Where that section is applicable the predecessor will not be taxed at all and may even be eligible for refund.

Succession—As to what constitutes succession see rulings referred to in the notes under section 25.

Where one of the partners takes over the business of the firm, the section applicable is section 26 and not section 44 the case being one of succession. *S M S Karupiah Pillai v Commissioner of Income-tax, Madras* 1941 I T R 1.

The transfer should be effective, and a mere agreement to transfer the business etc. will not bring section 26 into operation. Also the transfer should precede the assessment if the section is to apply, *Bagharandas Harikrishnadas v Commissioner of Income tax, C P*, 1938 I T R 176.

Partial succession—Old sub-section (2) was also applied to cases of partial succession, i.e., to succession to one business among several, (*Ramarakhmal v Commissioner of Income tax, Punjab*, 1937 I T R 137 A I R 1937 Lah 830 and other cases referred to below), and there seems to be no reason why the new sub-section (2) should not be similarly applied. In fact the general plan of the new section of taxing each person on what he gets makes it less difficult to extend the section to cases of partial succession.

While there can be no partial succession to a business, i.e., to a part of a business (as distinguished from succession to one of several businesses of the same person) *Stockham v Wallasey District Council*, 95 L T 834, *Commissioner of Income tax, Burma v N N Firm*, 1934 I T R 83, A I R 1934 Rang 13, it is not necessary that the successor should succeed to each and every business of the predecessor. The extension of the principle of *M Ar Ar Arunachalam Chelthar's case*, 1 I T C 278, 47 Mad 660 i.e., 'any business' in section 10 each and every business, to cases under section 26 would lead to absurdity. The scheme of the Act is to avoid assessing two persons in respect of the same business for the same period and to assess the one who can be more properly and conveniently assessed, *Commissioner of Income tax Madras v Best & Co., Ltd* 55 M 832 6 I T C 271, A I R 1932 Mad 434. The Judicial Commissioner's Court of Sind thought that because the English law stressed the succession to a business while the Indian law referred to a 'person' and 'in such capacity,' the latter required the predecessor to be wiped out before there could be a succession. In view, however, of the instructions in the Income tax Manual to the contrary and the doubtful nature of the issue the Court decided to give the meaning more favourable to the tax payer,

Commissioner of Income tax, Bombay v Sind Light Railway Co, 138 I C 673 A I R 1932 Sind 189

Business outside British India.—Before section 4 was amended in 1939 there had been doubts as to how far section 26 applied to firms outside British India

See *V R S A R Arunachalam Chettiar v Commissioner of Income tax, Madras*, 57 M L J 300, 3 I T C 441, A I R 1929 Mad 769 (F B) *Commissioner of Income tax, Madras v P R A L M Muthukaruppan Chettiar*, 1939 I T R 29, A I R 1939 Mad 376 The amendment of section 4 in 1939 has resolved these doubts

'Escaped' income of predecessor—Under the pre-1939 law income which had escaped assessment in the hands of the predecessor in business, etc., could be taxed under section 34 in the hands of the successor. It was immaterial for this purpose whether the succession took place before or after the close of the year in which the income escaped assessment. The only important dates were the date of assessment and the year of account, *Nachal Achu v Commissioner of Income tax, Madras*, 1933 I T R 277, A I R 1934 Mad 63 *Ram Rakhamal v Commissioner of Income tax, Punjab* 1937 I T R 137 A I R 1937 Lah 830. These decisions are now obsolete. Under section 26 (2) the predecessor and the successor is each assessed on his actual share and the predecessor's tax can be recovered from the successor only if the former can not be found.

Taking the converse case even under the pre-1939 law the fact that the predecessor had been wrongly taxed on profits taxable on the successor would not entitle the successor to exemption to that extent, he had to meet his liability and it was for the predecessor to obtain refund of tax if he was eligible thereto. *Karupiah Pillai v Commissioner of Income tax, Madras*, 1941 I T R 1.

Set off—As to set-off of losses in case of succession see notes under section 24.

Carry forward of losses—See section 24 and notes thereunder. Such carry forward is inadmissible in cases of succession, unless succession is by inheritance.

Notice to successor—The proceedings against the successor do not require to be initiated with a *de novo* notice under section 22 (2) or section 34. It is sufficient if the predecessor had received the notice, for such notice automatically attracts all the provisions of sections 23 and 26. *Nachal Achu v Commissioner of Income tax, Madras* supra *Ram Rakhamal v Commissioner of Income tax Punjab*, supra. The words 'at the time of making an assessment' simply mean 'in the course of the process of assessment', and the word 'assess' is not used here in the restricted sense of making an order of assessment. The process of assessment begins with the service of a notice under section 22 (2) and continues till an order of assessment has been made. A successor therefore cannot escape liability on the ground that since his predecessor could not be assessed under section 23 (owing to death in this case) no assessment could be made on the successor. *Maharajadhiraj of Darbhanga v Commissioner of Income tax, Bihar and Orissa* 1934 I T R 345 (P C). Section 24-B was not in existence at the time this case was decided. The present plan of section 26 is not inconsistent with this ruling.

Cannot be found—i.e., by the Income-tax authorities after reasonable efforts. The same applies to 'cannot be recovered'. Where the partners

of the predecessor in a firm are alive and their addresses are known, it cannot be said that they 'cannot be found'. Under section 2 (6-B), the words 'firm' etc. have the same meanings as in the Indian Partnership Act, and under section 4 of the latter, persons who have entered into partnership are called individually partners and collectively a firm. Merely because the Income tax Act treats a firm as a separate entity for certain purposes it does not follow that for all purposes it should be treated as a judicial person, *Commissioner of Income tax v National Cycle Importing Co*, 1941 I T R. 502.

Limitation of one year—This limitation overrides the limitation laid down in section 34. In cases of succession, the successor can be proceeded against on account of the predecessor's income which escaped assessment only to the extent of one year over and above the year of succession.

It should also be noted that the tax in respect of such predecessor's income as escaped assessment should be levied with reference to the predecessor's status though it is recovered from the successor.

Indemnity—In view of section 65 the concluding part of the proviso to sub-section (2) seems to be superfluous. It was added by the Select Committee in 1939 out of abundant caution. The mode of recovery by the successor is that which is permissible to him under the ordinary law, viz., set-off of debts or appropriation of predecessor's other monies or suit as the case may be.

Splitting up and amalgamation of business—The old section 11, before 1939 presented certain difficulties when two or more firms coalesced into a single firm or company, i.e., where two or more businesses or professions were merged, see *Hassana Labbai & Co v Commissioner of Income tax, Madras*, 3 I T C. 341, or if a part of a business only was transferred and the predecessor continued to carry on the business. But these difficulties cannot arise now since the present section proceeds on the simple plan of taxing both predecessor and successor on what each respectively is entitled to receive out of the profits of the combined period.

Unabsorbed depreciation—As regards the right of a successor to the unabsorbed depreciation allowance carried forward from the predecessor, see rulings under section 10 (2) (vi).

Interest paid to retiring partner—Where one or more partners leave a firm in the year of assessment receiving their capital with interest to the date of leaving, the surviving partners cannot claim to deduct from the profits of the firm the interest paid to the retiring partners. *Commissioner of Income tax Madras v Karupfaswami Mooppanar* 1934 I T R. 284 7 I T C. 283.

Revaluation of assets—No deduction can be claimed on account of revaluation of assets as a result of reconstruction of partnership. *K A R K Chettyar v Commissioner of Income-tax Burma* 7 I T C. 44, A I R. 1934 Rang. 1.

Succession by inheritance—This section applies to all kinds of succession and is not restricted to cases of succession *inter vivos*, *Maharajahdiraj of Darbhanga v Commissioner of Income tax Bihar and Orissa* A I R. 1933 Pat. 123 12 Pat. 5 affirmed by the Privy Council in 13 Pat. 607 61 I A. 312 1934 I T R. 345. In cases of succession by inheritance, the tax payable by the predecessor in respect of the period during which he was alive should evidently be recovered from whoever is responsible for it under section 24-B, i.e. not necessarily the successor but section 24-B is not intended to override

section 26 and where both are applicable, i.e., in cases of business, etc., it is the latter that should be applied *Ramaswami Iyengar v Commissioner of Income tax, Madras*, 1943 I T R 610

United Kingdom Law—The law about the computation of profits in cases of succession in the United Kingdom is complicated and has undergone several changes the most important being in 1926 *See for example Inland Revenue v Gibbs*, 1942 I T R 12 (Supp)

The only relevant rules and decisions under the United Kingdom law are those relating to the difference between 'discontinuance' and 'succession' which have been referred to under section 25 *See also notes under section 44*

26-A (1) Application may be made to the Income-tax officer on behalf of any firm, constituted under an instrument of partnership specifying the individual shares of the partners, for registration for the purposes of this Act and of any other enactment for the time being in force relating to income-tax or super-tax

(2) The application shall be made by such person or persons, and at such times and shall contain such particulars and shall be in such form, and be verified in such manner, as may be prescribed, and it shall be dealt with by the Income-tax Officer in such manner as may be prescribed

Rules

R. 2 Any firm constituted under an Instrument of Partnership specifying the individual shares of the partners may, under the provisions of section 26-A of the Indian Income-tax Act, 1922 (hereinafter in these rules referred to as the Act), register with the Income-tax Officer, the particulars contained in the said Instrument on application made in this behalf

Such application shall be signed by all the partners (not being minors) personally and shall be made—

- (a) before the income of the firm is assessed for any year under section 23 of the Act, or
- (b) if no part of the income of the firm has been assessed for any year under section 23 of the Act before the income of the firm is assessed under section 34 of the Act, or
- (c) with the permission of the Appellate Assistant Commissioner hearing an appeal under section 30 of the Act, before the assessment is confirmed, reduced, enhanced or annulled, or
- (d) if the Appellate Assistant Commissioner sets aside the assessment and directs the Income-tax Officer to make a fresh assessment before such fresh assessment is made, or
- (e) before or after the dissolution of the firm in respect of the assessment or assessments to be made on its income up to the date of dissolution

Provided that where an application is made under clause (e) after dissolution of the firm it shall be signed by all persons who were partners in the firm immediately before dissolution and by the legal representative of any such person who is deceased

R. 3 The application referred to in rule 2 shall be made in the form annexed to this rule and shall be accompanied by the original Instrument of Partnership under which the firm is constituted, together with a copy thereof, provided that if the Income-tax Officer is satisfied that for some sufficient reason the original Instrument cannot conveniently be produced, he may accept a copy of it certified in writing by all the partners (not being minors) or where the application is made after dissolution of the firm, by all the persons referred to in the proviso to the said rule to be a correct copy, and in such a case the application shall be accompanied by a duplicate copy

Form I.

Form of application for registration of a firm under section 26-A of the Indian Income tax Act, 1922

To

The Income-tax Officer,

Dated 19
Income tax year 19 19

1 We beg to apply for
the registration of our firm under section 26-A of the Indian Income-tax Act, 1922, for the assessment for the income tax year 19 19

2 The original a certified copy of the Instrument of Partnership
under which the firm is constituted specifying the individual shares of the
a copy

partners together with is enclosed The prescribed
a duplicate copy
particulars are given in the Schedule below

3 We do hereby certify that the profits (or loss if any) of the previous year the period up to the date of dissolution were (will be) divided or credited as shown in section B of the Schedule and that the information given above and in the attached Schedule is correct

(Signatures)
(Address)

SCHEDULE

NOTE —This application must be signed by all the partners (not being minors) in the firm as constituted at the date on which the application is made or where the application is made after dissolution of the firm, by all persons (not being minors) who were partners in the firm immediately before dissolution and by the legal representative of any such person who is deceased

Name of partner	Address	Date of admission to partnership	(1) Interest on capital or loans (if any)	(1) Salary or commission from firm.	(2) Share in the balance of profits (or loss) (as per the rupee)	Remarks
1	2	3	4	5	6	7

- (a) *Particulars of the firm as constituted at the date of this application*
- (b) *Particulars of the apportionment of the income, profits, or gains (or loss) of the business, profession or vocation in the previous year between the partners who in that previous year were entitled to share in such income, profits or gains (or loss).*

NOTE —(1) If the interest, salary and (or) commission is payable (or allowable) only if there are sufficient profits available this fact should be noted by making the items in the appropriate columns with the letter 'R' (In other cases the interest, salary and (or) commission may exceed the total profits so as to leave a balance of net loss divisible in column 6)

(2) If any partner is entitled to share in profits but is not liable to bear a similar proportion of any losses this fact should be indicated by putting against his share in column 6 the letter "P"

R. 4 If, on receipt of the application referred to in Rule 3, the Income tax Officer is satisfied that there is a firm in existence constituted as shown in the instrument of partnership and that the application has been properly made, he shall enter in writing at the foot of the instrument or certified copy, as the case may be, a certificate in the following form, namely —

instrument of partnership

"This _____ has this day been
certified copy of an instrument of partnership
registered with me, the Income-tax Officer for
in the province of _____ under section 26 A
of the Indian Income-tax Act, 1922, and this certificate of registration shall
have effect for the assessment for the year ending on the 31st day of
March, 19 ____"

(2) If the Income tax Officer is not so satisfied, he shall pass an order in writing refusing to recognise the instrument of partnership or the certified copy thereof, and furnish a copy of such order to the applicants

(3) The certificate referred to in paragraph (1) above shall be signed by the Income tax Officer, who shall thereupon return to the applicants the Instrument of Partnership or the certified copy thereof as the case may be, and shall retain the copy or the duplicate copy thereof

R 5 The certificate of registration granted under Rule 4 shall have effect only for the assessment to be made for the year mentioned therein

R. 6 Any firm to whom a certificate of registration has been granted under Rule 4 may apply to the Income tax Officer to have the certificate of registration renewed for a subsequent year Such application shall be signed by all the partners (not being minors) of the firm or where the application is made after dissolution of the firm, by all persons (not being minors) who were partners in the firm immediately before dissolution and by the legal representative of any such person who is deceased and accompanied by a certificate in the form set out below The application shall be made within the time and subject to the conditions, if any, which are specified in clause (a), clause (b), clause (c), or clause (d) as the case may be, of Rule 2

Form of application for the Renewal of Registration of a firm under section 26-A of the Indian Income tax Act, 1922

To

The Income-tax Officer,

Dated

19 .

Assessment for the Income-tax year

19 | 19

1 We beg to apply for the renewal of registration of our firm under section 26-A of the Indian Income-tax Act, 1922 for the assessment for the Income tax year 19 | 19 instrument of partnership

2 The _____ was registered by certified copy of the instrument of partnership the Income tax Officer for _____ in the province of _____ on the _____ of _____ 19 _____ and we hereby certify that the constitution of the firm and the individual shares of the partners as specified in the instrument of partnership

_____ so registered on certified copy of the instrument of partnership remains unaltered

3 We do hereby further certify that the profits (or loss if any) of the _____ previous year were _____ divided or credited as shown the _____ period up to the date of dissolution were, will be

below —

Particulars of the apportionment of the income, profits or gains (or loss) of the business profession or vocation in the previous year or the period up to the date of dissolution between the partners who were entitled to share in such income, profits or gains (or loss)

Name of Partner	Address	Date of admittance to partnership	(i) Interest on Capital or loans (if any)	(j) Salary or commission from firm	(u) Share in the balance of profits or loss (annas and pice in the rupee)	Remarks
1	2	3	4	5	6	7

NOTE —(i) If the interest salary and or commission is payable (or allowable) only if there are sufficient profits available, this fact should be noted by marking the items in the

- (a) *Particulars of the firm as constituted at the date of this application*
- (b) *Particulars of the apportionment of the income, profits, or gains (or loss) of the business, profession or vocation in the previous year between the partners who in that previous year were entitled to share in such income, profits or gains (or loss)*

NOTE —(1) If the interest, salary and (or) commission is payable (or allowable) only if there are sufficient profits available this fact should be noted by making the items in the appropriate columns with the letter 'R' (In other cases the interest, salary and (or) commission may exceed the total profits so as to leave a balance of net loss divisible in column 6)

(2) If any partner is entitled to share in profits but is not liable to bear a similar proportion of any losses this fact should be indicated by putting against his share in column 6 the letter "P"

R 4 If, on receipt of the application referred to in Rule 3, the Income tax Officer is satisfied that there is a firm in existence constituted as shown in the instrument of partnership and that the application has been properly made, he shall enter in writing at the foot of the instrument or certified copy, as the case may be, a certificate in the following form, namely —

instrument of partnership

' This _____ has this day been
certified copy of an instrument of partnership
registered with me, the Income-tax Officer for
in the province of _____ under section 26-A
of the Indian Income tax Act, 1922, and this certificate of registration shall
have effect for the assessment for the year ending on the 31st day of
March, 19 _____

(2) If the Income tax Officer is not so satisfied, he shall pass an order in writing refusing to recognise the instrument of partnership or the certified copy thereof, and furnish a copy of such order to the applicants

(3) The certificate referred to in paragraph (1) above shall be signed by the Income tax Officer who shall thereupon return to the applicants the Instrument of Partnership or the certified copy thereof as the case may be, and shall retain the copy or the duplicate copy thereof

R. 5 The certificate of registration granted under Rule 4 shall have effect only for the assessment to be made for the year mentioned therein

R. 6 Any firm to whom a certificate of registration has been granted under Rule 4 may apply to the Income-tax Officer to have the certificate of registration renewed for a subsequent year. Such application shall be signed by all the partners (not being minors) of the firm or where the application is made after dissolution of the firm, by all persons (not being minors) who were partners in the firm immediately before dissolution and by the legal representative of any such person who is deceased and accompanied by a certificate in the form set out below. The application shall be made within the time and subject to the conditions, if any, which are specified in clause (a), clause (b), clause (c), or clause (d) as the case may be, of Rule 2

Form of application for the Renewal of Registration of a firm under section 26-A of the Indian Income tax Act, 1922

To

The Income-tax Officer

Dated 19 .

Assessment for the Income tax year 19 | 19

1 We beg to apply for the renewal of registration of our firm under section 26-A of the Indian Income-tax Act, 1922 for the assessment for the Income-tax year 19 | 19 instrument of partnership

2 The _____ was registered by certified copy of the instrument of partnership the Income-tax Officer for _____ in the province of _____ on the _____ of 19 _____ and we hereby certify that the constitution of the firm and the individual shares of the partners as specified in the instrument of partnership

_____ so registered on certified copy of the instrument of partnership remains unaltered

3 We do hereby further certify that the profits (or loss if any) of the _____ previous year were _____ divided or credited as shown the _____ period up to the date of dissolution were, will be below —

Particulars of the apportionment of the income, profits or gains (or loss) of the business, profession or vocation in the previous year or the period up to the date of dissolution between the partners who were entitled to share in such income, profits or gains (or loss)

Name of Partner	Address	Date of admittance to partnership	(i) Interest on Capital or loans (if any)	(ii) Salary or commission from firm	(iii) Share in the balance of profits or loss (annas and pice in the rupee)	Remarks
1	2	3	4	5	6	7

NOTE —(i) If the interest, salary and/or commission is payable (or allowable) only if there are sufficient profits available, this fact should be noted by marking the items in the

appropriate columns with the letter "R" (In other cases the interest, salary and/or commission may exceed the total profits so as to leave a balance of net loss divisible in column 6).

(u) If any partner is entitled to share in profits but is not liable to bear a similar proportion of any losses this fact should be indicated by putting against his share in column 6 the letter "P"

(Signatures)

(Address)

NOTE—This application must be signed personally by all the partners (not being minors) in the firm, or if made after dissolution of the firm, by all persons (not being minors), who were partners in the firm immediately before dissolution and by the legal representative of any such person who is deceased

R. 6-A On receipt of an application under Rule 6 the Income tax Officer may, if he is satisfied that the application is in order, grant to the assessee a certificate signed and dated by him in the following form—

'The registration of the firm of _____ granted on _____ is renewed by me and will remain effective for the assessment for the year ending on the 31st day of March 19 ____'

If the Income tax Officer is not so satisfied, he shall pass an order in writing refusing to renew the registration of the firm

R. 6-B In the event of the Income tax Officer being satisfied that the certificate granted under Rule 4 or under Rule 6-A has been obtained without there being a genuine firm in existence he may cancel the certificate so granted

History—This section was introduced in 1930. Formerly the conditions and the procedure were regulated by the definition in section 2 (14) and the rules framed thereunder

Changes in 1939—Important changes were made in 1939 in the rules relating to the registration of firms. Firstly it is now necessary for *all* the partners to apply for registration and for renewal thereof, and the Income-tax Officer has no power to dispense with the signature of any of the partners even if sufficient cause be shown. Secondly, full details have to be given in the application not only of the constitution of the firm at the date of application but also of the apportionment of profits of the previous year under assessment. Thirdly, the rules codify (what was always implicit and recognised by Courts—see rulings quoted below) that a condition precedent to registration is the Income tax Officer's being satisfied that there is a firm in existence as shown in the deed of partnership. Fourthly, what is a corollary from this, the rule explicitly provides for the cancellation of registration made by mistake when there is no genuine firm in existence, neutralising the decision in *Sir Bissessar Daga's case*, 1936 I T R. 66 (Nag). And lastly, an order of refusal to register should be in writing, the partners having a right of appeal under section 30

Refusal to register—An appeal lies under section 30 against the refusal of the Income tax Officer to register a firm, so, the order of refusal should be in writing and communicated to the firm

The remedy against refusal to register a firm is only through an appeal under section 30, and not through a civil suit against the Crown, *Governor General in Council v Mulla Muhammad Bhai, etc*, 1945 I T R. 10 (Nag)

Cancellation of Registration—Rule 6 B does not require the income tax Officer in terms to pass in writing his order cancelling the registration.

Section 30 provides a right of appeal when registration is cancelled under section 23 (5), but not when it is cancelled under Rule 6-B. The latter cancellation is evidently equivalent to refuse to register, and therefore appealable as such.

Firm, what is a.—See section 2 (6-B) and notes thereunder as to what is a firm, what conditions it should satisfy, etc.

Enquiry by Income tax Officer.—The Income tax Officer has power to call for evidence as to the reliability of the instrument of partnership produced before him and to refuse registration if he is not satisfied about the genuineness of the partnership. *Bissessaral Brylal v Commissioner of Income tax, Bengal*, 4 ITC 365, 57 Cal 1336, A.I.R. 1930 Cal. 449. *Jattu Shah Nattu Shah v Commissioner of Income tax, Punjab*, A.I.R. 1932 Lah 575, 14 Lah 134, 6 ITC 162. *Ghansyandas Ramkumar v Commissioner of Income tax Bihar and Orissa*, 1933 ITR 215, 6 ITC 198. *Raghu Karson v Commissioner of Income tax, B & O*, 5 ITC 389. *Sockina Bhoy Salee Bhoy v Commissioner of Income tax, Bombay*, 6 ITC 13, A.I.R. 1932 Bom 116. *Haji Ghulam Rasul Khudu Bux v Commissioner of Income tax, Punjab*, 1937 ITR 506. In re *Sir Sundar Singh Majithia*, 1938 ITR 336, A.I.R. 1938 All 452. *Hafiz Abdul Ghafar v Commissioner of Income-tax C P*, 1939 ITR 625. In re *Central Talkies Circuit*, 1941 ITR 44 (Bom), or about the existence in law, of one *Hoosen Kasim Dada v Commissioner of Income tax, Bengal* 1937 ITR 182. The onus is on the applicant to prove the genuineness of the partnership. See *Bissessaral Brylal v Commissioner of Income-tax, Bengal*, 4 ITC 365 and cases quoted above. It is similarly for him to prove that a partnership has come into existence and that it is to be assessed instead of a Hindu undivided family, *Lachram Baldeoas v Commissioner of Income tax, B & O*, 1935 ITR 279. *Commissioner of Income tax, Bengal v Goshia Behari Sadhukhan, etc.*, 1946 ITR 219. In re *Gulab Sing Joharimal* 1946 ITR 246 (Lah). Whether the partnership is a sham is a question of fact, and if it is not a sham and is in law a valid partnership the motives of the partnership are irrelevant. *Mulla Fida Ali Sultan Ali v Commissioner of Income tax, C P*, 1937 ITR 615. *Lukhmanjee v Commissioner of Income tax, C P*, 1943 ITR 164.

Application when to be made.—The rule on this point had been altered many times before 1928 from which date it is substantially in its present form. According to the Income tax Manual the words 'No part of the income has been assessed' in Rule 2 (b), refer to cases in which the whole of the income of the person in question had escaped assessment altogether until proceedings were started under section 34. They do not apply to a case in which proceedings have been taken under section 23 in respect of the income of any person and owing to that person's concealing part of his income or owing to a part of his income having escaped assessment for any reason, he has either been declared not liable to tax, or been under-assessed.

In *Hussambhai Bohari v Commissioner of Income-tax*, 2 ITC 43, it was held by the Additional Judicial Commissioner, Central Provinces, that a certificate of registration granted before April in respect of the year commencing 1st April is not void.

Assistant Commissioner's powers.—The Appellate Assistant Commissioner cannot himself register the firm but only condone the delay and permit the Income-tax Officer to accept the belated application. The power of the Appellate Assistant Commissioner is discretionary and not amenable

to the jurisdiction of the High Court unless perversely exercised, *Chiranjul & Sons v Commissioner of Income tax, Punjab*, 1937 I T R 44

Registration—Application for—Signature of—An application made by an agent of the partners would not be adequate, and the registration of the firm on such an application is *ultra vires* and void *C T A C T Nachiappa Chettiar v Secretary of State and another*, 1933 I T R 330, 7 I T C 1 11 Rang 380, A I R 1933 Rang 229 A firm was registered in Burma and assessed as such on the application of the local agent At that time one of the partners was dead The son of the deceased partner who was assessed in Madras to super tax on the share of profits of the firm representing his father's interest objected to the registration as being illegal, but the Burma authorities would not cancel the registration On a reference to the Madras High Court it was held that the assessment made in Madras was correct since the firm continued to be a registered one, and that the assessee's remedy was to file a suit in Burma to get the registration annulled *A C T Nachiappa Chettiar v Commissioner of Income-tax, Madras*, 5 I T C 374

The hint was taken and a suit filed which went to the Rangoon High Court on second appeal That Court considered that the Madras Income-tax authorities ought to have determined for themselves whether the assessee was in fact a partner in the firm and the registration was or was not *ultra vires* The registration was in this case *ultra vires* because there had been a change of partnership (a partner having died) and this fact was not disclosed to the Income tax Officer at the time of registration, and also because the application for registration had been signed only by an agent, *C T A C T Nachiappa Chettiar v Secretary of State*, 1933 I T R 330, 11 Rang 380 A I R 1933 Rang 229, 7 I T C 1

The signature of the application by a clerk would not suffice, and the certificates would have to be completed by the partners, *Commissioner of Income tax, Madras v Gelli Krishnamurthy etc*, 1940 I T R 121

It should be noted that since 1st April, 1939, applications for registration have to be signed by all the partners According to the Madras High Court, *Commissioner of Income tax v Rao Bahadur Ravulu Subba Rao etc*, 1946 I T R 232, the word 'personally' excludes an authorised agent, section 2 of the Powers of Attorney Act, 1882 only states a general rule, which cannot override the specific provision in Rule 6 of the Income tax Rules In practice, however, some relaxation seems to have been made especially in respect of persons who cannot be easily reached on account of the war, and the Income tax Officer satisfies himself on the statements of the other partners that the absentee partners' share has been duly credited to him

Invalid partnerships—The Income tax Officer can only register the partnership specified in the instrument produced before him Therefore, if some of the partners cannot be partners, *e.g.*, a *Mutawali* of a *Wakf* or a minor, the Income tax Officer cannot treat the partnership as one subsisting between the remaining partners and register it, nor can the *wakf* or the minor be treated a partner in a loose sense and the partnership registered *Hossen Kasim Dada v Commissioner of Income tax, Bengal*, 1937 I T R 182

Fictitious firms—Where it was alleged that certain gifts had been made out of the capital of his business by a person to two of his employees and his two sons and that these sums had been reinvested by these four persons in the business which had thereby become a partnership of five persons,

and under the law the gifts had to be made in accordance with the Transfer of Property Act but were not it was held that the alleged firm could not be registered as such *Abba Dada & Co v Commissioner of Income tax, Burma*, 1938 I T R 470 A I R 1938 Rang 435

A firm consisting of the *kartas* of three Hindu families admitted eleven more members *viz*, their wives and their daughters in law The Income tax Department held that the new membership was fictitious and intended only to reduce tax and therefore refused to register the firm Thereupon the firm transferred its rights to a firm in another province composed of the same three *kartas* and their ten sons and the Income-tax Officer considered this transfer also to be fictitious and the High Court declined to interfere the question being one of fact *Bhagavandas Harkishandas v Commissioner of Income tax C P* 1938 I T R 176

By registering a firm an Income-tax Officer is not estopped from enquiring whether the alleged partner is the real partner or not *Kirpal Das Motandas v Commissioner of Income tax, Sind*, 1942 I T R 505 Section 26-A is a procedural section and does not affect the liability of a partner to tax which is determined by sections 3 and 4 An assessment can therefore be made on a basis different from what has been registered under section 26-A *Shapurji Pallonji v Commissioner of Income tax* 1945 I T R 113 (Bom)

On the placing of section 16 (3) on the statute book a family firm dropped out the minors and brought in an old lady of the family and in view of the following facts *viz*, (1) the lady was given a very large share in the profits without any reason or consideration (2) the firm did not need the finance which the lady was alleged to have brought in (3) she could not account for the source of the money (4) apart from section 16 (3) there was no apparent ground for the change in the firm the Income tax authorities held that the change in the firm was not genuine and the High Court declined to interfere In *re Central Talkies Circuit* 1941 I T R 44 (Bom.) While an assessee is at liberty so to arrange his affairs as to attract the least tax the transactions on which he relies must be genuine

Instrument of partnership—Registration of—The instrument to be produced before the Income-tax Officer to secure the registration of a firm need not be a registered instrument under the Indian Registration Act. The registration by the Income-tax Officer has nothing to do with registration under the Registration or Partnership Acts The Income-tax Officer as such is not concerned with the fact that the document is insufficiently stamped or requires to be registered under the Indian Registration Act and need not reject such documents as not being legal evidence since they are not adequately stamped nor accept them as being legal evidence merely because they are properly stamped or registered. His duty is to satisfy himself that the transaction evidenced by the instrument is genuine and then act accordingly He is not bound by the technicalities of the Indian Evidence Act—*see notes under section 23* As a Public Officer, however, it is incumbent on the Income-tax Officer to impound a document that comes before him if it is insufficiently stamped—*see section 33 of the Indian Stamp Act*

Hindu undivided families—As to members of Hindu joint families forming themselves into firms and being thus eligible for registration as firms under this section, *see notes under sections 2 (6-B), 2 (9), 25-A and 26* If the Income-tax Officer finds that there is no contractual relationship between the assesseees he cannot register them as a firm, *Piyarelal and*

others v Commissioner of Income tax, Punjab, 1933 I T R 215, A I R 1933 Lah 827, 7 I T C 31 If there has been partial partition and in respect of the partitioned properties a genuine firm has been formed out of the members of the family there are two entities viz, the family and the firm, and the firm is entitled to be registered if it complies with all the other requirements of the law *R B Dandhania v Commissioner of Income tax, B & O, 1944 I T R 126*

Deed of partnership—Which to be produced before Income tax Officer—Ever since 1928 when section 26 was amended so as to cover both super tax and income tax the deed of partnership to be produced before the Income tax Officer is in all cases the deed in force at the time of assessment or rather application. For the purpose of apportionment between partners however if the case falls under section 26 (1), there having been a change in the partnership the older partnership deed also may have to be produced if necessary. The registration is valid only for the year to which it relates and has to be renewed every year by fresh application.

Deceased partner—If one of the partners mentioned in the instrument of partnership is dead and nevertheless his name is included in the application for registration it will be open to the Income tax Officer to refuse registration *Banjee & Co v Commissioner of Income tax Burma 8 I T C 107 Chranji Lal & Sons v Commissioner of Income tax Punjab, 1937 I T R 44*. Where a partner dies before the application for registration is submitted the persons to sign the application are the partners at the time of application. The changed partnership will be dealt with under section 26 (1), and the assessment will be made on the firm as constituted at the time of making the assessment but the apportionment between partners will be based on the shares in the previous year.

Penalty for not distributing profits—See section 28 (2) as to the penalty leviable if the profits of a registered firm are distributed otherwise than in the manner set out in the instrument of partnership disclosed to the Income tax authorities. The registration of a firm cannot be refused on the ground that no disclosure has been made as to when profits will be distributed. Leaving profits in the business does not invalidate a partnership the test is whether the partners can draw their shares when they wish to *Kikabhai v Commissioner of Income tax Central Provinces 4 I T C 178 A I R 1930 Nag 6*

Instrument of partnership—Whether can be implied—The following dicta may be noted.

Ordinarily a contract for a term constituted by a written agreement must be considered as having come to an end at the expiration of the period for which it was entered into, and the contract during the term differs from that which arises from the continuance of the relation by the mutual consensus of the parties after the term has expired. The one is to last for a certain term the other only for so long a time as they both shall choose. Am I then by any principle of law bound to assume or justified in assuming that all the special articles and conditions in the original written deed of partnership for a term are at once transferred by law to this new contract which has no particular limit at the time of its duration? That would be a wrong and extravagant assumption and one that is not warranted by any principle or authority. *Per L. C. Westbury in Clarke v Llach, 1 D G J & S p 44*

There is no doubt about the law that, when there is a partnership for a term of years, and it is afterwards, after the expiration of the term, continued at will, the rule in the absence of a contract to the contrary, is that it may be presumed that the new business is carried on upon the old terms as far as they are applicable to it, and only so far, and as far as the principle is concerned, I do not think there is any discrepancy between any of the authorities, per Lord Selborne in *Neilson v Mossend Iron Co* 11 A C 298

Following the above—and in the absence of anything in section 256 of the Indian Contract Act to the contrary—the Madras High Court held in *M V Krishna Ayyar and Sons v Commissioner of Income tax*, 52 Mad 367, 56 M L J 151 A I R 1929 Mad 67 that where a written instrument of partnership expired and the partnership was continued without any break, or change in personnel, there was no written instrument within the meaning of section 2 (14) of the Income tax Act to enable the firm to be registered. See also *Commissioner of Income tax Madras v Gelli Krishnamurthy, etc*, 1940 I T R 121

Where the trustees of the estate of a deceased partner who are entitled to continue the partnership but are given discretion not to do so or to vary the terms of the partnership decide to continue, even if on identical terms as before, what is formed is a new partnership. The registration of the firm cannot be allowed unless a new instrument is written and produced before the Income-tax Officer. In *re Mokerwal Colhery*, 1942 I T R 422 (Lah)

Where the *shah* partner can increase or decrease the number of *gumasta* partners and actually does so a new partnership is formed which should apply for fresh registration if it requires it. *Commissioner of Income tax, Burma v Seth Mangoomal Lunda Singh* 1939 I T R 208

Letters exchanged may constitute an instrument of partnership. Where the correspondence is silent or incomplete about certain matters, it is necessary to enquire into the subsequent acts of the parties in order to ascertain the nature of the original agreement. In a case in which the Commissioner of Income tax refused to accept certain letters as constituting an instrument of partnership because the reply of the senior partner did not cover all the points raised by the junior partners the Calcutta High Court suggested that an opportunity should be given either for the junior partners to waive the other conditions or for the senior partner to accept them, and that the application for registration as amended in the light of the further document could be accepted as if made within time, i.e., on the date of the original application. *Hari Das v Commissioner of Income-tax, Bengal*, 4 I T C 475, A I R 1932 Cal 409 139 I C 497

A complete instrument of partnership, i.e., one not requiring to be supplemented by other evidence, is not necessary for the purpose of registering a firm. In a case therefore in which three partners had executed this instrument and the fourth had died before executing it, it was left to the Commissioner to register the firm if he was satisfied that the dead person had assented to the instrument before his death. In *re Ramlal Murlidhar*, 58 Cal 1005. A case of this sort will not arise under the new rules which require all the partners to sign the application unless the application is signed before the partnership instrument.

It was not necessary under the rules, as they were before April, 1939, that the partnership deed should be signed by all the partners, and unilateral

agreements executed by *gumasta* partners in favour of Capitalist partners were adequate for the purpose, *Bulchand Kesha-das v Commissioner of Income tax, Sind*, A I R 1930 Sind 301

Instrument of partnership not conclusive—Where there was a partnership deed between father and son, minor sons being excluded and there being no capital account nor any capital contributed by the son, and customers were not informed of the creation of the partnership, it was held that the Income tax Officer had materials before him on which he could find that there was no partnership in existence, *Aborvath Bros v Commissioner of Income tax, Burma*, (1934) 7 I T C 38

Retrospective partnerships—When persons enter into a partnership and execute a deed and say that they are to be partners retrospectively, all that is meant is that they take accounts back to the date mentioned. They cannot in any other sense be partners retrospectively. On the other hand even before the date of the deed they may have been in fact partners without a formal deed of partnership, and in that case the formal deed either supersedes or confirms the previously existing partnership rights. In all cases it is essentially a question of fact when a partnership commenced, *Waddington v O'Callaghan*, 16 Tax Cases 187

Specification of shares—A partnership cannot be registered under this section unless the instrument of partnership on the face of it specifies the individual shares of the partners, even if the Income tax Officer has other knowledge as to the shares. Accordingly, where a partnership was composed of another partnership (of four individuals) and certain (other) individuals, and the instrument of partnership merely showed the aggregate share of profits of the smaller partnership without specifying the shares of each of the four individuals who were members of the partnership, and the Income tax Officer refused to register the bigger partnership though he had registered the smaller one and knew the respective shares of the partners in it the High Court upheld the action of the officer, *Kannappa Naicker v Commissioner of Income-tax, Madras*, 1937 I T R 49. Where certain minors were admitted to the benefits of partnership jointly, without vested, and specific shares for each, the rights being governed *inter se* by survivorship it was held that the Income-tax Officer rightly refused to register the firm *Commissioner of Income tax, Madras v Abdulla Sahib*, 1942 I T R 7

Minors as partners—See the amendment of the definition of 'partner' in section 2 (6-B), so as to include a minor admitted to the benefits of partnership. So long as there are at least two partners competent to contract the fact that a minor has been admitted to the benefits of partnership will not stand in the way of the registration of the firm by the Income-tax Officer. The Income-tax Manual contains instructions to this effect.

Firms as partners—See notes under section 2 (6-B)

The following instructions adopting the rulings in *Jaidayal Madan Gopal v Commissioner of Income tax, U P*, 1933 I T R 186 (All), and *Chandrikaprasad Ramswarup v Ditto*, 1939 I T R 269 (All), are found in the Income tax Manual

"A firm cannot legally enter into partnership with another firm. It does not, however, follow that because a firm is not a partner in another firm what is described as its share in the profits of such firm is not its income. Although a firm cannot enter into partnership with another firm, yet, when two firms do so a larger partnership, the

larger partnership will be treated as one constituted by the members of the two firms. If registration is applied for by the larger partnership, it would be allowed provided the firms entering into partnership are also constituted under instruments of partnership specifying the individual shares of partners.

Registration—Cancellation of—Under section 23 (4) as amended by Act XVI of 1930 it is open to the Income-tax Officer to cancel after giving fourteen days' notice the registration of a firm which fails to produce the accounts and documents called for by the Income-tax Officer under section 22 (4) or the evidence relied on by the firm under section 23 (2). The primary object of registration is to tax each partner on his real income and this cannot be ascertained if the firm defaults in producing the most important evidence for this purpose. In other cases except when there was a change in the partnership between the date of registration and the assessment (about which *see* below) it was doubtful whether the Income-tax Officer could cancel the registration even if he found later on that the partnership was not genuine. In *re Sir Bissessar Das Daga and others* 1936 I.T.R. 66 (Nag) Rule 6-B makes this ruling obsolete.

Partnership—Change in—Between registration and assessment—If there is a change in the constitution of a partnership between the date of the registration with the Income-tax Officer and the date of assessment, the question will arise whether the new firm or rather the firm as newly constituted should not be treated as a separate assessee and called upon to make a return of income and register itself if it seeks that privilege. Such questions would be avoided if the Income-tax Officer postponed registering the firm till he was ready to make the assessment.

27 Where an assessee within one month from the service of a notice of demand issued as hereinafter provided, satisfies the Income-tax Officer that he was prevented by sufficient cause from making the return required by section 22, or that he did not receive the notice issued under sub-section (4) of section 22, or sub-section (2) of section 23, or that he had not a reasonable opportunity to comply, or was prevented by sufficient cause from complying with the terms of the last mentioned notices, the Income-tax Officer shall cancel the assessment and proceed to make a fresh assessment in accordance with the provisions of section 23.

Previous law—Under the Act of 1918, the only way in which an assessee could re-open an assessment was to get the appellate authority to pass an order on appeal remanding the case. The reference to 'the principal officer of a company' was omitted in 1939 as being unnecessary.

This section is to some extent analogous to Rules 9 and 13 of Order IV of the Civil Procedure Code.

Prevented—Meaning of—Though mention has not been made in this section of cases in which the notice under section 22 (2) does not reach the assessee it will evidently also apply to such cases. Arguably, a person could not be prevented from doing a thing unless he had an intention to do so, and *ex hypothesi* the assessee could not have intended making a return in the

absence of a notice having been served on him under section 22 (2), but it would be more reasonable so to read the section as to permit the re-opening of assessments if the assessee shows that the notice under section 22 (2) did not reach him.

Appeal—Since 1939 an appeal lies against orders passed under section 23 (4) so that the assessee has the option either of proceeding under section 27 or of lodging an appeal against the assessment itself under section 30. There is nothing to prevent his seeking both the remedies at the same time and if he does so it is not clear what will happen if the appellate orders of the Assistant Commissioner and the final decision of the Income-tax Officer under section 27 are in conflict. The Income-tax Manual recognises the right of the assessee to avail himself of both the remedies together.

United Kingdom Law—In the United Kingdom Law there is no such provision as in this section but assessments against *ex parte* or estimated assessments [corresponding to those here under section 23 (4)] can be appealed against.

Onus of proof—In a proceeding under this section the onus is upon the assessee to prove that he was prevented by sufficient cause from complying with the various requirements. If he furnishes no evidence it is open to the Income-tax Officer to refuse to cancel the assessment and even if he produces evidence it is for the Income-tax Officer to determine the weight of the evidence. No question of law will arise out of the Income-tax Officer's refusal. *Abdul Bari Chowdhury v Commissioner of Income tax Burma* 5 ITC 352 9 Rang 281 AIR 1931 Rang 194 A K R P L A Chettyar *Firm v Commissioner of Income tax Burma* 5 ITC 182 9 Rang 21 AIR 1931 Rang 97.

There is a passage in *Dunkley J's* judgment in *Abdul Bari Chowdhury case* which suggests that a question of law might arise on the ground of absence of materials for a finding. But the correctness of this view was questioned by the Calcutta High Court in *re Keshardeo Chamria* 1935 ITR 418 in which it followed the judgment of *Page CJ* and that of the Allahabad High Court in *Jotiram Sher Singh's case* 1934 ITR 129 56 All 933 AIR 1934 All 559. The refusal of the Income-tax Officer to grant time and his proceeding *ex parte* will not give rise to a question of law under this section. *Sir Hari Singh Gour v Commissioner of Income tax CP* 6 ITC 317.

Where the assessee has failed to comply with one of the notices referred to in section 23 (4) the fact that he had sufficient cause for not complying with another notice is not relevant and the assessment under section 23 (4) must stand. *Commissioner of Income tax CP v Laxminarain Badridas* 1937 ITR 170.

In proceedings under section 27 it is open to the assessee to challenge and prove the illegality and invalidity of the notices issued under sections 22 and 23. In *re Radhyclal Balnukund* 1942 ITR 1311 (All) cf. In *re Govindram Sakseria* 1943 ITR 104 (Bom) referred to under section 23 (4).

Insolvency of assessee—As to whether an assessment under section 23 (4) not reopened under section 27 can afterwards be reopened during insolvency proceedings of the assessee see *Dnyshaw & Co v Income tax Officer Lucknow* 1941 ITR 215 (Oudh) *Inter governor General in Council v Sargodha Trading Co* 1943 ITR 10 a large

Delaying of orders—It is not open to the Income tax Officer to hold over orders under this section until questions of law affecting the merits of the assessment but not the issues arising under section 27 have been disposed of by Courts finally on a reference from a previous assessment, *Commissioner of Income tax, Bombay v Bombay Trust Corporation, Ltd*, 1936 I T R 323

Sufficient cause—An assessee who failed to produce the accounts of a branch before the local Income-tax Officer when he called for them, and promised to produce them before the Income-tax Officer assessing the head office failed to produce them before the latter officer also on the ground that it was inconvenient to produce the branch accounts at the head office. *Held*, that the assessee was not prevented by sufficient cause from producing the accounts before the Income tax Officer

The word 'prevent' involves some definite active cause, making compliance with the order impossible and not a passive cause such as the opinion that compliance is not obligatory because of rights supposed to be secured under the Act', *Lachhmandas Baburam v Commissioner of Income tax U P*, 2 I T C 35 (All)

In *Kajorimal Kalyanmal v Commissioner of Income-tax, U P*, 3 I T C 451, A I R 1930 All 209, the same High Court ruled that the question whether an assessee is prevented by sufficient cause from complying with the notices issued by the Income tax Officer is a mixed question of fact and law. While the question whether there was sufficient cause is one of fact, *Sheo datras Pannalal v Commissioner of Income tax, U P*, 1941 I T R 118 (All), the question whether there is evidence at all is one of law. *Chatur bhuj v Commissioner of Income tax, U P*, 1941 I T R 286 (Oudh). In *Ramkumar Mohanlal's case*, 3 I T C 375, 119 I C 569, the Allahabad High Court held on the facts of the case that the assessee was not prevented by sufficient cause. The Patna High Court have also taken a similar view, *Chinna Rajulal v Commissioner of Income tax*, 5 I T C 28. The latter High Court have held in the case of a company that the non audit of its accounts or successive extensions of time granted by the Income-tax Officer up to a certain stage did not constitute sufficient cause for its not filing a return of income in time, *Manbhumi Transport Co v Commissioner of Income tax*, 6 I T C 203

In *Sri Prapat Bhattadu v Commissioner of Income tax*, I T C. 323, A I R. 1924 Mad 880, *Kumaraswami Sastri, J*, held in that first instance that it was entirely a matter for the Income-tax Officer to decide whether on the particular facts of the case the assessee had shown sufficient cause and that even if the High Court considered that the Income-tax Officer had judged harshly and made the assessment *ex parte* the High Court had no jurisdiction to interfere under section 66. This was appealed against. On appeal *Couts Trotter, C J* held that the question was essentially one of fact but *Krishnan, J* held that the discretion vested in the Income-tax Officer under section 27 should be exercised judicially, that the question is one of law and that though it may be open to a High Court to order a reference under section 66, it would not do so unless the discretion was *prima facie* improperly or illegally exercised. The view taken by *Krishnan, J*, was also taken by the Rangoon High Court in *P K N P R Chelliyar Firm's case*, 4 I T C 340, 8 Rang 203 A I R 1930 Rang 33, which however was overruled in effect by a Full Bench of the same Court in *Abdul Bazeer Chaudhuri's case* 5 I T C 352 9 Rang 281, A I R 1931 Rang 194. The latter

High Court ruled in *A K R P L A Chettiyar's case*, 9 Rang 21, A.I.R. 1931 Rang 97, 5 I.T.C. 182, that the only question of law that can arise in such cases is whether there was evidence to show that the assessee was prevented by sufficient cause. The Court will not consider whether on the facts the inference of the departmental authorities was correct. The ruling in *Abdul Baree's case* was followed by the Lahore High Court who decided that the question is essentially one of fact, *Nannehmal Jankidas v Commissioner of Income tax, Punjab*, 1934 I.T.R. 333, *Vithal v Commissioner of Income tax, C.P.*, 1938 I.T.R. 264. Questions of law can, however, arise, e.g., the illegality of the notice not complied with and can be made the subject of a reference, *Rajmani Devi v Commissioner of Income tax, U.P.*, 1937 I.T.R. 631.

According to the Judicial Commissioner of Nagpur, however, the words 'satisfied and was prevented by sufficient cause' in this section are practically identical in meaning with the similar words in Q.I.A. R. 9 and O. XLI, R. 19 of the Civil Procedure Code. *Commissioner of Income tax v Lakshminarain Badridas Agarwal*, 1934 I.T.R. 246, A.I.R. 1934 Nag 183.

As to whether the time allowed to the assessee for the purpose of compliance with the Income tax Officer's notices is reasonable, see notes under section 23 (4). Ordinarily the question is one of fact but in extreme cases it may be a question of law whether the time was not too short to be reasonable. In *re Sadaram Puranchand*, 5 I.T.C. 459, A.I.R. 1931 Cal 729, see also *Sacchidananda Sinha v Commissioner of Income tax, Bihar and Orissa*, 1 I.T.C. 381, 3 Pat 664.

The following rulings may also be noted though they do not relate to Revenue cases —

Per *Kershaw, C.J.*, and *Fulton, J.* — The Judge had a discretion to decide on the application, and it becomes necessary to enquire (1) what is the meaning and extent of such discretion, and (2) under what circumstances it can be said to be illegally exercised.

In *Sharpe v Wakefield*, (1891) A.C. 173 at 179, *Lord Halsbury*, L.C. observed

An extensive power is confided to the justices in their capacity as justices to be exercised judicially, and 'discretion' means, when it is said that something is to be done within the discretion of the authorities that that something is to be done according to the rules of reason and justice, not according to private opinion—*Rooke's case*, 5 Rep. 100, a, according to law and not humour. It is to be not arbitrary, vague and fanciful but legal and regular. And it must be exercised within the limit to which an honest man competent to the discharge of his office ought to confine himself—*Wilson v Rastall*, 4 T.R. at p. 757. So in *Reg v Boteler*, 33 L.J.M.C. 101, where justices thought proper not to enforce the law because they considered that the Act in question was unjust in principle the Court of Queen's Bench compelled them by a peremptory order to do the act which nevertheless the statute had said was in their discretion to do or leave undone. So again in the case of overseers who were required by 3 and 4 Vict., c. 61, to certify whether applicants for beer licences were real residents and rate payers of the parish, it was held that they were not entitled to refuse the certificate on the ground that in their opinion, there were already too many public houses, or that the beer shop was not required. So a discretion

which empowered justices to grant licences to inn keepers as in the exercise of their discretion they deemed proper would not be exercised by coming to a general resolution to refuse a licence to everybody who would not consent to take out an excise licence for the sale of spirits—*Reg v Sylvester*, 31 L J M C 93 "

The general result of the cases is stated by *Wills, J* in *Sharpe v Wakefield*, (1888) 21 Q B D 66 at p 80 as follows —

'So far it is I think impossible to contend that there was any limitation upon the absolute discretion of the justices, when applied to for a new licence to grant or refuse it upon any grounds which to them seem fit grounds to act upon, provided that there is a real judgment exercised in respect of the individual case I mean to exclude, for instance a case in which the ground of refusal had absolutely nothing to do with the question in hand as for instance where the justices refused the licence because the applicant had not taken out a spirit licence—*Reg v Sylvester*, 2 B & S 322, or where they had laid down a general rule that they would grant no more licences in the locality—*Reg v Justices of Walsall*, 3 C L R 100 In such cases there is really no exercise of discretion at all, and it is very much as if the licence had been refused because the applicant wore a blue coat or a white hat But where it cannot be shown that no real discretion had been exercised the applicant has in case of refusal, no other resort and must submit to his fate '

'Applying this principle we have to consider whether in the present case we are satisfied that the Judge has exercised no real discretion. If he had evidence before him, which would fairly warrant a reasonable man in his position coming to the conclusion at which he arrived, it cannot be contended that he exercised no real discretion In such a case, there would be no question of law involved, but he would be deciding a question of fact on reasonable and proper grounds which would not entitle this Court to interfere It has even been decided in such a case that the mere fact that the Court above would have come to a different conclusion is no ground for interference—*Ranchodji v Lallu* (1882) 6 Bom 304 and *Fatima Begam v Hans*, (1887) 9 All 244

, *Parvati v Ganpati*, 23 Bom 516

Per *Sir Arnold White C J* — The test is—Has the discretion been exercised after appreciation and consideration of all the facts which are material for the purpose of enabling the Judge to exercise a judicial discretion and after the application of the right principle to those facts? If a discretion is exercised under these conditions and a certain conclusion is arrived at, that conclusion is an exercise of discretion judicially sound though an appellate tribunal might be disposed to draw a different inference from the facts

Kichilappa Naicker v Ramanujam Pillai, 25 Mad 167

Per *Schnabe, C J* — "When for some reason a man has not attended a case in Court and there is no sufficient explanation of his absence, the case, by reason of his absence, is allowed to go *ex parte* If he comes to Court afterwards and asks that his case may be restored to file the question to be considered by the Court is not whether by some human possibility, being wise after the event he could not have got there in time or whether a man who studied his railway guide a little better, would not have got in another train or taken another

route, but whether a man honestly intended to be in Court and did his best though in his own stupid way, to get there in time, and once the Court is satisfied, as was the fact in this case, that the man did try to get there and that he would have got there in time but for the intervention of an inevitable accident for which he was in no way responsible, it is the duty of the Court, in my judgment, to set aside the judgment, mulcting, in proper cases, the delinquent man in costs. In all those cases, this universal panacea for healing wounds, as it has been called in England will properly be applied. It is not right in cases of this kind that the man should have his case disposed of without being heard. These Courts are here so that people who have cases can have those cases heard and determined, and it should never be the intention of the Court that a man should be deprived of a hearing unless there has been something equivalent to misconduct or gross negligence on his part or something which cannot be put right, as far as the other side is concerned by making the man to blame pay for it.

Arunachala Ayyar v Subbaramiah, 46 Mad 62

Penalty for concealment of income or improper distribution of profits

28 (1) If the Income-tax Officer, the Appellate Assistant Commissioner or the Appellate Tribunal in the course of any proceedings under this Act, is satisfied that any person—

(a) has without reasonable cause failed to furnish the return of his total income which he was required to furnish by notice given under sub section (1) or sub section (2) of section 22 or section 34 or has without reasonable cause failed to furnish it within the time allowed and in the manner required by such notice, or

(b) has without reasonable cause failed to comply with a notice under sub section (4) of section 22 or sub-section (2) of section 23, or

(c) has concealed the particulars of his income or deliberately furnished inaccurate particulars of such income, he (or it) may direct that such person shall pay by way of penalty, in the case referred to in clause (a), in addition to the amount of the income-tax and super-tax, if any, payable by him, a sum not exceeding one and a half times, that amount, and in the cases referred to in clauses (b) and (c), in addition to any tax payable by him, a sum not exceeding one and a half times the amount of the income-tax and super-tax, if any, which would have been avoided if the income as returned by such person had been accepted as the correct income.

Provided that—

(a) no penalty for failure to furnish the return of his total income shall be imposed on an assessee whose total income is less than three thousand five hundred rupees unless he has been served with a notice under sub-section (2) of section 22,

(b) where a person has failed to comply with a notice under sub section (2) of section 22 or section 34 and proves that he has no income liable to tax, the penalty imposable under this sub section shall be a penalty not exceeding twenty five rupees,

(c) no penalty shall be imposed under this sub section upon any person assessable under section 42 as the agent of a person not resident in British India for failure to furnish the return required under section 22 unless a notice under sub section (2) of that section has been served on him

(d) When the person liable to penalty is a registered firm or an unregistered firm treated under section 23 (5) (b) as a registered firm, so that the amount of the income tax and super tax payable by the firm itself has not been determined that amount shall be taken to be an amount equal to the tax which would have been payable by an unregistered firm on an income equal to the firm's total income, and, in the cases referred to in clauses (b) and (c), the amount of the income tax and super tax which would have been avoided if the income as returned had been accepted as the correct income, shall be taken to be the difference between the amount of the tax which would have been payable by an unregistered firm on an income equal to the firm's total income and the amount of the tax payable by an unregistered firm on an income equal to the income of the firm as actually returned by the firm

(2) If the Income tax officer, the Appellate Assistant Commissioner or the Appellate Tribunal in the course of any proceedings under this Act, is satisfied that the profits of a registered firm have been distributed otherwise than in accordance with the shares of the partners as shown in the instrument of partnership registered under this Act governing such distribution, and that any partner has thereby returned his income below its real amount, he (or it) may direct that such partner shall, in addition to the income tax and super tax, if any, payable by him, pay by way of penalty a sum not exceeding one and a half times the amount of income tax and super tax which has been avoided, or would have been avoided if the income returned by such partner had been accepted as his correct income, and no refund or other adjustment shall be claimable by any other partner by reason of such direction

(3) No order shall be made under sub section (1) or sub section (2) unless the assessee or partner, as the case may be, has been heard, or has been given a reasonable opportunity of being heard

(4) No prosecution for an offence against this Act shall be instituted in respect of the same facts on which a penalty has been imposed under this section

(5) An Appellate Assistant Commissioner or the Appellate Tribunal on making an order under sub-section (1) or sub-section (2) shall forthwith send a copy of the same to the Income-tax Officer

(6) The Income-tax Officer shall not impose any penalty under this section without the previous approval of the Inspecting Assistant Commissioner

History—See section 24 and section 39 (a) of the 1918 Act Under that Act, penal assessment could be made only in making any assessment or adjustment now it can be made 'in the course of any proceedings under this Act' The latter would include, for example, cases of refunds under sections 48 and 49 as well as revisional proceedings (before 1941) under section 33, while the former would not

Sub-section (2) was introduced and consequential alterations made in the other parts of the section in 1930

Extensive changes were made in 1939, *vis*, (a) It was made clear that the section applies both to income tax and to super tax (b) the maximum penalty was increased from the amount of tax awarded to one and a half times that amount, (c) the penalty is imposable not only for concealment as before but for failure to submit returns and in time and in proper manner—whether *suo motu* under section 22 (1) or in response to a notice under section 22 (2) even for failure to submit accounts under section 22 (4) or evidence under section 23 (2), (d) certain provisos were simultaneously added to mitigate the rigour of the new provisions

Proviso (d) was added in 1940, in order to fill a gap that existed because under section 23 (5) no tax is payable by the firm

Commissioner—The Commissioner has been given no powers now under section 28 In revisional proceedings before him under section 33 A it is not open to him to pass any prejudicial orders whether under section 28 or otherwise

Without reasonable cause—Cf sufficient cause under section 27 The failure need not be 'wilful', even gross negligence would bring the assessee within the mischief of this section There must be some element or circumstances beyond control to eliminate the operation of the section It would obviously be a question of fact whether there was reasonable cause or not, and while an appeal would lie to the Appellate Authorities and the Appellate Tribunal on this question no reference would lie to the High Court Questions of law could however arise about the legality of notices and so forth

Failure to submit returns—Sub section (1) can be applied to all cases of failure without reasonable cause to submit returns whether (1) under section 22 (1) which the tax payer has to submit *suo motu*, or (2) under section 22 (2) in response to a notice from the Income-tax Officer or (3) under section 34 in response to a similar notice, and also of failure in all the three cases, (4) to submit the return in time, or (5) to submit them in the manner required

Even if a return is submitted under section 22 (3) before the assessment is made, the assessee will still be liable to a penalty for not submitting the return in the first instance within the time allowed (by section 22 (1), section 22 (2) and section 34 respectively, as the case may be)

An incomplete or unverified return would not be a return in the manner required : *see* by sections 23-34 and Rules 18 *et seq*

Failure to submit accounts or evidence—Failure without reasonable cause to submit accounts or documents in response to a notice under section 22 (2) or to submit evidence in response to a notice under section 23 (2) is also liable to be visited with penalty under this section

United Kingdom Law—There are various penalties corresponding to the different circumstances arising under this section and the plan of the law is not very logical. The Macmillan Committee recommended a radical revision including an option to the tax payer to have proceedings for penalties dealt with by Courts of law instead of by Income-tax Commissioners. It was held in *Attorney General v Lloyds Bank (Lilicrap's executor)* 1945 K B D that it is no defence against the levy of a penalty to say that the false statements did not in fact give rise to any larger relief than if the true income had been returned. In India however the quantum of penalty is a multiple of the tax sought to be avoided and in such a case no penalty could be levied. On the other hand a prosecution would lie section 52

Concealment—Question of fact—It is clear that it must be a question of fact whether there has been concealment or deliberate misrepresentation. Relevant considerations would be the magnitude of the omitted income, the method of accounting, the nature of the transactions omitted and the evidence adduced by the assessee. So long as there is evidence to support the finding of the Revenue Officers, no question of law can ordinarily arise. In *re Lachhmondas Brayballabdas* 1942 I T R 186 (All.) *Lachhmondas Mehra and v Income tax Appellate Tribunal* 1944 I T R 432 (Lah.)

While the Revenue authorities ought to act fairly and reasonably according to the circumstances of each case, the quantum of penalty within the maximum limit laid down by this section is a question of fact and not of law. *K M O Chettyar Firm v Commissioner of Income tax Burma* (1934) I T R 160 7 I T C 187 *A A R Chettyar Firm v Commissioner of Income tax Burma* (1934) I T R 386 (F B), 11 Rang 75 *A I R* 1933 Rang 30 6 I T C 385 and the High Court will not interfere so long as the Income tax Authorities do not act capriciously or arbitrarily. In *re Gopaldas Purushotamdas* 1941 I T R 372 (All.)

For the purpose of imposing the penalty the true figure of profit is not that estimated by the assessee or shown in his books but that determined by the Income tax Officer if the books are not reliable. It is also not necessary for the Income tax Officer to specify each item in detail or the method of computation or estimate involved in the concealment. *Butto Kristo Kamala Saha v Commissioner of Income tax Bihar and Orissa* 5 I T C 122. The maximum penalty is the difference (now one and a half times) between the tax on the income declared by the assessee and that on the true income assessable under the Act—not merely the tax on the block of income concealed. *K M O Chettyar Firm v Commissioner of Income tax Burma* (1934) I T R 160 7 I T C 187, *A A R*.

Chettiyar Firm v Commissioner of Income-tax, Burma, 1934 I T R 386 (F B), 11 Rang 75, A.I R 1933 Rang 30, 6 I T.C 385

The evidence required for a penalty under section 28 need not necessarily be stronger than that required for an additional assessment under section 34 *Istafakhan v Commissioner of Income tax, U P*, 1942 I T R 435 (Oudh). The imposition of penalty, however, is not a matter of guess work. The Income tax authority must have before it such evidence as would satisfy a reasonable person that there has been concealment. *Commissioner of Income tax, Madras v Veera Venkataramiah*, 1943 I T R 308

In regard to cases of concealment, the words 'and has thereby returned it below its real assessment' have been omitted in 1939, evidently because they were superfluous.

Penalty is in all cases in addition to the tax payable

Provisos (a) and (b)—It will be seen that the penalty is measured either by the tax payable or by the tax avoided, and in either case it is obvious that an assessment must be made before the penalty can be levied. Under section 23, no assessment can be made in the event of non submission of return under section 22 (1) except by service of notice under section 22 (2). If these considerations are borne in mind, the following consequences seem to arise—

(1) The reference in proviso (a) to a notice under section 22 (2) is superfluous, the proviso merely means that no penalty will be levied on persons with a total income of Rs 3 500

(2) If an assessee fails to submit a return under section 22 (1), but submits one under section 22 (2), he will be liable for a penalty in respect of his initial default, even though his later return may be accepted *in toto*. This may seem harsh but is evidently intended

(3) Where there is a failure to submit a return even when called for, the penalty will be measured by the 'best judgment' assessment made under section 23 (4) and if eventually, whether as a result of action under section 27 or on appeal, the assessee proves that he has no income liable to tax, proviso (b) will restrict the penalty to a maximum of Rs. 25. On the other hand this result is not altogether in accord with the wording of the section. Under the substantive part of the section the penalty imposable is a multiple of the tax payable or avoided and if the latter is 'nil' the multiple must also be 'nil', and there is no need to limit it to a maximum

(4) If a case is re-opened under section 27 and the assessee has some income or where an assessment under section 23 (4) is reduced on appeal, it is not clear whether the penalty for initial default should be measured with reference to the total income in the original assessment or that in the revised assessment.

Proviso (c)—The object of the proviso is to give the agent of a non resident a specific opportunity to submit a return of income

Proviso (d).—Inserted in 1940 fills a gap, for under section 23 (5), no tax is payable by a registered firm or unregistered firm assessed as if registered

Income—The word in this section means assessable income after allowing for the legitimate deductions or exemptions and not the gross income and a person cannot therefore escape the penalty under this section merely on the ground that while his 'deduct' entries were false, his gross income was true, *Naginchand Shiv Sahai v Commissioner of Income tax, Punjab*, 1938 I T R 534, A I R 1938 Lah 620

"In the course of any proceedings"—According to the Allahabad High Court the use of the present tense 'has furnished' restricts the power of imposing penalty to cases of concealment during the particular proceeding before the Income-tax authority. It was held therefore in a case in which there was concealment in the original assessment under section 23 but not in the supplementary assessment under section 34 that a penalty could not be levied at the time of the latter assessment in respect of the earlier concealment, *Mayaram Durgaprasad v Commissioner of Income-tax*, 5 I T.C. 471. In this view an Income-tax authority can levy a penalty only if he detects a concealment then and there, so to speak, as it was made or attempted. Accordingly it was held in another case by the same High Court that where the income was returned wrongly both during the original assessment under section 23 and also during the supplementary one under section 34, that a penalty could be levied in respect of the concealment in the latter, *In re Baluk Prasad Khatri*, 5 I T.C. 138.

On the other hand, the Madras High Court have held that if in the course of revision the Commissioner finds on the materials of the original assessment that there had been a concealment, he is empowered to levy a penalty, *Commissioner of Income-tax, Madras v Sheikh Abdul Kadir Maracayar*, 3 I T.C. 372, A.I.R. 1928 Mad 257. This was, however, under the pre 1939 Law. The Commissioner acting under present section 33-A, cannot impose any penalties.

Executors—The Income tax department cannot it would appear, proceed against an executor for penalties in respect of defaults by the assessee when no penalty proceedings were pending against this latter at the time of his death. Cf. *Attorney General v Canter*, 17 A.T.C. 236 (K.B.D.), 17 A.T.C. 488 (C.A.) which arose under a Special United Kingdom Act of 1934 regarding claims by and against the estate of deceased persons.

"Deliberately"—Accidental mistakes cannot be penalised *see also* section 22 (3).

Unauthorised Agents—No penalty can be levied under this section in respect of concealment in a return of income filed by an agent who has no authority to file such return, *Raja Sayyid Mahomed Mehdi v Commissioner of Income tax, C P, and U P*, 1935 I.T.R. 202, A.I.R. 1935 Oudh 505.

If an Assistant Commissioner refuses to admit an appeal on ground that no appeal lies the assessment having been made under section 23 (4), there are no proceedings before him in the course of which he can impose a penalty under this section. Also, if against a penalty so imposed, an appeal is made to the Commissioner under section 32 (now, the Appellate Tribunal, under section 33) the latter cannot re-impose the penalty and thus validate the very order under challenge. Similarly, it would not be open to the Commissioner (now, the Appellate Tribunal) to re-impose the penalty when an application is presented under section 66 (2) for a reference to the High Court on the legality of the penalty, *Banarsi Das v Commissioner of Income-tax*, 1936 I.T.R. 218, A.I.R. 1936 Lah 585.

Appeal—Right of—As regards appeal against a penalty imposed under this section by the Income-tax Officer, *see* section 30, and as regards appeal against a penalty imposed by the Assistant Commissioner on appeal, *see* section 33. There was formerly (before 1939) no right of appeal against a penalty levied in the course of revisional proceedings by the Commissioner, nor a right of reference to the High Court, *Jangi Bhagat Ramavatar v.*

Commissioner of Income tax, Bihar and Orissa, 3 ITC 418, A.I.R. 1930 Pat 418 but if a question of law arose out of the Commissioner's order in revision a reference lay to the High Court between 1933 and 1939. In exercising the present revisional powers conferred by section 33 A the Commissioner cannot levy any penalty.

An order whether original or appellate, passed by the Tribunal in respect of a penalty is final unless a question of law, arises out of the order, in which case that question can go before the High Court.

Improper distribution of profits—The object of sub-section (2) is to check evasion of tax which is possible, by the dominant partner under stating his true share in the course of getting the firm registered and thus reducing the tax payable. The words "governing such distribution" must be read with reference to section 26. These provisions will presumably apply also to cases of non distribution. See, however, *Kakabhai v Commissioner of Income tax C P* 4 ITC 178 which was decided before this sub-section was introduced.

Reasonable opportunity—Whether reasonable opportunity was given or not is a question of fact. *Butto Kristo Kamala Saha v Commissioner of Income tax, Bihar and Orissa* 5 ITC 122. Normally, it would be necessary to serve a notice on the assessee. *Banarsidas v Commissioner of Income tax Punjab* 1936 ITR 218 A.I.R. 1936 Lah 585. Sometimes, the Income-tax Officer may presume that the assessee had 'constructive notice'. As to what this is it is—

'the knowledge which the Courts impute to a person (upon a presumption so strong of the existence of the knowledge that it cannot be allowed to be rebutted) either from his knowing something which ought to have put him to further enquiry or from his wilfully abstaining from enquiry to avoid notice' per *Farwell J*, in *Hunt v Luck*, (1901) 1 Ch 52 (Stroud).

There is no form prescribed for giving notice to the assessee under this section before he is penalised.

It is not necessary for the Income tax Officer to wait till the completion of the assessment or other proceeding before he can issue a notice under this section asking the assessee to show cause against his being penalised. The section does not require the Income-tax authority to be satisfied about the concealment before issuing the notice. He need be satisfied only before levying a penalty. In *re Batuk Prasad Khatri*, 5 ITC 138.

According to section 28 there is no difference between the procedure which the Income tax Officer should adopt and that which the appellate authorities should adopt. Obviously the latter can act only after the conclusion of the assessment therefore there is nothing to compel the Income tax Officer to issue a notice under section 28 before concluding the assessment. *Guruprasad Shaw v Commissioner of Income-tax, Bengal* 1944 ITR 233.

Forthwith does not mean *at once* without the lapse of any interval but as soon as possible thereafter. *R v Berkshire Justices*, 4 QBD 469.

Conditions to be satisfied—Three ingredients make up the conditions precedent to the infliction of a penalty, in cases of concealment of income viz., (1) In the course of a proceeding the Income tax authority must be satisfied that the assessee has deliberately furnished inaccurate

particulars of his income and thereby returned it below the real income (2) there must be a determination by the authority that the assessee has so furnished inaccurate particulars and (3) the authority refuses to accept as correct the income returned by the assessee. *In re Majaram Durga Prasad* 5 I T C 471 (All)

Evidence as to real income—Though this section relates not to the assessment of income for the purpose of levying tax but to the imposition of a penalty evidence adduced by the assessee purporting to disclose his real income is both relevant and admissible—not for the purpose of varying the assessment but in order to show either that no penalty should be imposed or that it ought to be less than the maximum. The Income-tax authority therefore must not shut out such evidence. *A R Chettiar Firm v Commissioner of Income tax, Burma* 1933 I T R 285 11 Rang 75 A I R 1933 Rang 30 6 I T C 385 (F B)

Approval of the Inspecting Assistant Commissioner—Sub section (6) was added in 1939. Over and above this the Government announced in the legislature that work in connection with the levy of penalties would be centralised in the Office of the Central Board of Revenue. It should be noted however that the levy of penalties can be appealed against to the Appellate Assistant Commissioner and the Appellate Tribunal.

The control of the Inspecting Assistant Commissioner is purely administrative and he need not give a hearing to the assessee only the authority levying the penalty is under obligation to hear the assessee. *In re Govindram Tansukhrar* 1944 I T R 450 (All) *Lachhmandas Mehrchand v Appellate Tribunal* 1944 I T R 432 (Lah)

Revised return—Effect of putting in—The fact that the assessee has put in a revised return will not absolve him from the penalty under this section if in the original return he had 'deliberately furnished inaccurate particulars of income etc. irrespective of whether his revised return is valid under section 22 (3) or not. *Commissioner of Income tax, Madras v A Rm A L A Arunachalam Chettiar*, 55 M 827 6 I T C 58, A I R 1932 Mad 433

This decision was given with reference to section 22 (3) as it stood before amendment in 1939. *A fortiori*, therefore under the new law, a revised return will not save the tax payer from penalty for concealment in the original return.

The Bill of 1938 as introduced contained an express provision that the submission of a revised return under section 22 (3) shall not operate to prevent the imposition of a penalty under section 28 (1), but the Select Committee omitted the provision in the view that it was unnecessary.

Order when to be passed—The words payable by him mean to which he has been assessed irrespective of whether the amount has been paid or not and it is open therefore to the competent authority to pass an order after the tax has been paid and it is not necessary for him to do so before the tax is paid. *Virbhan Banslal v Commissioner of Income tax, Punjab* (1938) I T R 616 A I R 1938 Lah 749

Prosecution—The second proviso [present sub-section (4)] does not bar a prosecution with reference to other facts. All that it does is to bar a prosecution in respect of the same facts on which a penalty has been imposed under this section. See *R v Hussain Ali*, 1 I T C 48, 43

Mad 498 55 I C 1003 a case under the 1918 Act relating to a prosecution for failure to produce accounts along with a penal assessment for a false return

Penalty when proceedings are illegal—An assessee whose income had escaped assessment was served by the Income tax Officer with notice under section 34. There was no response to the notice and the Income-tax Officer assessed him under section 23 (4). An application made under section 27 was rejected and on appeal against this rejection the Assistant Commissioner held that there had been no valid service of notice. The Commissioner of Income tax did not set aside the Assistant Commissioner's order but proceeded to re-assess under section 34. *Held* that the proceedings under sections 33 and 34 were null and void and that the Income-tax Officer could not levy penalty under section 28 since there were no proceedings under the Act. *Sheik Abdul Kadir Marakayar & Co v Commissioner of Income tax 2 I T C 372 A I R 1928 Mad 257*

Applicability to super tax—The Allahabad High Court ruled that this section being a penal provision should be construed strictly and that the word income-tax did not include super tax in the absence of a clear intention to the contrary. *In re Batuk Prasad, 5 I T C 138*. See how ever section 58 in this respect which has been the same at all material times. This decision has now been nullified by the amendment of the section in 1939 so as to refer in terms to super tax.

Jurisdiction of appellate authority to impose or enhance penalty—See *Pitta Ramaswamiiah v Commissioner of Income tax 2 I T C 196 40 Mad 831 A I R 1927 Mad 49 Malik Damsaz Khan v Commissioner of Income tax V IV F P 1944 I T R 489* in both of which the assessee argued unsuccessfully that the Appellate Assistant Commissioner had no jurisdiction to hear the appeal [both cases under the pre-1939 law when there was no appeal against assessments under section 23 (4)] the assessments though purporting to be made under section 23 (3) having been really made under section 23 (4) and that therefore there were no valid proceedings before the Assistant Commissioner to enable him to levy a penalty. See also notes under section 31 from which it will be seen that the Appellate Assistant Commissioner has been given power since 1939 to enhance a penalty under section 28 during appeal.

29 When any tax penalty or interest is due in consequence of any order passed under or in pursuance of this Act, the Income tax Officer shall serve upon the assessee or other person liable to pay such tax penalty or interest a notice of demand in the prescribed form specifying the sum so payable.

Notice of demand

Rules—For the Notice of Demand under section 29 see Rule 20.

History—This section was expanded in 1922 and again completely recast in 1939. Its terms are now wide and it covers all cases in which tax or penalty has to be recovered on whatever grounds.

The reference to interest was made in 1944 consequent on the system of advance payments of tax (section 18-A).

Assessee or other person liable to pay—Section 2 (2) refers to assessee as a person by whom Income-tax is payable, the reference to

'penalty in this section and the possibility of tax being recovered from persons other than the legal owners of taxed incomes, e g, section 16 (3), section 44-D, section 44-F, have led to the use of the words 'assessee' or other person liable to pay. The Income-tax Officer should obviously be supplied with copies of all orders passed by the various appellate (and revisional) authorities and Courts before he can issue a notice of demand with reference to such orders.

Supply of assessment order—See notes under section 23

Notice—Service of—Obligatory—Unless this notice has been first served no proceedings can be commenced under section 46

Notice—How to be served—The notice should be served on the assessee. As to how notices should be served, see section 63

Time limit for serving notice—Where no specific time limit has been prescribed the person acting must act as soon as possible i e, with due diligence. In two cases in the United Kingdom—*Queen v Special Commissioners of Income tax*—In re *The Cape Copper Mining Company*, 2 Tax Cases 332, 21 Q B D 313 and *Russell v North of Scotland Bank*, 3 Tax Cases 14—it was held in connection with claims for relief which had to be made 'within or at the end of the year' that the sections must receive a reasonable interpretation with regard to the exigencies of business and that everything depended on the particular circumstances of each case. In the second case mentioned, the bank's claim was refused on the ground that it had not exercised due diligence.

'Although no time is prescribed for issuing the notice in question (under section 29) it may be said that such a notice must be issued within a reasonable time. What would be a reasonable time might vary according to circumstances. There is no period of limitation in the Act', *Raja Rajendra Narayan Bhanj Deo v Commissioner of Income tax* 2 I T C 82 5 Pat 13 A I R 1925 Pat 581

Though there is no rule prohibiting the issue of separate notices for income tax and for super tax, yet since the form of notice of demand shows a simultaneous demand both for super tax and for income-tax, the demand for super tax should be made within a reasonable time of the assessment for income-tax and an interval of two years and four months is an unreasonable time, *Khemchand Ramadas v Commissioner of Income tax*, 1934 I T R 216, A I R 1934 Sind 46 affirmed by the Privy Council in *Commissioner of Income-tax v Khemchand Ramdas*, 1938 I T R 414. Sections 34 and 35 prescribe the only circumstances in which and the only time in which fresh assessment can be made, and fresh notices of demand issued (*Ibid*)

Correction of mistake—A demand notice simply apprises the assessee of an existing fact, viz, that he has been assessed to tax at a certain figure. Therefore, if a mistake has been made in writing out the notice a corrected notice can be issued. The fact that, by inadvertence, the sub-section of section 23 under which the assessment was made is wrongly entered in the notice will neither deprive the assessee of the right of appeal if he possessed it nor give him such a right if he did not possess it. In re *Pratap Chandra Ganguly (Calcutta)*, A I R. 1932 Cal. 410, 4 I T C. 418

Similarly the issue of a demand notice wrongly headed "section 29" in respect of an order by the Commissioner under section 33 gives the assessee

no right of appeal or of a reference to the High Court, *Mohamad Farid Mohamad Shafi v. Commissioner of Income-tax, Punjab*, 9 Lah. 317; A.I.R. 1927 Lah 513, 2 I.T.C. 430. But under section 33-A, now, the Commissioner cannot pass an order resulting in an additional demand for tax.

Return submitted after assessment but before issue of demand notice.—See notes under section 22 (3)

Alteration of assessment.—See notes under sections 3, 4 and 5.

30. (1) Any assessee objecting to the amount of income assessed under section 23 or section 27, or the amount of loss computed under section 24 or the amount of tax determined under section 23 or section 27, or denying his liability to be assessed under this Act or objecting to the cancellation by an Income-tax Officer of the registration of a firm under sub-section (4) of section 23 or to a refusal to register a firm under sub-section (4) of section 23 or section 26-A or to make a fresh assessment under section 27, or objecting to any order under sub-section (2) of section 25 or section 25-A or sub-section (2) of section 26 or section 28, made by an Income-tax Officer, or objecting to any penalty imposed by an Income-tax Officer under sub-section (6) of section 44-E or sub-section (5) of section 44-F or sub-section (1) of section 46 or objecting to a refusal of an Income-tax Officer to allow a claim to a refund under section 48, 49 or 49-F or to the amount of the refund allowed by the Income-tax Officer under any of those sections, and any assessee, being a company, objecting to an order made by an Income-tax Officer under sub-section (1) of section 23-A, may appeal to the Appellate Assistant Commissioner against the assessment or against such refusal or order :

Provided that no appeal shall lie against the order under sub-section (1) of section 46 unless the tax has been paid :

Provided further that where the partners of a firm are individually assessable on their shares in the total income of the firm, any such partner may appeal to the Appellate Assistant Commissioner against any order of an Income-tax Officer determining the amount of the total income or the loss of the firm or the apportionment thereof between the several partners, but in respect of matters which are determined by such order may not appeal against the assessment of his own total income :

Provided further that a shareholder in a company in respect of which an order under section 23-A has been passed by an Income-tax Officer, may not in respect of matters determined by such order appeal against the assessment of his own total income.

(1-A) Any person having, in accordance with the provisions of sub-section (3-A), (3-B) or (3-G) of section 18, read

with sub-section (6) of that section, deducted and paid tax in respect of any sum chargeable under this Act other than interest who denies his liability to make such deduction may appeal to the Appellate Assistant Commissioner to be declared not liable to make such deduction

(2) The appeal shall ordinarily be presented within thirty days of the payment of tax deducted under sub-section (3-A), (3-B) or (3-C) of section 18 or of receipt of the notice of demand relating to the assessment or penalty objected to or of the order in writing notifying the amount of total income on which the determination under sub section (5) of section 23 was based and the apportionment thereof between the several partners or of the loss computed under section 24 or of the intimation of the refusal to pass an order under sub-section (1) of section 25-A or to register a firm under section 26-A or of the date of the refusal to make a fresh assessment under section 27 or of the intimation of an order under sub-section (1) of section 23-A or under section 48, 49 or 49-F as the case may be ; but the Appellate Assistant Commissioner may admit an appeal after the expiration of the period if he is satisfied that the appellant had sufficient cause for not presenting it within that period

(3) The appeal shall be in the prescribed form, and shall be verified in the prescribed manner

RULES—Rule 21 prescribes the different forms (A to J) in which different kinds of appeal have to be filed and verified

History—This section roughly corresponds to section 21 of the 1918 Act and section 25 of the 1886 Act, but is completely different in detail, the machinery of administration having been radically changed. The section has been amplified several times since 1922, and on an extensive scale in 1939 in order to provide in terms a specific right of appeal in respect of each of the various matters on which an Income tax Officer can pass an order to the disadvantage of an assessee. See Rule 21 for the respective forms in which appeals in respect of different matters have to be preferred.

Appeals against order under Rule 6-B—There is no specific provision for an appeal against such an order, while there is one for an appeal against an order of cancellation of registration under section 23 (4)

Appeals under section 18 A—There is no appeal against advance collection of tax under section 18-A, for the assessee has the option to make his own estimate for the purpose and pay if need be penal interest and if there is any mistake as to the amount of interest section 35 provides the remedy, for the mistake would be obvious from the record.

Double Income tax Relief—In cases not covered by sections 49 or 49-F, *ie*, those falling under section 60 or 49 A or 49 D, an appeal can lie only if it is provided for in the relevant notification (under section 49 A or 60) or if it can be made as part of the appeal against the assessment (if the case is under section 49-D).

Verification—All appeals have to be verified and a false statement will attract prosecution under section 52

Copies of orders.—Under executive instructions an assessee is supplied a copy of every appealable order free of cost and without any application from him. A copy of any other order will also be supplied free of cost but only on his application

Form of appeal—See Rule 21 for forms A to J. In most cases the notice of demand (Rule 20) has to be attached to the appeal, while in others a copy of the order complained against has to be attached

Appeal in case of loss—Where assessable income before granting the depreciation allowance is less than that allowance an appeal lies against the decision of the Income-tax Officer as to the determination of the income and also against the allowance

Undistributed profits of Companies—In respect of companies dealt with under section 23 A the right of appeal to a Board of Referees formerly enjoyed under section 33 A has been withdrawn from April, 1939 and an appeal now lies to the Appellate Assistant Commissioner. A shareholder however cannot in an appeal against the assessment of the company raise questions about his own total income. The latter can be raised in appeal only in respect of his own assessment

Firms—In an appeal against the assessment of a firm the partners cannot raise questions about their own total income but only as regards the income of the firm and its apportionment between the partners. The appeal against the partners' own assessments would have to be entirely separate

Defective appeals—The Assistant Commissioner is not bound to call upon the appellant to rectify defects in an appeal and may reject *in limine* a defective appeal e.g. unsigned and unverified *Damodar Prasad v Commissioner of Income tax Bihar and Orissa* 3 ITC 405 8 Pat 796 A.I.R. 1929 Pat 409. An appeal must not be directed against the assessment orders of more than one year *Nawal Kishore Kharaitilal v Commissioner of Income tax Punjab* 7 ITC 409 1934 ITR 350

Annexing opinions to petitions—The practice of annexing to petitions and appeals the opinions of members of the legal profession was condemned by the Patna High Court who suggested that the tribunal to whom the petition or appeal is presented should insist on the removal of the opinions before considering the petition or appeal *Maharajadhiraj of Darbhanga v Commissioner of Income tax Bihar and Orissa* 1933 ITR 206 12 Pat 5 A.I.R. 1933 Pat 123

Appeal where demand has been altered—An appeal lies in respect of an assessment and not in respect of the demand notice therefore the fact that the demand notice has been subsequently altered by the Income-tax Officer is not a valid reason for the Assistant Commissioner to throw out an appeal *Mohanlal Hardevdas v Commissioner of Income tax, Bihar and Orissa* 4 ITC 90 9 Pat 172

When Income tax Officer becomes Assistant Commissioner—According to departmental instructions when an Income tax Officer is promoted to be an Assistant Commissioner he must not hear appeals against his own orders which should be dealt with by another Assistant Commissioner to whom the cases should be transferred for disposal under section 5

Limitation—Relaxation of—Computation of—The use of the word 'ordinarily' shows that the Assistant Commissioner can if he is satisfied

extend the period of thirty days *Mitchell v McNeill & Co*, 31 CWN 630, A.I.R. 1927 Cal 518, if the Assistant Commissioner refuses so to extend the period there is no question of law involved and no reference to the High Court can lie, *Kasi Chettiar v Commissioner of Income-tax*, 2 I T C 98. In computing the period of limitation, the day on which the order to be appealed against was made and the time requisite for obtaining a copy of such order should be excluded (See section 67 A.)

Appeals against section 23 (4) orders—Where an assessee does not proceed under section 27 but appeals straight away under section 30 he cannot raise the question of validity of the assessment as one properly made under section 23 (4) but only the question of quantum of income, note the words objecting to the amount in section 30 *Nabakumar Singh Dudhuria v Commissioner of Income tax, Bengal*, 1944 I T R. 327. It is open to the assessee to proceed both under section 27 (to reopen the assessment) and under section 30 (to contest on merits) but there is nothing in the law to prevent the confusion that may arise as a consequence.

Appeals against order under section 25 A—Where an Income tax Officer finds under section 25 A that a Hindu undivided family has been partitioned but from a date different to that claimed by the parties an appeal will lie generally under section 30 against the order instead of as a specific appeal against an order under section 25 A and the general form of appeal may be used, *Commissioner of Income tax, B & O v Lachminaram Bhadan*, 1944 I T R. 355.

Appeal admissible only in cases specified—A subject has no inherent right to appeal against an order (see Rules of Construction—Introduction). In cases not specified in the Act, there is no right of appeal, see *Furtado v City of London Brewery*, 6 Tax Cases 382 (1914) 1 K.B. 709. Per *Sainsbury Eady, L.J.*—The Rule of Law is that although a *certiorari* lies unless expressly taken away, yet an appeal does not lie unless expressly given by statute. This is the reason why section 30 has been amplified so many times.

The question of jurisdiction of the Income-tax Officer cannot be raised on appeal before the Assistant Commissioner and no reference will lie on it to the High Court. The question should be raised before or during the assessment and the Act leaves the question for the final decision of the Commissioner or the Central Board of Revenue as the case may be, *Dinanath Hemraj v Commissioner of Income tax, U P.*, 2 I T C 304, 49 All. 616, A.I.R. 1927 All 299. *Seth Kanhai Lal v Commissioner of Income-tax, U P.*, 1937 I T R. 739 (All.)

Pre 1939 law.—Before 1939 no appeal lay against an order under section 23 (4) and the only remedy was under section 27. So, it was a matter of importance whether an assessment had been originally made under section 23 (4) or not. See *In re Bhagwan Prasad*, 6 I T C 105, 54 All. 496 and other rulings referred to under section 31.

Objection before Income-tax Officer.—Every assessee assessed by an Income-tax Officer has an unqualified right of appeal under section 30 (as laid down therein), whether or not he had questioned his liability before the Income tax Officer. His right of appeal does not depend on his having so questioned the liability, though his not having so questioned it may be a good ground for not allowing his appeal. The mere submission of a return of income is not necessarily an admission by the assessee of his liability.

to tax *Ram Anand Anuar v Commissioner of Income tax, U P*, 1940 1 T R 126 (Oudh)

Review by Assistant Commissioner of His own orders—An Assistant Commissioner cannot review his own orders or those of an Income tax Officer. If an Assistant Commissioner throws out an appeal because of the non appearance of the assessee he cannot revive the appeal even if he is satisfied that non appearance was due to sufficient cause. The only remedy in such cases is for the assessee to move the Commissioner under section 33 A or the Appellate Tribunal under section 33 as the case may be.

Agent of non resident—There is nothing in section 30 to prevent a person declared by the Income tax Officer to be an agent (under section 43) of a non resident to dispute his selection as an agent and consequently his liability to tax by way of an appeal to the Assistant Commissioner *Gokuldas v Commissioner of Income tax* A I R 1932 Nag 152 but not in advance as a separate preliminary issue in anticipation of the appeal against the final assessment when of course he can raise the issue. *In re Sehgal Brothers* 1943 I T R 533 (Lah)

Appeals under section 18—The person entitled to appeal is the payer of interest or other chargeable item, and not the payee. An order passed on such an appeal cannot prejudice the right of the payee to claim refund if eligible under section 48 or other appropriate section or through a regular assessment under section 23 for, under section 18 (5) all deductions at source made under section 18 are treated as a payment of tax on behalf of the recipient of the income.

Succession—Before 1939 under section 26 (2) the successor was taxed in respect of the predecessor's profits also and no right of appeal was required beyond that of the successor against his own assessment. Now that the profits of the previous year in which the succession took place are apportioned between the predecessor and the successor under section 26 (2), a right of appeal has become necessary.

Penalties—The offences created by sections 44-E (6) and 44-F (5) are new (i.e. since 1939) and an appeal has been provided against them. Formerly there was no appeal against a penalty under section 46 (1), this has been permitted since 1939 but on condition that tax is first paid.

Appeal against refunds—An appeal now lies under section 30 instead of under section 50 A. As a result a right of reference to the High Court under section 66 arises to the assessee which he did not possess previously unless the Commissioner agreed to make a reference *suo moto* under section 66 (1).

Reference to High Court—As a consequence of the expansion of this section the right of reference to a High Court under section 66 now (since 1939) arises in respect of many other matters besides refunds referred to above.

Proviso—Assessments under section 23 (4)—As already mentioned the non appealability before 1939 of orders under section 23 (4) led to considerable litigation as to the extent to which the High Court could interfere with such assessments. At one time the Rangoon High Court had held *Commissioner of Income tax v A R A N Chettyar and V D W R M Chettyar* 6 Rang 21 2 I T C 477 *S P K A A M Chettyar Firm v Commissioner of Income tax, Burma* 7 Rang 669, A.I.R 1930 Rang 35, 4 I T C. 182 that the proviso did not prevent the High Court

T C. 352 The proviso applied to two kinds of cases viz, (a) assessments section 23 (4) But this view was later overruled, *Abdul Barea Chaudhuri v Commissioner of Income tax*, 9 Rang 281; A.I.R 1931 Rang 194, 5 I T C. 352 The proviso applied to two kinds of cases, viz, (a) assessments made under section 23 (4) and (b) those made under that sub-section read with section 27. It was held that if an assessee succeeded in having his assessment reopened under section 27, he had no further right of appeal, *A K A C T V V Chettyar Firm v Commissioner of Income-tax, Burma*, 3 I T C 253, 6 Rang 652 The proviso did not bar an appeal against refusal to reopen the assessment under section 27, for which the substantive part definitely provided

Procedure—See section 31

Assessment by estimate.—In England, assessments by estimate in the absence of returns [corresponding to assessments under section 23 (4) here] can be appealed against, *Holborn Viaduct Co v Queen*, 2 Tax Cases 228

31 (1) The Appellate Assistant Commissioner shall fix a day and place for the hearing of the appeal, and may from time to time adjourn the hearing.

Hearing of appeal

(2) The Appellate Assistant Commissioner may, before disposing of any appeal, make such further inquiry as he thinks fit or cause further inquiry to be made by the Income-tax Officer

(2-A) The Appellate Assistant Commissioner may, at the hearing of an appeal, allow an appellant to go into any ground of appeal not specified in the grounds of appeal, if the Appellate Assistant Commissioner is satisfied that the omission of that ground from the form of appeal was not wilful or unreasonable.

(3) In disposing of an appeal, the Appellate Assistant Commissioner may, in the case of an order of assessment,—

(a) confirm, reduce, enhance or annul the assessment, or

(b) set aside the assessment and direct the Income-tax Officer to make a fresh assessment after making such further inquiry as the Income-tax Officer thinks fit or the Appellate Assistant Commissioner may direct, and the Income-tax Officer shall thereupon proceed to make such fresh assessment, and determine where necessary the amount of tax payable on the basis of such fresh assessment,

or, in the case of an order cancelling the registration of a firm under sub-section (1) of section 23 or refusing to register a firm under sub-section (4) of section 23 or section 26-A or to make a fresh assessment under section 27,

(c) confirm such order, or cancel it and direct the Income-tax Officer to register the firm or make a fresh assessment as the case may be,

or in the case of an order under sub-section (2) of section 23 or sub-section (1) of section 23-A, or sub-section (2) of section 24 or section 48, 49 or 49-F.

(d) confirm, cancel or vary such order,

or, in the case of an order under sub-section (1) of section 25-A.

(e) confirm such order or cancel it and either direct the Income-tax Officer to make further inquiry and pass a fresh order or to make an assessment in the manner laid down in sub-section (2) of section 25-A.

or, in the case of an order under section 28 or sub-section (6) of section 44-E or sub-section (5) of section 44-F or sub-section (1) of section 46,

(f) confirm or cancel such order or vary it so as either to enhance or reduce the penalty,

or, in the case of an appeal against computation of loss under section 24,

(g) confirm or vary such computation ;

or in the case of an appeal under sub-section (1-A) of section 30,

(h) decide that the person is or is not liable to make the deduction and in the latter case direct the refund of the sum paid under sub-section (6) of section 18:

Provided that the Appellate Assistant Commissioner shall not enhance an assessment or a penalty unless the appellant has had a reasonable opportunity of showing cause against such

are enhancement :

Formerly there was provided further that at the hearing of any appeal against an assessment, if the Income-tax Officer, the Income-tax Officer shall

Appeal against reassessment heard either in person or by a representative. instead of under section 50, the result of an appeal any change is made High Court under section 66 a firm or association of persons or a new previously unless the Commissioner or association of persons is ordered to be under section 66 (1)

Reference to High Court Assistant Commissioner may authorise the this section, the right of reference amend accordingly any assessment made (since 1939) arises in respect of a firm or any member of the association :

Proviso—Assessments Appellate Assistant Commissioner shall, on the ground of non appealability, communicate the orders passed by him to the Commissioner. led to considerable litigation as to the Commissioner.

interfere with such assessments. 22 of the 1918 Act The section has been had held, *Commissioner of Income-tax v. M. R. Chettyar*, 6 Rang 21 (2 A), regarding additional grounds of appeal *Firm v Commissioner of Income-tax*, 22 Rang 35; 4 I T C. 182, that the effect of the separation of appellate and executive

functions, and gives a right to the Income-tax Officer to appear (as a party) before the Appellate Assistant Commissioner. The power to increase penalties was also added in 1939.

Sub-section (5) was added in 1941 to provide that the Appellate Assistant Commissioner shall of his own accord communicate his orders both to the assessee and to the Commissioner, both of them being entitled to appeal to the Appellate Tribunal under section 33.

United Kingdom Law—As will be seen from the notes under section 5 the administrative machinery in the United Kingdom is so dissimilar from that here, that the details of procedure in the United Kingdom regarding appeal are of no interest but the separation of appellate from executive functions of Assistant Commissioners and the right of the Income tax Officer to appear or be heard before the appellate authorities brings Indian procedure nearer to the British.

Procedure—Subject to what is stated in this section and section 37, the Appellate Assistant Commissioner can adopt any reasonable procedure regarding the hearing adjournments etc.

Additional grounds—The Lahore High Court held that the Assistant Commissioner had no power to admit new matter in the form of additional grounds of appeal whether within or after the period prescribed *Ramrakhamal and Sons v Commissioner of Income tax, Punjab*, 1937 I T R 137, A I R 1937 Lah 830 while the Oudh Chief Court held not only that he could do so but an improper refusal on his part might give rise to a question of law, *Commissioner of Income tax, U P v Beharilal Ramchandra* 1937 I T R 417. The amendment in 1939 resolves this difference of opinion and gives power to the Appellate Assistant Commissioner to allow new grounds of appeal if he is satisfied that omission in the first instance was not wilful or unreasonable. In allowing additional grounds, the Appellate Assistant Commissioner must not deprive the other side i.e., the Income-tax Officer of adequate opportunity to meet these new grounds.

Raising new questions and letting in new evidence.—It is not open to an assessee to raise before the Assistant Commissioner questions not raised before the Income-tax Officer *Karamchand v Commissioner of Income-tax Punjab*, 5 I T C 313, 12 Lah 714, A I R 1931 Lah 601. The refusal of the Assistant Commissioner to consider such questions is not a question of law arising out of order under section 31, *Chiranjilal v Commissioner of Income tax, Punjab*, 7 I T C 42. On the other hand the Assistant Commissioner is not necessarily confined to what is in the records before him and may, if he thinks fit call for further evidence. He could not however be compelled to do so *Bhadkmal Lodha v Commissioner of Income tax, U P*, 1934 I T R 164, 56 All 504.

An appellant in income-tax proceedings has no higher right in adducing fresh evidence on appeal than he would have in a civil case under Order XLI Rule 27 of the Civil Procedure Code. It is entirely within the discretion of the appellate authority to admit or reject further evidence, and where the assessee has had opportunity to tender evidence before the lower authority the appellate authority need not allow any further evidence *E. M. Chettyar Firm v Commissioner of Income-tax, Burma*, 4 I T C 111, 7 Rang 635, A I R 1930 Rang 4.

Appeals against orders under section 23 (4).—It follows from this that where an appeal is made against an order under section 23 (4) (no action having been taken under section 27) the Appellate Assistant Com-

missioner need not permit the tax payer to let in evidence which he failed to produce before the Income-tax Officer. As a result, the tax payer cannot attack the assessment unless there is some inconsistency or obvious absurdity in the Income-tax Officer's estimate. When however, an assessment has been made under section 27, the appeal would in all respects be like one made against an order under section 23 (3) unless the assessee was in default a second time. Section 37 gives the Assistant Commissioner powers to call for evidence, etc.

Questions of law—It is the duty of Income tax authorities to decide both on questions of law and questions of fact. The fact that an appeal can be made to the Appellate Tribunal and a reference to the High Court against the order of that Tribunal does not absolve Income-tax authorities from the obligation to decide questions of law.

Costs—No costs will be allowed to an assessee who succeeds in his appeal before the Assistant Commissioner or the Appellate Tribunal.

Copies of orders—A copy of the appellate order is given free of charge if applied for. Extra copies will be charged for.

Who may represent assessee.—See section 61. The Income tax Officer, however, may appear before the Appellate Assistant Commissioner and the Appellate Tribunal either in person or through any representative.

Appeals against orders passed under section 27—In deciding such appeals, the jurisdiction of the Assistant Commissioner is limited to seeing whether the appellant had sufficient cause preventing him from complying with the requirements in respect of which the default occurred. He is not at liberty to enter into the merits of the assessment. *Jhuri Misra v Commissioner of Income tax, U P*, 3 I T C 248, *In re Pratab Chandra Ganguly*, 4 I T C 418, A I R 1932 Cal 410, *Mohanlal Hurdeodas v Commissioner of Income tax, Bihar and Orissa*, 5 I T C 62, *Commissioner of Income tax, Burma v A K R P L A Chettyar Firm*, 9 R 21, A I R 1931 Rang 97, 5 I T C 182. If, however, he has decided the appeal on the merits, his order it has been held is one under section 31 even if strictly speaking no appeal lay, and a reference can lie to the High Court in respect of his order, *Abdul Qayam v Commissioner of Income tax, U P*, 1933 I T R 375 A I R 1933 Oudh 396. A contrary view has also been held *Kunwarji Ananda v Commissioner of Income tax, B & O* 5 I T C 417, 11 Pat 187, A I R 1931 Pat 306. These rulings are obsolete and an appeal has first to go to the Appellate Tribunal.

Whether the Income-tax Officer applied his discretion justly in refusing to re-open an assessment under section 27 may be a question of law arising out of an appellate order passed under section 31. See notes under section 27.

Enquiries—It is not open to the Assistant Commissioner to institute enquiries behind the back of the assessee and use the result of such enquiries against him for the purpose of assessment. If the Assistant Commissioner's finding however, can be supported on other relevant circumstances, without taking into consideration the result of the private enquiries, his finding will not be illegal *c f*, section 167 of the Indian Evidence Act. *Gopinath Naik v Commissioner of Income tax, U P*, (All), 1936 I T R 1, A I R 1936 All 286.

Though under section 23 (3) the Income-tax Officer is under obligation to consider the evidence tendered by the assessee, he is under no such obligation in respect of enquiries conducted by him under the orders of the

Assistant Commissioner or higher authorities, *Sheik Abdur Razak v Commissioner of Income tax, B and O*, A I R 1935 Pat 425, 8 I T C. 268

Assistant Commissioner not bound by the letter of the Indian Evidence Act—In this respect, the position of the Assistant Commissioner is the same as that of the Income tax Officer. See notes under section 23 as to how far the Income-tax Officer is bound by the Law of Evidence, and the cases cited under that section

'When an assessment is made by Commissioners the burden is upon the person disputing it to displace it, not on the person making it to sustain it"—Per Scrutton, L J, in *Belfour v Mace* 13 Tax Cases 539

Res judicata—See notes under section 23 as to how far the principles of *res judicata* and estoppel apply to Income-tax proceedings

Preliminary state of facts to be decided by Assistant Commissioner—It is for the Assistant Commissioner to decide first of all whether an appeal lies or not

Whether an order dismissing an appeal on the ground that no appeal lies is an order under section 30 or one under section 31 has been the subject of difference of opinion. The Patna High Court in *Kunwar Ananda v Commissioner of Income-tax*, 5 I T C 417, 11 Pat 187, A I R 1931 Pat 306, and *Meharam Gyan Manjari Kuari v Commissioner of Income tax, B and O*, 1944 I T R 59, the Allahabad High Court in *In re Bhagwati Prasad* 34 All 496 A I R 1932 All 390, 6 I T C 105, and the Lahore High Court in *Dunichand v Commissioner of Income-tax*, 4 I T C 33, 10 Lah 596 A I R 1929 Lah 593 held that the order was one under section 31. On the other hand the Allahabad High Court held in other cases that no reference lay to the High Court where the Assistant Commissioner held that section 23 (4) had been rightly applied and that no appeal lay, *In re Suraj Bhan Ugar Sen*, 6 I T C 143 A I R 1932 All 642. *In re Pallumal Bholanath*, 1933 I T R 235, A I R 1933 All 541, 146 I C 759. *Jot Ram Sher Singh v Commissioner of Income tax*, 1934 I T R 129 7 I T C 173. *Hiralal v Commissioner of Income tax, U P*, 1942 I T R 148 so also the Oudh Chief Court in *Lakshmbai v Commissioner of Income-tax*, 1940 I T R page (Ref). Though some of these rulings are later than *Khemchand Ramdas* case 1938 I T R 414 (P.C.) they do not refer to it. Such an order is according to the view in these latter cases passed under section 30 and not under section 31. It has also been held that an order by an Assistant Commissioner dismissing an appeal on the ground that it is time-barred is an order under section 30 and not under section 31. An appeal is filed under the former section, and it is only after it is admitted under that section as being within time that the Assistant Commissioner can function under section 31, *Shrinath Prasad v Commissioner of Income tax, U P & C P*, 1935 I T R 200 (All). See also *M K S Chettyar firm's* case referred to under section 30, 5 I T C 96 8 Rang 587, A I R 1931 Rang 53

The Privy Council supported the former view, viz, the mere fact that the assessment purports to have been made under section 23 (4) does not shut out the appeal, it must be shown that the circumstances of the case bring it within the scope of that sub-section. One of the questions of law arising out of the order of the Assistant Commissioner is whether the appeal to him was competent and he cannot deprive the assessee of the right of a reference to the Court merely by deciding this question against the assessee

Commissioner of Income tax, Bombay v Khemchand Ramdas, 1938 I T R. 414 (P C)

Though a reference to the High Court now lies, not from the order of the Assistant Commissioner, but from that of the Appellate Tribunal, the general principle in the Privy Council ruling above is still of importance *vis*, an authority cannot shut out a reference to higher authority merely by deciding a preliminary issue of law against a party.

Form of appellate order—The fact that the Assistant Commissioner entertained an appeal gives him no power to consider questions not within his jurisdiction *e g*, the merits of an assessment made under section 23 (4) (this was before 1st April, 1939 when no appeal lay against such assessments) It is unnecessary for him to say that the appeal is incompetent, if he simply dismisses it there is nothing wrong in his orders, *Nawalkishore Kharaitlal v Commissioner of Income tax, Delhi*, A I R 1932 Lah 1014, 7 I T C 409 The Assistant Commissioner however must, in disposing of an appeal state the facts and give reasons for his conclusions *Rampratap Sukh Dial v Commissioner of Income tax, Delhi*, 3 I T C 362, 10 Lah 833 A I R 1930 Lah 277 On the other hand according to the Rangoon High Court he is under no such obligation *E M Chettyyar Firm v Commissioner of Income tax*, A I R 1930 Rang 224 4 I T C 464

Remand—The Appellate Assistant Commissioner is entitled to call for a report from the Income tax Officer and after considering it to pass such orders as he may think fit, including, if necessary the enforcement of the assessment. In re *Lala Sarju Prasad*, 1943 I T R 525 (All). The Appellate Assistant Commissioner can also remand the case to the Income tax Officer for disposal on its merits. The basis and details of the assessment, including the application of the proviso to section 13 (regarding the estimating of profits from the accounts) can be raised by the Appellate Assistant Commissioner. In re *Pearayal Shukla*, 1942 I T R 238 (All).

Appeal against orders under section 31—Before the Appellate Tribunal was set up, no appeal lay against the appellate orders of the Assistant Commissioner unless there was an enhancement of assessment under this section or a penalty was levied by the Assistant Commissioner under section 28. The only remedies were a petition to the Commissioner under section 33, (corresponding to present section 33 A) or a reference to the High Court under section 66 if a question of law was involved. Now, all orders passed by the Appellate Assistant Commissioner are appealable to the Appellate Tribunal.

Appeals against assessments made under section 34.—See notes under section 34. The Assistant Commissioner cannot give any relief in respect of the original assessment or enhance the supplementary one if the latter is without jurisdiction. His general power is subject to the limitations laid down in sections 34 and 35. *Commissioner of Income tax Punjab v Nawab Shaw Nawaz Khan*, 1938 I T R 370 A I R 1938 Lah 741.

Non appearance of assessee—An Assistant Commissioner cannot dismiss an appeal because the assessee does not appear. Whether he appears or not the Assistant Commissioner should consider the appeal on its merits and decide. There is no provision in the law authorising the Assistant Commissioner to dismiss an appeal, *in vacuo*, without, applying his mind to it simply because the appellant does not appear. But the appeal should of course be *adjudicated* in order before he can consider it.

Order when to be passed—The Assistant Commissioner is not required to pass orders on the actual date of hearing but may pass orders after the last day of hearing but whenever he passes the order he has to communicate it under sub-section (3) both to the assessee and to the Commissioner both of them having the right of appeal against the order to the Appellate Tribunal.

Adjournment—Though there is no provision to that effect it is obviously the duty of the Assistant Commissioner to re-open the hearing if it is apparent that the notice of hearing has not reached the assessee. If the Assistant Commissioner has decided an appeal *ex parte* he cannot re-open the appeal on grounds similar to those set out in section 27 even if the appellant shows that he was prevented by sufficient cause from being present at the hearing of the appeal.

Appeal withdrawn—Where an assessee withdrew his appeal before the Assistant Commissioner and afterwards claimed that on the basis of an alleged understanding by which the assessee was to withdraw his appeal and at the same time the Assistant Commissioner was to withdraw a then impending prosecution the Assistant Commissioner ought to have re-opened the appeal and decided it on its merits because he had not kept his part of the undertaking it was held by the Allahabad High Court that the question raised did not arise out of an order under section 31 or section 32 with which alone the Court were concerned, *Shyam Sundar Beharilal v Commissioner of Income tax* U P 6 I T C 290.

By filing an appeal the assessee creates not merely an opportunity but a duty for the Assistant Commissioner to perform a public task which may have an effect entirely opposite to that contemplated or desired by the assessee. He cannot therefore claim either by not appearing before the Assistant Commissioner or by withdrawing the appeal that the latter should not proceed further with it cf. *Rex v Special Commissioners of Income tax* (ex parte *Elmhurst*) 20 Tax Cases 381 (1936) 1 K.B. 487 (C.A.) 14 A.T.C. 509.

The Income-tax Act is a special piece of self contained legislation on a special subject and while there is provision for enhancement of assessment on appeal there is none for withdrawal of appeal. The absence of the latter is clearly intended to avoid the absurdity of the appeal being withdrawn as soon as the appellant fears a possible enhancement of assessment in other words the extension to the special Act of the general power of withdrawal of appeal would nullify the power of the Assistant Commissioner to enhance assessments *Commissioner of Income tax Punjab v Narab Shah Nawaz Khan* 1938 I T R 370, A I R 1938 Lah 741.

Assistant Commissioner cannot travel beyond subject matter of appeal—See *Babu Jagannath Tharam v Commissioner of Income-tax Bihar and Orissa* 2 I T C 44 Pat. 385, A.I.R. 1925 Pat. 408 also *Nawal-kisore Khaerallal v Commissioner of Income tax Punjab*, 1936 I T R. 287.

If after hearing the assessee the Assistant Commissioner calls for a report from the Income-tax Officer the Assistant Commissioner is under no obligation to give the assessee a further hearing unless the Income-tax Officer's report is of such a nature that it would be a denial of natural justice not to give the assessee an opportunity to contest the report. *Maharajahwaj of Darbhanga v Commissioner of Income-tax B & O* 4 I T C 233 9 Pat. 240.

If the report indicates an enhancement of assessment on the strength of evidence to rebut which the assessee has had no chance, it would seem that he should be given such a chance

The Assistant Commissioner's power of enhancement is subject to the other provisions of the Act, so, he cannot add an item after the expiry of the limitation laid down in section 34, *Commissioner of Income tax, Punjab v Nawab Shah Nawaz Khan*, 1938 I T R 370

What is enhancement of assessment—In view of (a) assessment in section 23 referring to the determination of "total income" and (b) the reference in section 30 to one (not several) assessment and to objections to "the amount" and 'the rate,' it has been held that if an Assistant Commissioner on appeal upholds the assessment of the Income tax Officer as a whole *i.e.*, does not increase the total income there is no enhancement even though the Assistant Commissioner may increase the figures under certain items necessarily decreasing those under others *Namburumal Chetti and Sons v Commissioner of Income tax Madras*, 1933 I T R 32, 6 I T C 313, 56 Mad 329, A I R 1933 Mad 1. *A fortiori* if the Assistant Commissioner reduces the total income assessed, there can be no enhancement

Opportunity to assessee to show cause against enhancement—The enhancement may be made by estimate if the materials before the Assistant Commissioner are insufficient to base a precise figure upon. If the enhancement by the Assistant Commissioner is based on materials from which he could reasonably conclude—though only roughly—that a particular figure is the true income, then his action is legal, if, on the other hand it is wholly arbitrary and based on no materials it is illegal. In particular, it is open to appellate authorities to enhance an assessment based on the proviso to section 13 by altering the basis of the estimates, including the probable percentage of profits. In *re Pearylal Shukla*, 1942 I T R 239 (All)

It is not necessary for the Assistant Commissioner to give notice that he proposes to enhance the assessment to a particular figure or to disclose the materials forming the basis of the proposed enhancement, a general intimation of proposed enhancement is enough but he should give the basis of the enhancement in his appellate order so that the Appellate Tribunal or the Commissioner can decide on further appeal (or revision) whether the enhancement was justified *cf.*, *E M Chettiar v Commissioner of Income tax Burma* 4 I T C 111 7 Rang 635, A I R 1930 Rang 4. The proviso does not deprive the appellant of the right to be heard.

Enhancement of penalty on appeal—The ruling of the Allahabad High Court that a penalty levied under section 28 could not be enhanced in the course of an appeal *Rai Sahib Harikrishnadas v Commissioner of Income tax* 5 I T C 275 53 All 679 A I R 1931 All 401, is obsolete, the section having been amended in 1939. The assessee, however, should be given an opportunity to show cause against the proposed enhancement.

32 (Omitted in 1939)

Before the Appellate Tribunal was set up this section provided for an appeal to the Commissioner in two cases *viz.*, (a) levy of penalty by the Assistant Commissioner and (b) enhancement of assessment by him, and there was a right of reference to the High Court on questions of law, arising out of the Commissioner's Appellate order under section 32.

Now, all orders of the Appellate Assistant Commissioner can be appealed against to the Appellate Tribunal under section 33.

33 (1) Any assessee objecting to an order passed by an Appellate Assistant Commissioner under section 28 or section 31 may appeal to the Appellate Tribunal within sixty days of the date on which such order is communicated to him.

(2) The Commissioner may, if he objects to any order passed by an Appellate Assistant Commissioner under section 31, direct the Income tax Officer to appeal to the Appellate Tribunal against such order, and such appeal may be made within sixty days of the date on which the order is communicated to the Commissioner by the Appellate Assistant Commissioner.

(2-A) The Tribunal may admit an appeal after the expiry of the sixty days referred to in sub-sections (1) and (2) if it is satisfied that there was sufficient cause for not presenting it within that period

(3) An appeal to the Appellate Tribunal shall be in the prescribed form and shall be verified in the prescribed manner, and shall, except in the case of an appeal referred to in sub-section (2), be accompanied by a fee of one hundred rupees

(4) The Appellate Tribunal may, after giving both parties to the appeal an opportunity of being heard, pass such orders thereon as it thinks fit, and shall communicate any such orders to the assessee and to the Commissioner

(5) Where as the result of an appeal any change is made in the assessment of a firm or association of persons or a new assessment of a firm or association of persons is ordered to be made, the Appellate Tribunal may authorise the Income tax Officer to amend accordingly any assessment made on any partner of the firm or any member of the association

(6) Save as provided in section 66 orders passed by the Appellate Tribunal on appeal shall be final

History—This section came into effect in 1941 with the setting up of the Appellate Tribunal

Form of appeal.—See Rule 22 of the rules made by the Central Board of Revenue which sets out the different forms

Appeal by assessee—An appeal lies against any order under section 31 or 28. Before 1941 appeals to the Commissioner under section 32 lay only in a few specified cases

Appeal by the department—While the Income tax Officer is the authority to appeal he cannot do so except under the orders of the Commissioner. The idea obviously, is to avoid unimportant appeals to the Tribunal. It should be noted that the department cannot appeal on the ground of inadequate penalty levied under section 28

Delayed presentation of appeals—As to what is sufficient cause see notes under section 27

The date on which an order is 'communicated to' a person is presumably the date on which he received it and not the date on which the order is despatched from the office of the Tribunal. The change in 1941 was evidently intended to avoid only the service of notice and not to curtail the time at the disposal of the parties.

Forms—See Rule 22 which sets out the forms in which appeal has to be made to the Tribunal in respect of different matters. The appeals have to be verified, and false statements will attract prosecution under section 52.

Fees—No fee is payable by the Commissioner when he appeals. If the assessee appeals, his appeal should be accompanied by a fee of Rs. 100.

Sub section (4)—Nothing has been stated as to costs. 'Such orders as it thinks fit' will, it is presumed, not include costs. The Tribunal has to hear both parties (in the presence of each other) and communicate its orders to both parties.

Additional grounds—It is open to the Tribunal to allow additional grounds of appeal at any stage, and an application to move such additional grounds need not be stamped or verified. The discretion, however, should be used judicially and not arbitrarily. So, when the Tribunal refused to allow a fundamental question of law as an additional ground and such question did not require new facts to be found merely on the ground that the memorandum of appeal had not been amended and that the application was not stamped or verified, the High Court interfered, *Dyranji & Co v Commissioner of Income tax*, C P, 1943 ITR 286.

It should be noted, however, that there is no provision in section 33, as in sub-section (2 A) of section 31, authorising the Tribunal to permit the appellant to go into new grounds of appeal, so, the above decision would apply only to cases not involving any new finding of fact. The Tribunal, it should be remembered is a Court of second appeal. In any case, when new grounds are allowed to be added, the opposite party should be given sufficient opportunity to meet the new grounds.

Points which were not and which could not be, raised before the Appellate Assistant Commissioner could not be raised for the first time before the Tribunal. For example in an appeal against an appellate order arising out of an assessment under section 23 (4) the assessee not having acted under section 27, it would not be open to the assessee to raise before the Tribunal questions relating to the invalidity of notices under sections 22 and 23 and consequently the illegality of the assessment under section 23 (4). *Naba kumar Singh Dudhuria v Commissioner of Income tax, Bengal*, 1944 IT R 327.

Rule 21 of the Tribunal Rules is as follows—The appellant shall not except by leave of the Tribunal urge or be heard in support of any ground of objection not set forth in the grounds of appeal, but the Tribunal in appeal to the Commissioner shall not be confined to the grounds of objection set forth in the grounds of appeal or taken by leave of the Tribunal under the Rules. There was a right of reply.

Now, all orders of the Appellate Tribunal shall not rest its decision on any other ground than that on which the Commissioner's decision may be affected thereby has had a sufficient opportunity to be heard on that ground.

This rule merely recognises the principle that the judgment of the lower Court may be supported on any ground, even though not raised in the memorandum of appeal. It does not enlarge the powers of the Tribunal to raise new grounds or permit new grounds to be used against an appellant or to enhance an assessment when the Commissioner has not appealed against it or to suggest a new mode of assessment altogether. The word 'therein' in sub-section (4) merely means on the grounds raised in the appeal, *Motor Union Insurance Co v Commissioner of Income-tax, Bombay, 1945 1 T R 272*

Sub-section (5)—Consequential on a similar amendment of section 31, supplies an omission

Sub-section (6)—The orders of the Tribunal will be final and binding on both parties unless a reference is made to the High Court under section 66. As stated in *R v Speyer, (1936) 1 K B 595*, it is "respectful and proper" to assume that the departmental authorities will carry out the orders of the Tribunal

33-A. (1) The Commissioner may of his own motion call for the record of any proceeding under this Act in which an order has been passed by any authority subordinate to him and may make such inquiry or cause such inquiry to be made and, subject to the provisions of this Act, may pass such order thereon, not being an order prejudicial to the assessee, as he thinks fit :

Provided that the Commissioner shall not revise any order under this sub-section if—

(a) where an appeal against the order lies to the Appellate Assistant Commissioner or to the Appellate Tribunal, the time within which such appeal may be made has not expired, or

(b) the order is pending on an appeal before the Appellate Assistant Commissioner or has been made the subject of an appeal to the Appellate Tribunal, or

(c) the order has been made more than one year previously.

(2) The Commissioner may, on application by an assessee for revision of an order under this Act passed by any authority subordinate to the Commissioner, made within one year from the date of the order, call for the record of the proceeding in which such order was passed, and on receipt of the record may make such inquiry or cause such inquiry to be made, and, subject to the provisions of this Act, may pass such order thereon, not being an order prejudicial to the assessee, as he thinks fit :

Provided that the Commissioner shall not revise any order under this sub-section if—

(a) where an appeal against the order lies to the Appellate Assistant Commissioner or to the Appellate Tribunal but has

not been made, the time within which such appeal may be made has not expired, or, in the case of an appeal to the Appellate Tribunal, the assessee has not waived his right of appeal, or

(b) where an appeal against the order has been made to the Appellate Assistant Commissioner, the appeal is pending before the Appellate Assistant Commissioner, or

(c) the order has been made the subject of an appeal to the Appellate Tribunal

Provided further that an order by the Commissioner declining to interfere shall be deemed not to be an order prejudicial to the assessee

(3) Every application by an assessee under sub-section (2) shall be accompanied by a fee of twenty-five rupees

History—This power of revision of the Commissioner formerly misnamed review was withdrawn from the Commissioner when the Appellate Tribunal was set up and soon afterwards restored in a modified form. The corresponding old section was as below —

33 (1) The Commissioner may of his own motion call for the record of any proceeding under this Act which has been taken by any authority subordinate to him or by himself when exercising the powers of an Appellate Assistant Commissioner under sub-section (5) of section 5

(2) On receipt of the record the Commissioner may make such inquiry or cause inquiry to be made and, subject to the provisions of this Act, may pass such orders thereon as he thinks fit

Provided that he shall not pass any order prejudicial to an assessee without hearing him or giving him a reasonable opportunity of being heard.

There was another section 33 A from 1930 to 1939, dealing with Boards of Referees for Companies dealt with under section 23 A. An appeal lay in such cases to the Assistant Commissioner and from him to the Appellate Tribunal

'Proceeding'—There is no definition of the word. The expression may refer to any course of events happening under the Act *e.g.* arising out of the liability or obligation imposed by the Act. The Commissioner can interfere not only in respect of assessments proper but in respect of any proceeding under this Act *e.g.* refunds or penalties

The validity of the view that the Commissioner can under no circumstances review his order passed under section 33 was questioned but not decided in *Sachchidananda Sinha v Commissioner of Income tax, Bihar and Orissa* 1 ITC 381 3 Pat 664

Res judicata—As to the applicability of *res judicata* and estoppel to Income tax proceedings see notes under section 23

Sub section (1)—The section is in two parts: the first sub section dealing with revision *suo motu* by the Commissioner and the second at the instance of the assessee

The first sub-section, more or less, continues the provisions of old section 33 barring the important prohibition of 'prejudicial' orders now, and also codifies departmental practice in respect of matters not referred to in that section. The provisions fill certain gaps in that section

Formerly, all action under section 33 was in theory *suo motu* by the Commissioner though in practice petitions were received from the assessee, sub section (2) now gives the assessee a definite right to have his case considered in revision but on payment of a fee of Rs 25

Should assessee be heard?—The section does not compel the Commissioner to hear the assessee or his representative but it is not unusual to give a hearing

Enquiries—It is entirely for the Commissioner to decide whether he shall make any enquiries at all and if so by himself or through others

Prejudicial orders—The most important difference between the old section and the new is that the Commissioner cannot in the course of revision pass orders prejudicial to the assessee. Formerly he could but had to give the assessee a reasonable opportunity to be heard. Questions therefore arose as to what was a reasonable opportunity *e.g.*, *Sachchidananda Sinha v Commissioner of Income tax B and O 1 I T C. 381 3 Pat 664* and also from 1933 questions of law arising from the Commissioner's orders in revision could be referred to the High Court

The High Courts differed in their interpretation of what constituted 'prejudicial orders' the Madras High Court in a Full Bench ruling *Voora Sriramulu Chetti v Commissioner of Income tax*, 1939 I T R 263, holding that an order declining to interfere could itself be a prejudicial order. The second proviso to sub-section (2) counteracts this ruling and makes it clear that an order declining to interfere is not a prejudicial order. The large number of rulings as to what is a 'prejudicial order' is of little interest now. As section 33 A now stands any additional assessment or any penal action that the Commissioner may wish to take as a result of his perusing the records in the cause of revision can only be taken under the other appropriate sections of the Act and in accordance with them and not under the guise of orders in revision which can now take only two forms either of benefiting the assessee or of declining to interfere. The Commissioner when acting under section 35 however can correct mistakes obvious from the record irrespective of whether the assessee is prejudiced or not but if the correction will be against the assessee the latter has to be heard before the orders are passed

Where appeals are pending—The provisos both in sub-sections (1) and (2)—restraining the Commissioner from revising proceedings in matters pending before appellate authorities are intended to avoid possible embarrassment from conflicting orders and also to protect the right of reference of the assessee to the High Court. Cf. *Khemchand Ramdas v Commissioner of Income-tax, Bombay*, 1938 I T R 414 (P C)

Limitation—The limit of one year codifies departmental practice which had judicial approval. *Nankaral Jankiram v Commissioner of Income-tax, Punjab*, 1940 I T R 437. Formerly when the Commissioner could pass a 'prejudicial order' in revision it was decided (in several cases) that he could not override the limitation laid down in sections 34 and 35, *e.g.* *Khemchand Ramdas v Commissioner of Income-tax, Sind* 1938 I T R 414 (P C). This question does not arise now

Authority subordinate —The Appellate Tribunal is not an authority subordinate to the Commissioner, but an Appellate Assistant Commissioner is, see section 5 (7) even though no one, not even the Central Board of Revenue, can interfere with the appellate discretion of the Appellate Assistant Commissioner

Where there is conflict of interest —If as a result of the Commissioner's orders in revision, the interest of some other party is adversely affected *e g*, cases of discontinuance of business, etc., or of succession, changes in partnership, etc., no proceedings can be started except under other provisions of the Act, *e g*, section 34, for, under section 33 A, it is not open to the Commissioner to pass a prejudicial order against any one

Penalties —See section 28 which gives no power to the Commissioner to levy a penalty, in any case, the Commissioner is precluded by section 33 A from levying a penalty, for doing so would be passing a 'prejudicial order'

Reference to High Court —Before 1933, no reference lay to the High Court against orders of the Commissioner, in revision, even if the orders were prejudicial in that year provision was made for a reference on questions of law arising out of prejudicial orders in revision This provision was omitted when the Commissioner's revisional powers were withdrawn but has not been restored when the powers were restored, because, under the present section, the Commissioner cannot pass an order prejudicial to the assessee If, nevertheless, the Commissioner passes a prejudicial order, *i e*, not merely that he declines to interfere, but placing the assessee in a worse position than before in any respect, a suit would lie against the Crown since section 67 would afford no protection, the order complained against not being in good faith or being made under the Act

Questions pending before Courts —With reference to old section 33, in which there was no limitation of time within which the Commissioner could pass orders in revision it was held that, where an assessment for a particular year was held invalid by the Court (in this case the Privy Council), the Commissioner must not decline to use his revisional powers to set aside, the assessments of subsequent years, *i e*, from the next year after the particular year to the date of pronouncement of judgment by the Court. The Commissioner's refusal in that case was based on the ground that in respect of the subsequent years the assessee had neither appealed to the Privy Council nor made arrangements with the Commissioner to hold the assessments in abeyance According to the High Court, the later assessments in this case were *ab initio* void and could therefore be set aside at any time by the Commissioner under section 33 *The Tribune Trust v Commissioner of Income tax, Punjab*, 1944 I T R 370 If a similar situation were to arise under present section 33 A the remedy, it would seem, is for the assessee to appeal to the Appellate Assistant Commissioner (and to the Tribunal and to the High Court) in respect of each year unless the Commissioner agrees to hold over the assessments of subsequent years till the case before the High Court (or the Privy Council) is decided

United Kingdom Law —There is no corresponding provision in the English law An appeal there, once determined by the Commissioners (whether General Commissioners or Special Commissioners) is final, and neither the determination of the Commissioners nor the assessment made thereon can be altered except by the order of the High Court to whom a case should be stated

34. (1) If in consequence of definite information which has come into his possession the Income-tax officer discovers that income, profits or gains chargeable to income-tax have escaped assessment in any year, or have been under-assessed, or have been assessed at too low a rate, or have been the subject of excessive relief under this Act, the Income-tax Officer may, in any case in which he has reason to believe that the assessee has concealed the particulars of his income or deliberately furnished inaccurate particulars thereof, at any time within eight years, and in any other case at any time within four years of the end of that year, serve on the person liable to pay tax on such income, profits or gains, or, in the case of a company, on the principal officer thereof, a notice containing all or any of the requirements which may be included in a notice under sub-section (2) of section 22 and may proceed to assess or re-assess such income, profits or gains, and the provisions of this Act shall, so far as may be, apply accordingly as if the notice were a notice issued under that sub-section :

Provided that the tax shall be charged at the rate at which it would have been charged had the income, profits or gains not escaped assessment or full assessment, as the case may be :

Provided further that when the income, profits or gains concerned are income, profits or gains liable to assessment for a year ending prior to the commencement of the Indian Income-tax (Amendment) Act, 1939, or where the assessment made or to be made is an assessment made or to be made on a person deemed to be the agent of a non-resident person under section 43, this sub-section shall have effect as if for the periods of eight years and four years a period of one year were substituted.

(2) No order of assessment under section 23 or of assessment or re-assessment under sub-section (1) of this section shall be made after the expiry, in any case to which clause (c) of sub-section (1) of section 28 applies, of eight years, and in any other case, of four years from the end of the year in which the income, profits or gains were first assessable:

Provided that nothing contained in this Sub-section shall apply to an assessment made in pursuance of an order under section 31, section 33, section 66 or section 66-A.

Form of notice.

The following form has been laid down for the notice under section 34.—

Notice under section 34 of the Indian Income-tax Act (XI of 1922).
INCOME-TAX OFFICE,
Dated

To

Whereas in consequence of definite information which has come into my possession I have discovered that your income from* assessable to income tax in the year ending the 31st March, 19 , has

- (a) escaped assessment,
- (b) been under-assessed,
- (c) been assessed at too low a rate,
- (d) been the subject of excessive relief, I propose to assess (re-assess) the said income that has,

- (a) escaped assessment,
- (b) been under-assessed,
- (c) been assessed at too low a rate,
- (d) been the subject of excessive relief

I hereby require you to deliver to me not later than or within 30 days of the receipt of this notice, a return in the attached form, of your total income and total world-income assessable for the said year ending 31st March,

Seal

Income tax Officer.

Previous law—This section corresponds to section 25 of the 1918 Act. Important changes were made in 1939—(a) The period of limitation was raised from one year to eight in cases of concealment and four in other cases, (b) A time limit for the conclusion of assessment proceedings was laid down, (c) The doubt created in *In re Mahabram Ramjeedas*, 1938 I T R 265 as to the preliminary state of facts in which alone the section could be applied was removed, (d) Cases of excessive relief in the first instance, e.g., wrong refunds granted, can now be re-opened. The retrospective action of the new provisions was, however, limited. In 1941, the proviso to sub-section (2) was added in order to remove doubts.

Scope of section—The section now covers four types of cases, viz., (1) 'Escaped assessment', i.e., to cases of income outside the cognisance of Income tax Officer at the earlier stage, (2) 'under assessed', i.e., to mistakes in computation, wrong allowances and exemptions and so forth (as to mistakes of law, see notes below), (3) 'assessed at too low a rate', i.e., mistakes in rate of tax, and (4) excessive relief, i.e., excessive refunds or exemptions. The expansion of the section in 1939, so as to cover all such cases, removed the difficulties caused by some of the earlier rulings.

Income-tax Officer alone can act under section 34—See notes under section 33 A. Formerly when, under old section 33, the Commissioner had power to pass orders in revision prejudicial to the assessee the question arose to what extent he was bound by the other provisions of the Act, and it was held that he could not, under the guise of orders under section 33, start proceedings that should really be governed by other sections e.g., sections 34 and 35. Similarly it was not open to the Assistant Commissioner, who, at that time, exercised both appellate and inspecting functions, taking action, through his appellate orders, instead of under the appropriate other provisions of the Act. The initiation of proceedings under section 34 could be made only by the Income-tax Officer and subject to that section. There was considerable litigation on the subject, the most important ruling being *Commissioner of Income tax, Sind v Khemchand Ramdas*, 1938 I.T.R.

* (a), (b), (c), (d) Unnecessary portions to be struck out

441 (P.C.). See also *Commissioner of Income-tax, Madras v. Sheikh Abdul Kadir Marakkayar & Co.*, A.I.R. 1928 Mad. 257; 2 I.T.C. 372; *Ganeshdas v. Commissioner of Income-tax, Punjab*, 2 I.T.C. 316; 8 Lah. 354, *Commissioner of Income-tax, Burma v. Vednath Singh*, 1940 I.T.R. 222; and *Commissioner of Income-tax, Punjab v. Nawab Shah Nawaz Khan*, 1938 I.T.R. 370. The Commissioner, acting under section 33-A, now, cannot pass an order prejudicial to the assessee, and an appellate Assistant Commissioner (or the Tribunal) cannot travel beyond the subject-matter of the appeal. The latter cannot, however, enhance an assessment in a manner that would normally fall to be made through section 34 or section 35; to that extent the above rulings are still of interest.

Original assessment under appeal.—The fact that the original assessment has been or is the subject of an appeal to the Assistant Commissioner or the Tribunal or has become final after the appellate or revisional orders passed by any of them or under revision by the Commissioner does not preclude the Income-tax Officer from making a supplementary assessment under this section. See *Commissioner of Income-tax, Bengal v. Mahaliram Ramjidas*, 1940 I.T.R. 442 (P.C.), *In re Halder and Sons*, 1942 I.T.R. 79 (All).

Burden of proof.—The burden of proving that income has escaped assessment or that it was assessed at too low a rate is, according to the Bombay High Court, on the Income-tax Officer, and the mere fact that he thinks that his predecessor underestimated profits is no proof that profits escaped assessment. *Commissioner of Income-tax, Bombay v. G. V. Manohar*, 1935 I.T.R. 372. According to the Rangoon High Court this view is not correct; for, if such onus lay on the Income-tax Officer, the effect would be that the assessee would have an appeal to the Court on facts, which is neither intended nor provided. All that can be said is that if there is no misdirection in law and there are materials for a finding the Court will not interfere. *Commissioner of Income-tax, Burma v. Dey Brothers*, 1936 I.T.R. 209. According to a later view of the Bombay High Court, it is for the Income-tax Officer to satisfy himself and the appellate authorities, on evidence that income has escaped assessment. He cannot merely throw on the assessee the burden of proving that no evidence had escaped assessment. He cannot, for instance, issue a notice under section 34, wait for three years, and then, when the assessee claims that the relevant books had been destroyed, turn round and say that an additional assessment will be made because the assessee had not proved that income had not escaped assessment. *Chimanram Motilal v. Commissioner of Income-tax*, 1943 I.T.R. 44.

Definite information.—With reference to this section as it stood before 1939—"If, for any reason, . . . income . . . has escaped assessment etc."—the Calcutta High Court had held varying views with reference to the conditions precedent to the application of section 34. See *In re Ramjidas Mahaliram*, 1936 I.T.R. 25, 62 Cal 1011; *In re The North British and Mercantile Insurance Co.*, 1937 I.T.R. 349; (1937) 2 Cal 540; *In re Mahaliram Ramjidas*, 1938 I.T.R. 265, A.I.R. 1938 Cal 557. The matter went before the Privy Council, who ruled that it was enough if the Income-tax Officer believed *bona fide* on the information before him that there was ground for thinking that income had escaped assessment or been underassessed. No formal preliminary enquiry, by way of convening the assessee or informing him of the nature of the escape or of giving him an opportunity to be heard, was necessary, before the Income-tax Officer set section 34 in motion. The section was one of machinery and should be

construed so as to make it workable. An assessment under section 34 automatically involves an enquiry under section 23, and a preliminary enquiry before taking action under section 34 would merely duplicate the enquiry without any purpose. *Commissioner of Income tax, Bengal v Mahaliram Ramjidas*, 1940 I T R 442 (P C). See also *In re The Indians National Tannery*, 1941 I T R 618 (Cal) following the above.

Where a supplementary assessment was made on two main grounds *viz* (a) the profit was small in relation to the turnover, (b) the closing value of stock was understated, the High Court held that there were no materials to find that income had escaped assessment. Ground (a) was a *non sequitur*, for, it was at least equally probable that other circumstances which were not in dispute could have accounted for the low profits. As for (b), since the opening and closing balances of each year had been valued on the same basis and the opening balance of each year had agreed with the closing balances of the preceding year no income could have escaped assessment, *Commissioner of Income tax, Burma v Dey Bros*, 1936 I T R 209. Merely because (a) the expenditure is high in relation to the volume and value of trade and (b) the sales are smaller than in earlier years it cannot be assumed that the accounts are false or that income has escaped assessment. *Nawal Kishore Kharaitilal v Commissioner of Income tax Punjab* 1936 I T R 287, 168 I C 181.

The present section according to the Bombay High Court must be taken as a whole, and when it is so taken, there must be definite information which has come into the possession of the Income-tax Officer, which results in his discovering that income has escaped assessment or been underassessed etc., and there must be some information as to a fact. And the fact may be as to the state of the law *e.g.*, that a case had been overruled or that a statute had been passed of which the Income tax Officer had not been aware but a mere change of opinion on the part of the Income-tax Officer as to the meaning of the law or the correction of the opinion of the Income-tax Officer by a superior officer would not be such definite information. *Commissioner of Income tax v Sir Yusuf Ismail*, 1944 I T R 8.

In another case proceedings were started on the ground that 'income from Madras branches of the assessee had escaped taxation'. The Appellate Tribunal found that the Income tax Officer had in his mind the existence of the Madras branches when making the original assessment. In the absence of any other reason stated by the Income tax Officer as inducing him to take action under section 34, it was held by the Patna High Court that there was no 'definite information' in the possession of the Income tax Officer as required by this section and that therefore the notice issued under section 34 was not tenable in law. *Fazl Dhala v Commissioner of Income-tax*, 1944 I T R 341. According to the Madras High Court, *Raghavulu Naidu & Sons v Commissioner of Income tax* 1945 I T R 194, in view of the words 'in consequence of definite information' the word 'discovers' means something more than 'has reason to believe' or 'satisfies himself', the English decisions as to the meaning of 'discovers' were therefore not relevant. The definite information need not relate to a pure question of fact, and definite information with regard to the state of the law will bring the section into operation. No general rule can be laid down as to when the section can be applied but it cannot be invoked merely because an Income-tax Officer changes his mind about the interpretation of the law or a new

Income tax Officer differs from the old. Accordingly when an Income tax Officer applied to an assessment the rates of the Finance Act of a particular year and his successor sought to revise the rates with reference to the Act of the next year which in his view should have been applied, it was held that there was no definite information to justify the reopening of the assessment *Income tax Appellate Tribunal v B P Byramji & Co*, 1946 I T R 175 (Nag)

In a particular year the share of profits of a minor admitted to the benefits of partnership was omitted to be aggregated with the father's income owing to a mistaken idea of the law in the next year, it was so aggregated and the High Court held the aggregation to be in order. Before the High Court passed orders a notice was issued under section 34 in respect of the omission in the first year and the High Court held that there was no definite information before the Income-tax Officer to justify his notice. If the notice had followed the High Court's decision instead of preceding it it would have been in order for there would then have been definite information in respect of the state of the law *Commissioner of Income tax Madras v Lakshmana Iyer* 1942 I T R 242.

The word discovers means that the officer should have formed an honest and reasonable belief on material that could reasonably support such belief and which definite information must be more than gossip or rumour it need not necessarily be though ordinarily it would be information of fact nor need it be information of actual escape of tax. It may be circumstantial evidence. Where therefore an officer in examining a return found that it was false and this made him suspect for similar reasons that the assessee had escaped tax in earlier years his action in reopening the earlier assessments was upheld *In re Badar Shoe Stores* 1946 I T R 431 (All)

Additional assessments can be more than one—So long as the conditions of this section are satisfied i.e. within the time limit laid down on the basis of definite information the Income-tax Officer may make as many additional assessments as the case may require. There is no estoppel or *res judicata* in respect of Income-tax matters.

It follows from the above rulings that if having started proceedings under section 34 the Income-tax Officer feels that there has been no under-assessment he is under no obligation to continue the proceedings and the assessee cannot insist on such continuation on the ground that he is eligible for some relief. The assessee's remedy in such a case is under section 35 section 48 or section 49 A *et seq* or section 25 or other appropriate section as may apply to his case.

To what extent the assessment is to be re-opened—Section 34 refers to a specific case *viz* the case where an item of income chargeable to income-tax has escaped assessment or has been assessed at too low a rate. The section does not require the whole assessment to be re-opened. In one sense, of course the Income-tax Officer must fix the taxable income to enable him to fix the rate of tax but he is not bound to re-open the items which are not in question. On the other hand he is bound to confine himself to the omitted item or items or to the enhancing of the rate as the case may be, *P J M P L. Palaniappa Chettiar v Commissioner of Income tax, Madras* AIR 1930 Mad 126 4 ITC 196 *Commissioner of Income tax*

Burma v T S T S Chettiyar Firm, 9 Rang 28, 5 ITC 194, *Mayaram Durgadas v Commissioner of Income tax*, U P, 5 ITC 471. The words 'assess or re assess such income' refer only to the income which escaped assessment, and the section therefore does not give a general power of review, *In re Kashinath Bogla*, AIR 1932 All 1, 4 ITC 472, *Thackersey v Commissioner of Income tax Bombay*, 7 ITC 216 1935 I.T.R. 457

It is of course open to the assessee to show in any way he can that the income alleged to have escaped assessment has in fact not so escaped. He can therefore show that the income was really assessed under some other head or source, even though the Income tax Officer has not re-opened the assessment under that head or source, but, if income has in fact escaped assessment the assessee cannot claim to have the assessment under other heads reopened merely on the ground that under those heads he had been overassessed, *In re Satyendra Mohan Roy Chowdhury*, 58 Cal 326, 4 ITC 447, *Thackersey v Commissioner of Income tax*, *supra*

The question whether the income thought to have escaped has been included under some other head or not is a question of fact, but an assessee who denies the existence of a particular source of income and withholds relevant information cannot afterwards plead that the income was in fact included under some other head, *Thackersey v Commissioner of Income tax*, *supra* see also *Jawala Prasad Chobey v Commissioner of Income tax Bengal*, 1935 I.T.R. 295. If the additional assessment arises as a result of a complete change in the basis of computation or of the law as applied to the case and it is not possible to isolate the additional items constituting the supplementary assessment, it is clear that the entire assessment must in effect be re-opened. Such cases, however will be rare.

Law applicable—An additional assessment has to be made in accordance with the law applicable in the assessment year during which the escaped income should have been initially assessed in the normal course, *Krishna Hydraulic Press v Commissioner of Income tax, Bengal*, 1943 I.T.R. 504. The question of limitation within which proceedings should be started or furnished in respect of additional assessments would, however, be governed by the law at the time the proceedings are started or furnished.

Appeal against re assessment—It is clear from the foregoing that the Assistant Commissioner dealing with an appeal against an assessment made under section 34 read with section 23 (3) is precluded from granting any further relief beyond the extra tax imposed under section 34, *In re Kashinath Bogla*, 4 ITC 472 AIR 1932 All 1. He cannot re-open the original assessment as a whole, *i.e.*, except in regard to the disposal of the specific points arising out of the re assessment *Rajendra Narayan Deo v Commissioner of Income tax, Bihar and Orissa*, 2 ITC 82, 5 Pat 13 AIR 1925 Pat 581 *Burjorjee v Commissioner of Income tax, Burma* 5 ITC 270, 9 Rang 161 AIR 1931 Rang 101.

He cannot also enhance a supplementary assessment if that has been made without jurisdiction, *In re North British & Mercantile Insurance Co Ltd*, 1937 I.T.R. 349 I.L.R. (1937) 2 Cal 540. Further, he cannot by way of enhancement add new items to those detected in the supplementary assessment on appeal ignoring the limitations of sections 34 and 35 *Commissioner of Income tax Punjab v Nawab Shah Nawaz Khan* 1938 I.T.R. 370, I.L.R. (1938) Lah 359, AIR 1938 Lah 741.

The principles of the above rulings would seem to apply, with full vigour, to the Appellate Tribunal also.

Delayed completion of assessments.—Till 1939 this section was not intended to meet cases in which proceedings already begun under section 23 and connected sections had not been closed within the year. There was no limitation as to the period within which assessment proceedings, if begun in time, whether ordinary assessments or those under section 34 or 35, should be completed, *Commissioner of Income tax Punjab v Nawal Kishore Kharaital*, 1938 I T R 61 (P C.) *Commissioner of Income tax, Bengal v Rajendranath Mukherjee*, 1934 I T R 71 (P C.) The limitation laid down by this section applied only to the issue of the notice initiating the supplementary assessment proceedings. In *re Kedarnath Kesraol*, 4 I T C 407, 58 Cal 254, In *re Burn & Co*, Calcutta, 1934 I T R 30, 61 Cal 132, and the rest of the proceedings was not further limited as to time. As to delay arising out of orders on agents of non residents under section 43, see notes under that section.

Since 1939 with the insertion of sub-section (2), definite time limits have been laid within which assessments, both original and supplementary, have to be concluded. The proviso to sub-section (2) was added in 1941 in order to exclude from this time limit re assessments made under appellate orders or under the orders of the High Court or the Privy Council. Such re assessments are subject to no time limit, but it would stand to reason that they should be completed at least within four years of the receipt of the orders necessitating re-assessment. As already observed, re assessments arising out of appellate and other orders are different from additional assessments governed by sections 34 and 35.

Once a final assessment has been made it cannot be re-opened except in accordance with sections 34 and 35 which are exhaustive and which prescribe the only circumstances in which and the only time within which supplementary assessments can be made and fresh notices of demand issued, *Commissioner of Income tax, Bombay v Khemchand Ramdas*, 1938 I T R 414, 65 I A 236, I L R 1938 Bom 487, A I R 1938 P C 175. This was however, before the amendment of section 48. Under that section in order to grant a refund, a re assessment may often be necessary.

'In any year'—In any year refers to the twelve months in which the first assessment would be normally initiated, i.e., to the financial year, In *re Burn & Co Calcutta* 1934 I T R 30 38 C W N 204, 61 Cal 132 A I R 1934 Cal 515.

The end of the year—The section does not prevent the income that escaped assessment being assessed during the year of original assessment itself. This section only defines the latest date up to which proceedings could be started for assessing the 'escaped income'.

The Income-tax Officer can rely on facts coming to his notice after the issue of a notice under this section, *Muthappa Chettiar v Commissioner of Income tax, Madras*, 1938 I T R 725, but the supplementary assessment has to be concluded before the periods laid down in the section.

Assessment by estimate.—The question whether section 34 can be used to re-open assessments under section 23 (4)—assessments by estimate

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Since 1939 with the insertion of sub-section (2), definite time limits have been laid within which assessments, both original and supplementary, have to be concluded. The proviso to sub-section (2) was added in 1941 in order to exclude from this time limit re-assessments made under appellate orders or under the orders of the High Court or the Privy Council. Such re-assessments are subject to no time limit, but it would stand to reason that they should be completed at least within four years of the receipt of the orders necessitating re assessment. As already observed, re assessments arising out of appellate and other orders are different from additional assessments governed by sections 34 and 35.

Once a final assessment has been made it cannot be re opened except in accordance with sections 34 and 35 which are exhaustive and which prescribe the only circumstances in which and the only time within which supplementary assessments can be made and fresh notices of demand issued. *Commissioner of Income-tax, Bombay v Khemchand Rindas*, 1938 I.T.R. 414, 65 I A 236, I L R 1938 Bom 487, A I R 1938 P C 175. This was however, before the amendment of section 48. Under that section in order to grant a refund a re-assessment may often be necessary.

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The Income-tax Officer can rely on facts coming to his notice after the issue of a notice under this section. *Muthappa Chettiar v Commissioner of Income tax, Madras*, 1938 I T R 725, but the supplementary assessment has to be concluded before the periods laid down in the section.

Assessment by estimate—The question whether section 34 can be used to re-open assessments under section 23 (4)—assessments by estimate

in cases of default of the assessee—was raised in *Commissioner of Income tax v Sundaresa Iyer*, 2 I T C 173 and it was held that such an assessment can be re-opened if the Income tax Officer finds that there has been under assessment i.e., that income has escaped assessment or been assessed at too low a rate of tax. This was followed by the Punjab High Court in *Manoharlal Deokarandas v Commissioner of Income tax*, 3 I T C 317 10 Lah 691 A I R 1929 Lah 173 and by the Allahabad High Court in *Haji Taj Muhammad Haji Abdul Rahman & Co v Commissioner of Income tax* 6 I T C 240. This section cannot however be used to revise an assessment based in the first instance on an estimate only [whether under section 23 (4) or under section 23 (3) examples under the latter sub-section are flat rate estimates under section 13] on the ground that the original estimate had been made too low. *Commissioner of Income tax Burma v U Lu Nyo* 1933 I T R 372 A I R 1933 R 350 7 I T C 47

U Lu Nyo's case did not decide as the Bombay High Court thought in *Commissioner of Income tax, Bombay v Manohar* 1935 I T R 372 that income from a particular source once having been assessed could not be re-assessed under section 34. What it decided as *Manohar's* case also did, was that a later Income tax Officer could not use this section merely because he was inclined to estimate the profits higher than an earlier officer. *Commissioner of Income tax Burma v Dey Bros* 1936 I T R 209. So long, however as the action of the officer is not arbitrary or capricious as explained by the Privy Council in *Commissioner of Income tax, U P and C P v Laxminaran Badridas* 1937 I T R 170 I L R (1937) Nag 191 it is open to him to re open an assessment under section 34 even if it was made originally only on an estimate. *Sheik Mubarak Ali v Commissioner of Income tax, Punjab*, 1938 I T R 625. See also *Madan Mohan Lal v Commissioner of Income tax Punjab* 1935 I T R 438 16 Lah 937 A I R 1935 Lah 742.

If a person assessed in the first instance under section 23 (4) is re-assessed under section 34 the fact that he has furnished a return under section 34 will not enable him to get the original assessment under section 23 (4) cancelled automatically because under section 34 only that part of the assessment will be re-opened in respect of which there has been under assessment. The filing of a return under section 34 cannot cure the default which led in the first instance to an assessment under section 23 (4). *Chotey v Commissioner of Income tax U P* 5 I T C 466 A I R 1932 A 83.

All these rulings however relate to the law as it was before 1939 and as the law now stands if the Income tax Officer has definite information that there has been under assessment he can start proceedings for an additional assessment and make such an assessment subject of course to the right of appeal of the assessee against the new assessment.

Orders made under this section appealable—An order under section 34 *Ltd.*, appealed against but not one under section 35.

Obligatory—If the Income tax Officer decides to act under this section he must issue a notice and follow the procedure in section 35, *Con* with original assessments as laid down by sections 22 and 23 unless 1938 I n clear admissions by the assessee.

The Income tax Officer need not however issue a notice in the same terms as a notice under section 22 (2). The essential features of a notice under that section are that the assessee has to give the details of his income in a particular form and verify the information in a particular way. If the information on which the supplementary assessment is proposed to be made has already been furnished by the assessee himself though in some other connection and it had also been verified by him it is strictly speaking unnecessary for the Income-tax Officer to issue a notice, though in practice the assessee is probably given an opportunity of being heard on the analogy of the provision in section 25. On the other hand if any of the information at the disposal of the Income tax Officer has either not been furnished by the assessee or not verified by him the notice is clearly necessary.

But the notice must not ask for more particulars than can be demanded under section 22 (2). If the Income-tax Officer requires such additional particulars he should proceed under section 37.

Period for compliance with notice.—Though a notice need issue only in the circumstances described above once a notice has issued it is governed so far as may be by the provisions of section 22 (2), that is, it will be necessary to give the assessee at least 30 days time to comply with the notice. Similarly the same penalties will follow non compliance with the notice as in the event of non compliance with a notice under section 22 (2), e.g., assessment under section 23 (4) and punishment under section 28 or 51.

Details of notice.—The notice under section 34 need not specify the detailed ground on which the assessment is proposed to be re-opened, *Commissioner of Income-tax v Sundaresa Iyer*, 2 ITC 173. Section 34 does not prescribe a standard form of notice it leaves discretion to the Income-tax Officer as to how much of the requirements of a notice under section 22 (2) shall be included and it will be valid in so far as it tells the person on whom it is served what he has to answer deal with or furnish, *In re Burn & Co, Calcutta*, 61 Cal 132, 1934 ITR 30. *Jawala Prasad Choubey v Commissioner of Income tax, Bengal*, 1935 ITR 295. A separate notice under section 22 (2) is not necessary, *Vir Bhan Banslal v Commissioner of Income tax, Punjab* 1936 ITR 111. The notice need not specify the income or the source that has escaped assessment or been under assessed, etc., *Istifur Khan v Commissioner of Income tax, U P*, 1942 ITR 435 (Oudh). *Chimanram Motilal v Commissioner of Income tax Bombay (Central)* 1943 ITR 44 (Bom).

A belated notice under section 22 (2) issued after the end of the year, without any idea in the mind of the Income-tax Officer that the income had escaped assessment cannot be treated automatically and alternatively as a notice under section 34. *Maharaja of Patiala v Commissioner of Income-tax, Bombay, (Central)*, 1943 ITR 202.

Where an initial assessment was held *ab initio* void, on the ground (as held by the High Court with reference to the law as it was before 1939) that a non resident could not be assessed under section 42 except through an agent under section 43, and the Income-tax Officer subsequently appointed an agent under section 43 and issued a notice under section 34, the notice was held to be valid. *Kunwar Bishwanath Singh v Commissioner of Income tax U P*, 1942 ITR 322 (All).

Applicable to all kinds of escaped income.—The amendments in 1939 extend the ambit of the section widely, and the following rulings relate mainly to the difficulties that arose before the amendments.

Counsel contends that this income in question has not escaped assessment' These words, he maintains cannot be applied to a portion of homogeneous income but only to income of a different class and to a case where the assessee derives his income from different sources, e g , money lending and house property In this case, the whole of the income of the assessee is derived from money lending The words used in my opinion do not admit of this interpretation, and for every and any income whether it be of the same class or type as that originally assessed or of a different class or type clearly comes within the scope of section 34 —Per Harrison J , in *Bulagi Shah v Crown*, 1 I T C 256

It makes no difference whether the escaped income escaped altogether or was taxed in the hands of some one else by mistake, *Ganesh Das v Commissioner of Income tax Punjab*, 2 I T C 316, 8 Lah 3-4, *Commissioner of Income tax, Burma v Vednath Singh*, 1940 I T R 222, and the section clearly applies to cases in which the Income tax Officer thinks in the first instance that the assessee has made a loss and then discovers that he has made profits *Vir Bhan Bansal v Commissioner of Income tax, Punjab*, 1936 I T R 111 170 I C 607

The section applies to cases in which —(a) No assessment at all has been made on the person receiving the income, (b) an assessment has been made but some part of the income has for some reason or other, not been assessed and (c) the rate charged has been too low In all other cases, the assessment already made is final and cannot be revised, *Commissioner of Income tax Burma v Dey Brothers*, 1936 I T R 209 The words are clearly wide enough to cover cases of concealment of income by the assessee in the first instance *Commissioner of Income tax, Bombay v Lokumal Bhonal*, 1939 I T R 51 (Sind)

The remark of the Privy Council in *Rajendranath Mukherjee's case*, 1934 I T L 71, 61 I A 10, 61 Cal 285 7 I T C 143 that has escaped assessment is not equivalent to has not been assessed merely means that in that case as the assessment had not been completed or no final order of assessment made it could not be said that income had escaped assessment It clearly does not mean that, if no notice has been issued under section 22(2), no additional assessment can be made later under section 34 for the Privy Council say in the same judgment It may be that if no notice calling for a return under section 22 is issued within the tax year, then section 34 provides the only means available to the Crown of remedying the omission Section 34 therefore can be applied in cases in which there has been no assessment at all no notice having issued under section 22 (2) *Commissioner of Income tax Bombay v Pirojbaht Contractor*, 1937 I T R 338

Escaped assessment is not confined to mistakes of omission only The words in the second alternative 'assessed at too low a rate' show that the escape need not necessarily be due to inadvertence It is therefore open to an Income tax Officer to re-open an assessment deliberately wrongly made In re *Sri Krishna Chandra Gajapati Narayan Deo*, 2 I T C 104, 49 Mad 22, A I R 1926 Mad 287

The Madras view was endorsed by the Calcutta High Court *Anglo-Persian Oil Co v Commissioner of Income tax*, 1933 I T R 129, 60 Cal 840, A I R 1933 Cal 727 but not by the Lahore High Court who

held that income known or disclosed to the authorities cannot be said to have escaped assessment. The word escape connotes failure by the taxing authority to tax the income owing to accidental or deliberate omission of the assessee to declare it or to some similar circumstances. It does not according to the Lahore view include cases where income is known or disclosed to the taxing authorities and has been the subject of assessment which has been set aside by superior authority owing to some mistake in procedure or to the income being treated in a wrong category. *Dewan Kishan Kishor v Commissioner of Income tax Punjab* 1933 I T R 143 6 I T C 345 14 Lah 255 A I R 1933 Lah 284. In a later case the same High Court after reviewing all the rulings decided that in view of the words for any reason occurring before the words escaped assessment the interpretation placed by the Calcutta and Madras High Courts was the more correct one. *Amar Singh Sher Singh v Commissioner of Income tax, Punjab*, 1935 I T R 171 A I R 1935 Lah 361. The words have been under assessed now occurring in the section obviate these difficulties.

According to the Allahabad High Court *Chotey Lal v Commissioner of Income tax U P* 5 I T C 466 A I R 1932 All 83 if an individual is wrongly assessed in the first instance as an undivided Hindu family, section 34 can be used later on to rectify the mistake and recover additional super tax. While section 23 uses the word assess to denote the determination of income section 34 clearly refers to assessed at too low a rate. A similar conclusion was reached by the Lahore High Court in *In re Lakshminarayan Gadodia* 1943 I T R 491. Under the section as it now stands the income of the assessee in such a case is *ex hypothesi* either assessed at too low a rate or been the subject of excessive relief.

The remark of the Privy Council in *Rajendra Nath Mukherjee's case* 1934 I T R 71 61 I A 10 61 Cal 285 that the words escaped assessment are not equivalent to has not been assessed was made in connection with the question of when an assessment should be completed. The Privy Council were concerned more with the word assessment to which they gave a wide interpretation than with the word escaped and all that they decided about the latter was that it was not wide enough to include income as to which no final assessment order had been made. The section therefore is not confined to cases where income had not been returned at all and applies to cases where an item has been returned but has not been assessed and to cases where items have been assessed but the assessment has been cancelled by the appellate or revisional authority. *Madan Mohan Lal v Commissioner of Income-tax, Punjab* 1935 I T R 438. *Nawal Kishore Kharaital v Commissioner of Income tax Punjab* 1936 I T R 281 168 I C 181.

The Bombay High Court also have adopted the view that the section can be used to cover in stakes of law in the first instance on the part of the taxing authorities. *Commissioner of Income tax v D R Naick* 1939 I T R 362 also Calcutta see *In re Mallik and Aich* 1940 I T R 236.

Where the Income-tax Officer allowed a credit (of tax collected at source) in the initial assessment and the assessee claimed a large credit on a different basis (the claim being eventually upheld by the High Court) it was held that it was not open to the Income-tax Officer to invoke section 34 in order to alter the initial basis since no income had escaped assessment all of it having been checked and assessed, *In re North British and Mercantile Insurance Co Ltd* 1937 I T R 349 I L R. (1937) 2 Cal 540. This ruling

has been neutralised by the words 'have been under assessed' which have been since added to the section

Super tax.—The section clearly applies both to super tax and to income-tax, *Choteyal v Commissioner of Income tax, UP*, 5 ITC 466, *Commissioner of Income tax Bombay v D R Naik*, 1939 ITR 362 See section 58

Discovers—In the United Kingdom where the corresponding provision are to the effect that 'If the surveyor discovers that have been omitted from the first assessment, etc' (Section 125, Income tax Act, 1918) It has been held even if all the facts were fully known to the Inspector (Surveyor) and he had wrongly decided at the first assessment not to tax some income it would be open to him or to his successor to make a re-assessment He need not discover any new facts all that he has to discover is the fact of under assessment, *Williams v Grundy*, 12 A T C 530 1934 ITR 236 (K.B.D.) (see also *Commissioners of Inland Revenue v Trustees of Mckinlay*, 17 A T C 345 (C.S.), 22 Tax. Cas 305) But this view was questioned by the Court of Appeal in *British Sugar Manufacturers Ltd v Harris*, 16 A T C 421, 21 Tax. Cas 528

The word 'discovers' has been variously interpreted as equal to 'comes to the conclusion', *Bray, J*, in *R v Kensington Commissioners (Ex parte Armaro)* 6 Tax Cases 279 (H.L.) 'has reason to believe' *Avory, J* in *Grundy v Dunham* 7 Tax Cases 12 and 'satisfies himself' *Lush, J* in *Williams v Trustees of Grundy*, 18 Tax Cases 271, (1934) 1 K B 524

Irregular proceedings under sections 22 and 23—If proceedings are started under sections 22 and 23 by the Income tax Officer having jurisdiction and these proceedings are continued by an Income-tax Officer not having jurisdiction the proceedings can be resumed at any time by the first officer at the stage at which he left them, the subsequent irregular proceedings being ignored In such cases section 34 does not apply since income cannot be said to have escaped assessment when assessment proceedings are still pending and there is no time limit for completing them (Since these rulings were given, a time limit has been imposed by sub-section (2) of section 34 on assessments whether under section 23 or under section 34) 'Escaped assessment' is not the same as 'has not been assessed' and 'assessment' is not confined to the definite act of making an order of assessment under section 23, *In re Lachhiram Basantlal* 58 C 909, 35 CWN 310, A.I.R. 1931 Cal 545, 5 ITC 144, *Rajendranath Mukerjee v Commissioner of Income tax, Bengal*, 61 LA 10 61 Cal 285 A.I.R. 1934 PC 30 1934 ITR 71 (P.C.), *In re Burn & Co, Calcutta*, 1934 ITR 30, 38 CWN 204

This however does not mean that an assessment is not concluded when the amount of tax payable by an assessee has been determined and a notice of demand (under section 29) issued The words 'cancel the assessment', 'make a fresh assessment' 'annul or enhance the assessment' in sections 27 30 and 31 respectively show that proceedings after the issue of the demand notice do not form part of assessment It is not therefore open to the Income tax authorities to claim that the revision of the quantum of profits on the basis of the existing records is not the same as assessing income which has escaped assessment, *Nawalokhore Kharaitil v Commissioner of Income-tax, Punjab*, 1936 ITR 287

Book-keeping problems—As to questions arising under section 34 out of problems of book keeping, *see* notes under section 13, especially in regard to Stock Values, Reserves and Bad Debts, Interest, Devices to conceal income and Double taxation due to change in accounting also notes under previous year', section 2 (11)

In a case, the facts of which were unusual the Income tax Officer dealt with a part of the balance in a suspense account as if it was a secret profit, and in a later year, when the limitation under section 34 had expired, he sought to tax further amounts of the suspense balance when adjusted (not by credit to profit) The High Court disallowed the action of the Income-tax Officer, *W K Muhammad Ibrahim v Commissioner of Income tax, Madras*, 1942 I T R 64 This ruling by no means disallows the taxation of suspense items as and when credited to profits but merely held that on the facts the profit that escaped assessment had arisen long before

Accrued interest—Where interest accrues and is compounded and is not paid and no tax is levied on the interest each year as it accrues section 34 does not come into operation when eventually tax is levied on the interest in the year of payment. But the onus would be on the Revenue to show that tax had not been levied in preceding years as the interest accrued *Rajah Bhunesh Pratap Narain Singh v Commissioner of Income tax UP* 6 I T C 167 (All)

Calling for past accounts—*See Kandam Pillai's case*, 3 I T C 297 referred to under section 23 regarding the calling of accounts in the course of an assessment under section 23 with a view to finding out whether a supplementary assessment should be made in respect of the preceding year

Default in complying with notice—Since the procedure under this section is to be so far as may be the same as would be applied to an original notice under section 22 (2), the provisions of section 23 (4) would be attracted to re-assessments made under this section if any of the defaults referred to in section 23 (4) occur, *In re Kedarnath Kesriwal*, 4 I T C 407 58 Cal 254, A I R. 1931 Cal 209

Where an assessee lumped together his income from two branches and the Income tax Officer afterwards suspected that a part of the income from one of the branches had escaped assessment and accordingly issued a notice under section 34 asking for a return of income of that branch, the assessee, instead of furnishing the return merely drew the Income tax Officer's attention to the fact that he had already submitted a return in the first instance *Held*, that the assessee did not comply with the requirements of the Income-tax Officer whose object in issuing the notice was to know separately the income of the two branches and that an assessment under section 23 (4) was in order, *Ramachandra Kashinath v Commissioner of Income-tax, Bihar and Orissa*, 5 I T C 58 A mere reference to the previous return is not a valid return in response to the notice under section 34 so an assessment can be made under section 23 (4), *In re Putamber Prasad* 1942 I T R 370

Penalty for concealment of income—As to penalties in respect of concealment at time of original assessment discovered at the time of supplementary assessment, *see* notes under section 28

Registration of firm assessed under section 34.—Before 1928, a firm that was being assessed under section 34 could not claim the benefit of registration. The application for registration may be made now even in

respect of assessments under section 34 if no part of the income of the firm has been assessed in the usual course under section 23. The benefit of registration is denied to a firm that conceals a part of its income or keeps quiet over a manifest mistake made by the Income tax Officer, but not to a firm that was not assessed at all in the first instance.

Partners of firms—The taxation of partners of firms at source is more a liability than a right and a partner cannot claim that the firm must be assessed and not he. Therefore, if profits escape assessment through the firm not being taxed proceedings can be started under section 34 against the partners direct without such proceedings being started against the firm. In *re Neemchand Daga*, 35 CWN 534, 58 Cal 120, AIR 1931 Cal 686 5 ITC 206. In *re Burn & Co* 6 ITC 135 (Cal), *M A L A R Arjan Chethiyar v Commissioner of Income tax, Madras*, 1937 ITR 600. The Act does not say that a firm should be assessed first and it is open to the Income tax Officer to assess either the firm or the partners.

In such a case it is immaterial that the proceedings against the firm would be time barred so long as the proceedings against the partner are not.

This question will seldom arise after 1939 in view of the new basis of taxation of firms adopted in 1939. See sections 14 and 23 (5).

Estoppel and res judicata—See notes under section 23.

Insurance Company—See notes under section 10 (7) and schedule.

Succession—See notes under section 26 in regard to supplementary assessments in cases of succession.

Sections 34 and 35 not mutually exclusive—Where both sections apply it is open to the Income tax Officer to proceed under either section. *Commissioner of Income-tax Bombay v D R Naik* 1939 ITR 362.

Payment of tax by instalments—In order to mitigate possible hardship in an assessee's having to pay additional tax for several past years all at once, Government promised to issue executive instructions to Income tax Officers to allow payment by instalments in deserving cases.

35 (1) The Commissioner or Appellate Assistant Commissioner may, at any time within four

Rectification of mistake

years from the date of any order passed by him in appeal or, in the case of the

Commissioner, in revision under section 33-A and the Income-tax Officer may, at any time within four years from the date of any assessment order or refund order passed by him, on his own motion, rectify any mistake apparent from the record of the appeal, revision, assessment or refund as the case may be, and shall within the like period rectify any such mistake which has been brought to his notice by an assessee.

Provided that no such rectification shall be made, having the effect of enhancing an assessment or reducing a refund unless the Commissioner, the Appellate Assistant Commissioner or the Income tax Officer, as the case may be, has given notice to the

assessee of his intention so to do and has allowed him a reasonable opportunity of being heard.

Provided further that no such rectification shall be made of any mistake in any order passed more than one year before the commencement of the Indian Income tax (Amendment) Act, 1939

(2) The provisions of sub-section (1) apply also in like manner to the rectification of mistakes by the Appellate Tribunal

(3) Where any such rectification has the effect of reducing the assessment, the Income-tax Officer shall make any refund which may be due to such assessee

(4) Where any such rectification has the effect of enhancing the assessment or reducing a refund the Income-tax Officer shall serve on the assessee a notice of demand in the prescribed form specifying the sum payable, and such notice of demand shall be deemed to be issued under section 29, and the provisions of this Act shall apply accordingly

History—Before 1922 the Collector could rectify mistakes only when brought to his notice by the assessee, in 1928 the power of rectification of mistakes which had been confined only to the Income-tax Officer in respect of original assessments was extended to other authorities. In 1939 the time limit was extended to four years subject however to no retrospective effect for this limit, i.e., in respect of pre-1939 assessments and orders

Scope of section—This section does not confer on Officers a general power of review or revision or authorise any assessee to introduce any new facts in connection with the said assessment. Sections 34 and 35 are not mutually exclusive and if both sections apply to a given case the Income-tax Officer may proceed under either section *Commissioner of Income-tax Bombay v Naik*, 1939 I T R 362

Mistake—Mistake is not mere forgetfulness (per *Esher, M R Barrow v Isaacs*) it is a slip made, not by design, but by mischance" (per *Russell, C J Sandford v Beal*, 65 L.J.Q.B. 74 74 L.T. 406), *Prescott v Lee*, infra Cf 4 Bl Com. 27 (Stroud.)

Appeals.—No appeal lies against an order under sect on 35 as indeed it cannot when the object of the section is to provide for the correction of an *obvious* mistake. No reference to the High Court can be made in respect of cases under section 35. Before the Appellate Tribunal was set up, the Commissioner could refer *suo moto* any question of law for the opinion of the High Court and a question under section 35 was so referred under the 1918 Act in *Jubilee Mills v Commissioner of Income tax, Bombay*, 2 I T C 25 A I R 1925 Bom 257

United Kingdom Law—For similar provisions see sections 120 (2) and 121 (6) of the United Kingdom Act of 1918

Notice of demand—If this rectification leads to an additional demand for tax, a fresh demand notice should be issued under section 29, and if it leads to a refund, a refund order will be issued

(Before 1939, the limitation in this section ran from the date of demand and not that of the assessment order, and a question arose as to what was the demand. See *Tricumchand Dan Singh v Chief Revenue Authority*, 2 I T C 436, 55 Cal 565, which is of little interest now.

Revisional powers.—The Commissioner cannot under his powers of revision under section 33 A correct a mistake in the face of the time bar under section 35 even though the assessee had moved the Commissioner under section 33 A within the time limit in respect of other matters, *Jesaram v Commissioner of Income tax, Punjab*, 8 Lah 357, 2 I T C 342, A I R 1921 Lah 421, *Commissioner of Income tax, Bombay v Khemchand Ramdas*, (P C) 1938 I T R 414 65 I A 236, I L R (1938) Bom 487, A I R 1938 P C 175.

Mistakes apparent from the record.—In *Jubilee Mills v Commissioner of Income tax*, 2 I T C 25, A I R 1925 Bom 257 a case under section 26 of the 1918 Act it was held that the section was intended only to rectify mistakes caused by the demand not corresponding to the assessment and not to provide appeals to the Commissioner from an order of the Collector under section 26 either rectifying a mistake or refusing to rectify it. The words "apparent from the record" bring out the substance of the first part of this decision. There were no such words in the 1918 Act.

A firm possessed five collieries which had been assessed separately in the names of three persons. When the Income tax Officer came to know that the same firm possessed all the five collieries he issued a notice purporting to issue under section 35 (but really under section 34) a notice of proposed supplemental assessment. This evoked an application from the assessee firm (purporting to be heard under section 35) alleging that the previous returns had omitted certain losses and asking for a refund of excess tax paid. The Commissioner rejected the application for refund and also dropped the proceedings under section 34. Held, that there was no mistake apparent on the face of the record of the assessment within the meaning of section 35, *Trikamji Jivan Das v Commissioner of Income-tax*, 1 I T C 406, 4 Pat 224 A I R 1925 Pat 352.

Cases remanded on appeal.—In a case remitted by the Assistant Commissioner on appeal, the Income tax Officer decided the points in issue in favour of the assessee but at the same time rectified a mistake without, however giving an opportunity to the assessee to show cause against. The Assistant Commissioner cancelled this rectification but reduced the assessment to the original figure, instead of cancelling the assessment altogether. A question of law was held to arise out of the Assistant Commissioner's appellate order *Delhi Cloth and General Mills, Ltd v Commissioner of Income tax*, 117 I C 383 A I R 1929 Lah 326.

36 In the determination of the amount of tax or of a refund payable under this Act, fractions of an anna less than six pies shall be disregarded, and fractions of an anna equal to or exceeding six pies shall be regarded

Tax to be calculated to the nearest anna

as one anna

Departmental instructions.—Fractions of a rupee in income are disregarded in practice.

37. The Income-tax Officer, Appellate Assistant Commissioner, Commissioner and the Appellate Tribunal shall, for the purposes of this Chapter, have the same powers as are vested in a Court under the Code of Civil Procedure, 1908, when trying a suit in respect of the following matters, namely :—

(a) enforcing the attendance of any person and examining him on oath or affirmation ;

(b) compelling the production of documents ; and

(c) issuing commissions for the examination of witnesses ; and any proceeding before an Income-tax Officer, Appellate Assistant Commissioner, Commissioner or Appellate Tribunal under this Chapter shall be deemed to be a "Judicial proceeding" within the meaning of sections 193 and 228 and for the purposes of section 196 of the Indian Penal Code.

History—Corresponds to section 27 of the 1918 Act and sections 28 and 37 of the 1886 Act

The words "for the purposes of section 196" were added by Act XXII of 1930. These words neutralise the effect of the ruling of the Calcutta High Court in *Lal Mohan Saha v The Crown*, 2 ITC 428, 31 CWN 996

Scope of section—This section does not by itself make an Income-tax Officer or Assistant Commissioner or Commissioner a Court or a Judge for all purposes. All that this section does is to confer specific powers on these officers in order to enable them to achieve a specified object, *viz*, the assessment of tax in as reasonable and equitable a manner as possible, which requires the eliciting of information, whether from the assessee or from others, which is necessary for the assessment. The ordinary rules of procedure in regard to evidence as followed in Courts do not necessarily apply to these proceedings before officers under the Income tax Act. *See*, however, notes under section 23 and section 52

Payment to witnesses—Under departmental instructions, witnesses before Income tax authorities summoned under section 37 are paid the same allowance as before civil courts in the same area

Effect on section 61—Though section 61 permits the assessee to appear through an agent, it does not exempt the assessee from being summoned by the Income-tax Officer under this section, if the Income-tax Officer considers the assessee's personal attendance necessary. If the Income-tax Officer needs the assessee's personal presence, he should issue a summons under section 37, it is not enough if he issues a notice under some other section, for in that case it is open to the assessee to appear through his representative.

Commissioner—The Commissioner has been given powers under this section to enable him to dispose of matters under section 33-A (revision), section 64 (jurisdiction of Income-tax Officer), section 58-B (provident funds) and the like

Commissions—This section gives power to issue commissions only for the examination of witnesses and not for that of books, *Bhawan Sahai v Commissioner of Income-tax, Punjab*, 1936 I T R 222

Penalties—The penalties for disobeying the summons of the officers of the Income tax Department issued under this section are the same as for disobeying similar summons issued by a Civil Court. An assessment cannot be made under section 23 (4) merely because an assessee fails to respond to a summons under this section, or even if he perjures himself. An assessment can be made under section 23 (4) only if the conditions therein set out are satisfied

As regards the penalties for absconding in order to evade summons or notice being served, disobeying summons to appear or to produce documents, or for refusing to be sworn in, *see* section 172 *et seq* in Chapter X, Indian Penal Code

See also sections 195 and 476 *et seq* of the Criminal Procedure Code, regarding the procedure for prosecuting such offenders etc

Civil Procedure Code—Applicability of—Details of—Extracts from Orders V, XIII XVI and XXVI of the Civil Procedure Code, 1908, have been set out in an Appendix. The rules in these orders will apply to proceedings in the Income-tax Department to the extent set out in the section, *viz*—(a) enforcing the attendance of persons and examining them on oath or affirmation (b) compelling the production of documents, and (c) issuing commissions for the examination of witnesses

Income tax Officer—Revenue Court—In *re Punamchand Maulekai* 38 Bom 642, it was held that an Income tax Officer is a Revenue Court for the purpose of clauses (b) and (c) of section 195 of the Criminal Procedure Code. Following the above it was held by the Lahore High Court, that an Income tax Officer is a tribunal for the purpose of section 135 (2), Civil Procedure Code, and that a person on his way to appear before the officer in response to a notice from him is exempt from arrest, *Basheshar Nath v Amolak Ram* 1933 I T R 9, A I R 1933 Lah 214

For the purposes of this Chapter—That is, in respect of matters connected with deduction at source assessments appeals revision, etc. The powers cannot be exercised in respect of proceedings under other Chapters *e g*, Recovery of tax (Chapter VI) Penalties (Chapter VIII) or original order of refund (Chapter VII)

False evidence—Sections 193 and 196, Indian Penal Code—193
Whoever intentionally gives false evidence in any stage of a judicial proceeding, or fabricates false evidence for the purpose of being used in any stage of a judicial proceeding shall be punished with imprisonment of either description for a term which may extend to seven years and shall also be liable to fine,

and whoever intentionally gives or fabricates false evidence in any other case, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine

Explanation 1—A trial before a Court martial is a judicial proceeding

Explanation 2—An investigation directed by law preliminary to a proceeding before a Court of Justice, is a judicial proceeding, though that investigation may not take place before a Court of Justice

Illustration

A, in an enquiry before a Magistrate for the purpose of ascertaining whether *Z* ought to be committed for trial, makes on oath a statement which he knows to be false. As this enquiry is a stage of a judicial proceeding, *A* has given false evidence

Explanation 3—An investigation directed by a Court of Justice according to law, and conducted under the authority of a Court of Justice, is a stage of a judicial proceeding, though that investigation may not take place before a Court of Justice

Illustration

I, in an enquiry before an officer deputed by a Court of Justice to ascertain on the spot the boundaries of land makes on oath a statement which he knows to be false. As this enquiry is a stage of a judicial proceeding, *I* has given false evidence

196 Whoever corruptly uses or attempts to use as true or genuine evidence any evidence which he knows to be false or fabricated shall be punished in the same manner as if he give or fabricate false evidence

Intentional insult or interruption to Income tax Officer—Section 228, Indian Penal Code—228 Whoever intentionally offers any insult or causes any interruption to any public servant, while such public servant is sitting in any stage of a judicial proceeding shall be punished with simple imprisonment for a term which may extend to six months or with fine which may extend to one thousand rupees or with both

Section 196, Indian Penal Code—Prosecution under—The ruling of the Calcutta High Court in the case of *Lal Mohan Saha* 2 I T C 428, 31 C W N 996, 104 I C 903, that in view of section 37 of the Income-tax Act no punishment was possible under section 196, Indian Penal Code in respect of corrupt use of false or fabricated evidence before Income-tax authorities had overlooked the fact that the first part of section 193, Indian Penal Code refers to giving or fabricating false evidence in a *judicial proceeding* and the second to giving or fabricating such evidence in *any other case*, and that section 196, Indian Penal Code, which deals with the corrupt use of such evidence, applies as much to cases in which such use is made in judicial proceedings as to those in which it is made otherwise. This decision however is now obsolete in view of the insertion in section 37 of the Income tax Act of the words "for the purposes of section 196"

United Kingdom Law—Under section 144 of the United Kingdom Act of 1918, the General Commissioners can summon witnesses and examine them on oath. The penalty for disobedience or refusal to be sworn in or to answer questions is £20. But the Special Commissioners cannot, except in certain circumstances, summon witnesses. Their enquiries, however, are answered by affidavits before the local General Commissioners—see sections 67 (3) *ibid*

38 The Income-tax Officer or Assistant Commissioner may, for the purposes of this Act,—

Power to call for information.

(1) require any firm, or Hindu undivided family to furnish him with a return of the members of the firm, or of the manager or adult male members of the family, as the case may be, and of their addresses ;

(2) require any person whom he has reason to believe to be a trustee, guardian, or agent, to furnish him with a return of the names of the persons for or of whom he is trustee, guardian or agent, and of their addresses ;

(3) require any assessee to furnish a statement of the names and addresses of all persons to whom he has paid in any year rent, interest, commission, royalty or brokerage, or any annuity not being an annuity taxable under the head "Salaries," amounting to more than four hundred rupees together with particulars of all such payments made

History—Corresponds to section 28 of the 1918 Act. Sub-section (3), introduced in 1933, was substituted for another which has now been incorporated in section 22 (5). It crystallises previous departmental practice and obviates the inconvenient alternative of action under section 37.

Rent—*See* notes under section 10 (2) (i). According to the Concise Oxford Dictionary 'Rent' means 'Tenants' periodical payment to owner or landlord for use of land or house or room'

Interest—*See* notes under section 10 (2) (iii) and section 42 as to what is meant by 'interest'

Annuity not being of the nature of salaries—*See* section 7. The annuity contemplated is of the kind paid by an Insurance Company or out of an estate

Penalties—For penalties for failure to comply *see* section 51 (c)

Form of notice—No form of notice has been prescribed under this section, at his option, the Income-tax Officer may summon any of these persons under section 37 and obtain the required information from them

False statements—Section 52 provides for prosecution only in respect of false declarations under sections 22, 30 (3) and 32 (2), however, a false statement furnished under section 38 could be dealt with under section 177, Indian Penal Code : *see*, the person proceeded against for giving false information

Time-limit—No time-limit has been fixed within which the information need be furnished under this section. Before a prosecution is started under section 51, the Income tax Officer should give the persons concerned reasonable time within which to comply with his demands

United Kingdom Law—There are no directly corresponding provisions in the United Kingdom Law, but *see* the *Fifth Schedule* of the 1918 Act Part XVI

39 The Income-tax Officer or Assistant Commissioner, or any person authorised in writing in this behalf by the Income-tax Officer or Assistant Commissioner, may inspect and, if necessary, take copies, or cause copies to be taken, of any register of the members,

Power to inspect the register of members of any company

debenture-holders or mortgagees of any company or of any entry in such register

Fees not payable—As the right is conferred on the officers of the department by statute, they need not pay any fees for inspection under sections 36 and 125 of the Indian Companies Act (1913)

CHAPTER V

LIABILITY IN SPECIAL CASES

40. (1) Where the guardian or trustee of any person being a minor, lunatic or idiot (all of which persons are hereinafter in this sub-section included in the term "beneficiary") is entitled to receive on behalf of such beneficiary or is in receipt on behalf of such beneficiary of, any income, profits or gains chargeable under this Act, the tax shall be levied upon and recoverable from such guardian or trustee as the case may be, in like manner and to the same amount as it would be leviable upon and recoverable from any such beneficiary if of full age or sound mind, and in direct receipt of such income, profits or gains, and all the provisions of this Act shall apply accordingly

Guardians, trustees and agents.

(2) Where the trustee or agent of any person not resident in British India, and not being a minor, lunatic or idiot (such person being hereinafter in this sub-section referred to as a 'beneficiary') is entitled to receive on behalf of such beneficiary, or is in receipt on behalf of such beneficiary of, any income, profits or gains chargeable under this Act, the tax if not levied on the beneficiary direct, may be levied upon and received from such trustee or agent, as the case may be, in like manner and to the same amount as it would be leviable upon and recoverable from the beneficiary if in direct receipt of such income, profits or gains, and all the provisions of this Act shall apply accordingly

Previous Law—This section corresponds to section 31 of the Act of 1918 and sections 20 and 21 of the Act of 1886. In 1939, the words 'entitled to receive' replaced in respect of, and it was stated in items that a non resident may be taxed either directly or through an agent. In 1941 the section was recast into two sub-sections dealing respectively with incapacitated persons on the one hand and with non residents on the other, and the words 'or resident in British India' omitted. The failure to delete

these words in 1939 led to the unintended result that a non resident beneficiary would be taxed on his world income

Machinery Chapter—This chapter mixes up substantive provisions with those relating to machinery as will be seen from sections 41 and 42. Section 40 however is essentially a machinery section

Scope of section—The section applies only to four specific cases of trustees and agents *viz*, of a minor, lunatic, idiot or non resident. As regards other cases section 41 applies and in certain cases section 42

Some of the questions which arise are common to both sections 40 and 41 and the notes below therefore overlap and cover both the sections

Sub-section (2) of section 40 and sub-section (1) of section 42 also overlap and the agent of the non resident may be caught by either section

Property—According to departmental instructions where any property (in the widest sense of the word and including a business) is held under trust the owner of the property for the purposes of the Income tax Act is the beneficiary and the income is the income of the beneficiary. The Act does not permit double taxation of the income of trusts once in the hands of the trustees and again in the hands of the beneficiary

United Kingdom Law—See Rule 4 of the General Rules. The Rule does not require the trustee etc. to be actually in receipt of profits all that is necessary is that he should have the direction control or management of the property or concern of the beneficiary. But it has been suggested in *Huxley's case*, 7 Tax Cases 49, (1916) 1 K B 788 cited below that if the infant himself is directly taxed the guardian will not be liable unless he is in receipt of the profits

Rule 5 which relates to non resident beneficiaries says that the resident trustee agent etc., shall be taxed whether he is in receipt of the profits or not as though the beneficiary were resident in England and in receipt of the profits or gains

Rule 1 is as below. Every body of persons shall be chargeable to tax in like manner as any person is chargeable under the provisions of this Act

In the *Holz Trust case* 11 Lah 724 A I R 1930 Lah 929 5 I T C 8 the Lahore High Court observed *a propos* of the taxation of associations (other than firm companies etc.) that there was little difference between this Rule 1 of the United Kingdom Law and sections 3 and 10 of the Indian Act

Trusts not covered by sections 40 and 41.—The provisions in these sections and section 38 (2) do not exclude the taxation whether as trustees finally or merely as agents on behalf of beneficiaries of trustees not falling strictly within the provisions of sections 40 and 41. See *Williams v Singer*, 7 Tax Cases 387 *infra* and the decision of the Privy Council in *Currumbhoy Ebrahim Trust v Commissioner of Income tax Bombay* 1934 I T R 148 A I R 1933 Bom 422 6 I T C 439. These special provisions are primarily machinery and of enabling nature and do not prevent the Revenue from proceeding under other sections at their option. *Mrs Saldanha v Commissioner of Income tax, Madras* 55 Mad 891 6 I T C 114, A I R 1932 Mad 378. *Trustees of the Tribune Ltd v Commissioner of Income tax Punjab*, A I R 1939 P C 208 16 Lah 829 1939 I T R 415. Since these rulings were given section 41 has been

amended so as to cover all trusts under duly executed trust deeds whether testamentary or otherwise, but cases not covered by deeds still remain to be dealt with under section 3. Also certain special types of trusts have to be dealt with under section 16.

Extent of liability of trustee—In India before 1939 it was clear that the liability of the trustee should be confined to the profits that came into his hands, this was provided for by the words 'being in receipt on behalf of the beneficiary of any income etc.' In 1939 the words were altered into 'entitled to receive' and in 1941 both the sub-sections adopted the words 'is entitled to receive' or 'is in receipt of'. Thus a resident agent or trustee would even apart from section 44-D be liable, if being entitled to receive but without himself receiving, the profits he diverted them in such a manner that in the form of ultimate receipt by the beneficiary the income was not taxable though if the non resident had been in direct receipt of the profits he would have been taxable. On the other hand income which merely accrues on paper and may not be received at all would not be ordinarily liable to tax. See notes under section 13. According to the notes on clauses attached to the Statement of Objects and Reasons in 1938 the object of the amendment was to cover all cases. The Crown cannot in any case recover tax due from the beneficiary on other accounts through the trustee or guardian or agent the liability of the latter being confined to what he is entitled to receive or receives under the trust. On the other hand the liability need not be confined to what the trustee has with him on the income account but may extend to what he has with him on the capital account of the trust since conceivably the tax on profits may exceed actual profits as received in cash (because of the disallowance of various deductions for income-tax purposes).

Minor may be taxed direct if no guardian—In *R v Northwick Commissioners* (Ex parte Huxley) 7 Tax Cases 49 (1916) 1 K B 788 in which the assessee was a minor without a guardian it was contended on behalf of the assessee that though he earned substantial sums from his profession of a jockey he could not be taxed because he was not a 'person' and that a minor could be taxed only if there was a guardian or trustee. In the King's Bench Division a bench of three judges unanimously held that the minor could not be taxed but the decision was reversed unanimously by the Court of Appeal.

Per Phillimore L J—It was urged that the making of a return is a matter of difficulty and that an infant is not supposed by the law to be capable of doing such difficult business matters that every subject who is assessed has a right of appeal and that an appeal is in the nature of a *lis* and that no *lis* in which an infant is concerned can be conducted in the Courts unless he has a guardian *ad litem*. I think the answer is that in most if not quite all of the rare cases in which an infant becomes chargeable it would be because of his exceptional and precocious skill that such infant may be presumed to be capable of either making a return or of instructing and paying some competent adviser and that the analogy of a *lis* must not be pushed too far.

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'It is not necessary to consider what might be the decision if the infant had a guardian having the direction and control or management of his property and the Crown was minded nevertheless to require a

return from the infant. But in that case, the decision in another part of the same section, viz — *Tischler v Apthorpe*, 2 Tax Cases 89, 52 L T 814 approved as it was in this Court in the case of *Werle & Co v Colguhoun*, 2 Tax Cases 402, 20 Q B D 753 would have to be reckoned with "

Per *Warrington, L J* — Huxley contends that the law treats all infants, whether babies in arms or men of twenty years of age, as equally incapable. But I think the legal doctrine of equality of incapacity has reference to the question of status before the law, and for the purpose of construing such an Act as the present it has no applicability.

Per *Phillimore, L J* — But guardians will not be liable for the infant's default if they have not received or had the control of the infant's income.

Non resident may be taxed direct if accessible — The words "if not levied on the beneficiary direct occurring in sub-section (2) codify the following decisions viz *Chief Commissioner of Income tax v Bhanjee Ramjee & Co* 1 I T C 147 44 Mad 773, A I R 1921 Mad 212, *Commissioner of Income tax, Bombay v National Mutual Life Association of Australasia* 1933 I T R 350, 57 Bom 519, A I R 1933 Bom 427, 6 I T C 426, and *Maharaja of Patiala v Commissioner of Income tax, Bombay, (Central)*, 1943 I T R 202, and neutralise the decision in *Sir Aditya Narayan Singh (Maharaja of Benares) v Commissioner of Income tax, U P*, 1938 I T R 217, I L R 1938 All 432, A I R 1938 All 310 which held the contrary view. In view of the addition of these words to the statute the corresponding rulings in the United Kingdom on the subject in *Tischler v Apthorpe*, 2 Tax Cas 89 *Werle & Co v Colguhoun* 2 Tax Cas 402 (C L.) *Whitney v Inland Revenue*, 10 Tax Cas 88 (H L.), and *Macdine & Co v Eccote* 10 Tax Cas 481 (H L.), are of little interest now.

Who should be taxed — Beneficiary or trustee — Section 40 is not a charging but a machinery section and under the law the person charged with tax is neither the trustee nor the beneficiary but whoever is in actual receipt of control of the income which it is sought to reach *Hota Trust v Commissioner of Income tax Punjab* 11 Lah 724 A I R 1930 Lah 929, 5 I T C 8, In re *Probynabad Stud Farm* 1936 I T R 114 A I R 1936 Lah 602, 8 I T C 439 *Commissioner of Income tax, Bombay v Abu Baker Abd. Rahman* 1939 I T R 139. The amendments in 1939 to sections 40 and 41 give explicit option to the Crown to recover tax either from the trustee or from the beneficiary.

In the case of the *Hota Trust* the trustees carried on business and administered the properties of the testatrix for the benefit of her children all of whom were of full capacity and ordinarily resident in British India. The trustees had to keep proper accounts and get them audited. They had to set aside a part of the profits every year as a reserve for business purposes and this reserve if not utilised in the business was to be divided among the beneficiaries at the end of ten years and thereafter periodically according to circumstances. The trustees could extend the business at their discretion and could borrow for this purpose. Half the profits was to be earmarked for the purpose of repaying such loans. No beneficiary could hypothecate or alienate his or her share except by selling it equally to all the other beneficiaries. Held that the trustees should be taxed on

the profits of the business, as an association of individuals *Hota Trust v Commissioner of Income-tax, Punjab* 5 I T C 8, 11 Lah 724, A I R 1930 Lah 929

Following the above ruling the Madras High Court held that a business carried on by a Christian mother on behalf of herself and her minor sons of whom she was the guardian belonged to an association of individuals within the meaning of section 3 and was taxable under section 10 *Mrs Saldanka v Commissioner of Income tax*, 5 Mad 891 6 I T C 144 A I R 1932 Mad 378

A trust was created by statute to maintain the dignity of a Baronetcy. There were four trustees of whom the beneficiary Baronet was one and managed the properties. The trustees paid out certain sums retained others and paid the balance to the Baronet. It was decided by the Privy Council, confirming the decision of the Bombay High Court that the trustees were taxable both in respect of what they spent or retained and what they paid to the Baronet *Trustees of Sir Currimbhoy Ebrahim Baronetcy Trust v Commissioner of Income tax Bombay* 1934 I T R 148 7 I T C 195 61 I A 209 5 Bom 317 A I R 1934 P C 166 (P C). It was suggested in argument before the Privy Council that the result would be that both the beneficiary and the trustee would be taxed that the assessment of trustees involved the graduation of the tax with reference to the total income of the trustees with reference to the income of other trusts or even the personal income of the trustees and that on the other hand there would be no graduation with reference to the total income of the beneficiary either in his favour if he enjoyed only a small benefit out of a large estate with slender other resources or in favour of the revenue in other cases. As regards double taxation the Privy Council declined to express an opinion since the position as argued might or might not be correct. As regards graduation the Privy Council considered that it may be found compatible with the scheme and machinery of the Act to have the scale of tax adjusted according to the total income of the Baronet individually. Departmental practice is based on this ruling.

Remittances from non resident trustees—Resident beneficiaries—

In *Drummond v Collins*, (1915) A C 1011, 6 Tax Cases 525 a non resident left property situate abroad upon trust for the children of his deceased son. The trustees under the will were directed to accumulate the income of the respective shares of the children on certain conditions. The will also directed that out of the net income of the proportionate share of the trust estate held in trust for any child the trustees might in their uncontrolled discretion provide from time to time for maintenance and education of such child. The children lived with their guardian the mother, in the United Kingdom. From time to time the trustees remitted moneys to the mother on behalf of the children. It was contended that the moneys were not liable to tax, firstly because they were voluntary payments and secondly because the mother had no control of the foreign property. Held that the payments in question were taxable.

Per Lord Loreburn—"I do not assent to the proposition that a voluntary payment can never be charged, but it is enough to say that these were not voluntary payments in any relevant sense. They were payments made in fulfilment of a testamentary disposition for the benefit of the children in the exercise of a discretion conferred by the will. They were in fact the children's income.

Per Lord Parker — " Though they might be incapable, because of their age, of giving a receipt for the money, it is in my opinion none the less clear that the money in question was, as soon as the trustees had exercised their discretionary trust, held in trust for these infants as beneficiaries "

Per Lord Wrenbury — " Let me however assume that the interest of the infants is contingent, that is to say, the income of another (the person entitled under the gift over) in another contingency "

It remains however that in this case the trustees exercise their discretion in favour of the child, the interest of the child ceases to be contingent and becomes vested. Whether the money is paid to the child or to the guardian of the child or to the school master or to the tailor or other person who supplies the wants of the child it is paid to or to the use of the child and is the income of the child "

Does liability of trustee depend on liability of beneficiary?—On the question whether the liability of the trustee depends on the liability of the beneficiary the following judgments in the United Kingdom may be noticed

Indeed, I understood Mr Cunliffe to go so far as to say that, when funds are vested in trustees, the Revenue authorities are entitled to look to those trustees for the tax, and are neither bound nor entitled to look beyond the legal ownership

My Lords, I think it clear that such a proposition cannot be maintained

If the legal ownership alone is to be considered, a beneficial owner in moderate circumstances may lose his right to exemption or abatement by reason of the fact that he has wealthy trustees, or a wealthy beneficiary may escape super-tax by appointing a number of trustees in less affluent circumstances. Indeed if the Act is to be construed as Counsel for the appellant suggests, a beneficiary domiciled in this country may altogether avoid the tax on his foreign income spent abroad by the simple expedient of appointing one or more foreign trustees. Accordingly, I put this contention aside. On the other hand, I do not think it would be correct to say that, whenever property is held in trust, the person liable to be taxed is the beneficiary and not the trustee.

Section 41 of the Income tax Act, 1842, renders the trustee, or other person who has control of the property of an infant, woman or lunatic chargeable to income-tax in the place of the infant, married woman or lunatic.

And, even apart from these special provisions, I am not prepared to deny that there are many cases in which a trustee in receipt of trust income may be chargeable with the tax upon such income. For instance, a trustee administering a trade for the benefit of creditors or beneficiaries

all or a trustee who is under an obligation to apply the trust income to the satisfaction of charges or to accumulate it for future distribution, appears to come within this category, and other similar cases may be imagined. The fact is that if the Income-tax Acts are examined it will be found that the person charged with tax is neither the trustee nor the beneficiary as such, but the person in actual receipt and control of the income which it is sought to reach. The object of the Acts is to be sure for the State a proportion of the profits chargeable, and this could be attained (speaking generally) by the simple and effective ex-

pedient of taxing the profits where they are found. If the beneficiary receives them, he is liable to be assessed upon them. If the trustee receives and controls them, he is primarily so liable. If they are under the control of a guardian or committee for a person not *sui juris* or of an agent or receiver for persons resident abroad, they are taxed in his hands. But in cases where a trustee or agent is made chargeable with the tax, the statutes recognise the fact that he is a trustee or agent for others, and he is taxed on behalf of and as representing his beneficiaries or principals.

In short, the intention of the Acts appears to be that, where a beneficiary is in possession and control of the trust income and is *sui juris*, he is the person to be taxed, and that, while a trustee may in certain cases be charged with the tax, he is in all such cases to be treated as charged on behalf or in respect of his beneficiaries, who will accordingly be entitled to any exemption or abatement which the Acts allow.

—Per Viscount Cave in *Williams v. Singer and others* and *Pool v. Royal Exchange Assurance*, 7 Tax Cases 387 at 410, (1921) 1 A.C. 65.

It was suggested by Counsel for the appellant that the Income-tax Acts, except in certain special and rather narrow instances, took no account of the position of trustees, but regarded only the legal ownership. On the other hand, from some of the language in the judgments of the Court of Appeal, especially that of Lord Justice Warrington, it would appear that a contention that the Income-tax Acts looked generally to the beneficiary and disregarded the trustee, except as a means of reaching the beneficiary in certain rare cases, had found favour. I do not propose to express an opinion whether either, or which if either of these two extreme views is right.

It may perhaps be said that, where there is a trust for accumulation or for payment of debts, no person can be said to be entitled to the receipt of the profits and that in such case the trustee is to be the person to be assessed. It is possible also that, where trustees have the management of a business, they should be the persons to be assessed or charged. There are disbursements which may have to be made in the course of conducting a business which a prudent owner would consider as deductions from profits and which trustees would make before they paid the net income over to the beneficiary but which nevertheless for income-tax purposes, as the law at present stands, are not considered as legitimate deductions from income—cases of which the decision of this House in *Strong & Co. v. Woodfield*, 5 Tax Cases 215, (1906) A.C. 448 is an example. In these cases, if the Revenue is to receive its full quota, it would seem that the assessment must be put upon the trustee and not upon the beneficiary, and that in such cases the trustee is the person to be assessed. The case now before your Lordships is not one of such cases.

Per Lord Phillimore (*Ibid*).

'We hear of no matters in which a conflict between capital and income and their respective interests has arisen, nor of any business carried on by the trustee as to which the more complex case of trading profits would replace the plain case of dividends paid. If there had been annuitants with a prior right to be paid or several beneficiaries entitled to share in the income, if there had been reversionsers who could claim that part of the annual profits were in the nature of accretions to

capital, if there was a trust for accumulation or a power to vary the amounts payable from time to time as between minors, the impracticability of saying that any or all of the beneficiaries entitled to the income owned the whole or any part of that income from the moment it became payable and was paid to the full extent of the amount paid would be evident'—Per Lord Sumner in *Baker v Archer Shee*, 11 Tax Cases 749 (1927) A C 844

In *Williams v Singer*, 7 Tax Cases 387, it was decided that where the income is, under a mandate from the trustees payable direct to the beneficiary or his bankers, the liability to tax should be determined by the circumstances (e.g., in respect of residence, domicile allowances and reliefs) of the beneficiary and this principle was recognised in later cases as of universal application *Reid's Trustees v Commissioners of Inland Revenue* 14 Tax Cases 512, (1929 S C 439) approved in *Kelly v Rogers*, (1935) 2 K B 446 (C A), 19 Tax Cas 692

It will be noted that sections 40 and 41 of the Indian Act have specifically provided for the various contingencies referred to in the above rulings. It has to be ascertained with reference to the facts of each case whether the trustee is entitled to receive the income specifically on behalf of a beneficiary or not.

Expenses of management of trust—It was held at one time that if a will or settlement created a trust providing for the payment of the cost of management and a gift of the remainder of the income to a beneficiary, the income of the beneficiary was the net income after deducting the expenses of management of the trust *Murray v Commissioners of Inland Revenue*, 11 Tax Cases 133, but this view was overruled by the House of Lords in *Baker v Archer-Shee*, 11 Tax Cases 749 (1927) A C 844. If the trust does not provide for the expenses of management the income of the beneficiary should be taken as the gross income of the trust in all cases irrespective of the circumstances. It is a different matter whether the trustee can claim to deduct from his taxable income as trustee expenses of management of the trust in those cases in which he is taxed (and not the beneficiary). In such cases, expenses of management would not ordinarily be allowed as a deduction as such expenses would not be necessary for earning the income that is the subject of charge see *Aikm v Macdonald's Trustees* 3 Tax Cases 306.

Under a trust made by himself, as assessor was the life-tenant with remainders over. All the expenses and liabilities were to be met by the trustees out of the income. One of the terms of the trust gave the assessor the right to receive the whole or any part of the income and spend it on legitimate payments connected with the estate. It was held that this condition amounted to his being given a mandate to administer the estate on behalf of the trustees and that his own income was the net income after deduction of expenses *Commissioners of Inland Revenue v Lord Hamilton of Dalzell* 10 Tax Cases 406.

Business carried on by trustees—A testator who died in 1900 directed his trustees *inter alia*, to pay to his sister the life rent of certain insurance monies and to pay the full annual proceeds of the residue of the estate to his widow for her maintenance and that of his children. The widow died in 1908 leaving two minor daughters. (Both these daughters and the aunt, the testator's sister, were alive in 1914 when the case arose.) Under the will, each daughter was to acquire on attaining majority, an

absolute interest in one-half of the trust estate subject to the aunt's life-
 rent. If either sister died in minority leaving issue which attained the
 age of 21 years or married (if a female), such issue was to take the
 parent's prospective share. Failing issue, the prospective share of the pre-
 deceased was to go to the surviving sister. During minority the daughters
 had no absolute right to any part of the income, and the trustees had discre-
 tion to apply the whole or part of the prospective share of each sister
 to her maintenance and education. In addition to the insurance money,
 the estate consisted of heritable property and the wine merchants' business
 of the testator. The trustees, acting in the exercise of an express power
 to that effect, carried on the business. The entire net profits were paid
 over annually to or on behalf of the minor daughters. *Held*, that the
 business was that of the trustees and not that of the beneficiaries.

The real reason why business has not been handed over by the
 trustees to the Misses Shuels was not any technical difficulty in the
 way of obtaining a discharge from minors unprovided with a guardian
 but the much more formidable difficulty that the trustees could not
 have denuded in favour of minor beneficiaries without committing a
 breach of trust. Such a trustee could not have been re-
 garded either as a simple trustee who was bound to denude in their
 favour when called upon', per Lord Sherrington in *Fry v Shiel's*
Trustees, 6 Tax Cases 583, 585.

Examples of trustees carrying on business, not for the benefit of
 specific beneficiaries, can also be found in clubs and institutions carrying
 on trade with outsiders. See *Inland Revenue v Stonehaven Recreation*
Trustees, 15 Tax Cas 419, *Carlisle and Silloth Golf Club v Smith*, 6 Tax
 Cas 198 and other cases referred to under 'Mutual Concerns' in the notes
 under section 3.

Income—Whether belonging to trustee or beneficiary—In *Baker*
v Archer-Shee, 11 Tax Cases 749, Lady Archer Shee's father, who was a
 foreigner, had directed by his will that his estate should be held in trust
 and that the trustees should apply the whole of his income to the daughter's
 use. The trust fund consisted of American securities, and the trustees
 were in America where the income was realised. From time to time the
 trustees placed sums of money to the credit of Lady Archer Shee in an
 American Bank after retaining sums necessary to pay income tax, etc., in
 America. The trustees had power to change the investments at their dis-
 cretion. The question was whether having regard to the United Kingdom
 Law the assessment should be made only on the amount remitted to the
 United Kingdom or whether the whole of the amount placed to the credit
 of Lady Shee in America could be taxed. It was contended that the lady
 was entitled only to the interest from the estate, and that this interest
 was not a "foreign possession," and that the owners of the securities *viz*
 the trustees, were non residents, and that therefore only the amounts
 actually brought into the United Kingdom by the lady could be taxed.

Rowlatt, J., (1927) 1 K B 109, while conceding that what the lady
 had was not a right to specific property but only the right in equity to
 compel the trustee to discharge his trust properly, *held* that the trustees
 should be dropped out for the purpose of determining liability to income
 tax, and that, since, had the trustees been in England they would have been
 assessed the beneficiary should be assessed in the absence of the trustees.

who were outside the United Kingdom His reading of the decision of the House of Lords in *Williams v Singer* 7 Tax Cases 410, (1921) 1 A C 65 was that in that case the beneficiary being abroad herself her interest was from a foreign source and as she was herself not taxable her trustees were also not taxable and that if the beneficiary had been in England she would have been liable to tax on those stocks and shares on which it was held the trustees were not liable

The Court of Appeal reversed Rowlatt J's decision on the ground that what the beneficiary received was not the dividends *in specie* but the balance after the trustees had carried out their trust and defrayed expenses and the sums paid were no longer clothed in the form in which it was originally received having no trace of its ancestry (per *M R Hansworth*) They followed *Sudeley v Attorney General* (1897) A C 11 and emphasised the fact that Lady Archer Shee had only an equitable right and not a specific right in the income

The House of Lords in 11 Tax Cases 749 (1927) A C 844 reversed the decision of the Court of Appeal by a majority of three to two Lord Sumner considered that the stocks etc belonged only to the trust and not to the beneficiary who had only an equitable right Lord Blanesburgh agreed with him and emphasised the fact that the assessee was sole beneficiary only by accident and that at one time her mother was also a beneficiary Incidentally he approved of the ruling in *Murray v Commissioners of Inland Revenue* 11 Tax Cases 133 Lords Atkinson Wrenbury and Carson on the other hand held that on the facts of the case the administration of the estate had been concluded that Lady Archer Shee's interest had become vested in her and that the trustees were only her agents The majority's decision resulted in the overruling of the Scottish Court's decision in *Murray's* case referred to above

Later on with reference to further evidence on the American Law which for English Courts is a question of fact the House of Lords unanimously held that the correct view was that taken by Lords Sumner and Blanesburgh above *Garland v Archer Shee* 15 Tax Cases 693 (1931) A C 212

An educational endowment policy was taken out by trustees for the benefit of a child If the child died before the age of fifteen the trust funds were to revert to the father otherwise the child received an annuity for four years from the age of fifteen and also the accumulated trust funds on attaining the age of twenty one The annual premiums covered the bulk of the trust fund It was held by the House of Lords that the money spent on premiums was not the income of the child Though the conclusion was unanimous the judgments differed in the reasoning and what weighed most was the absence of provision in the trust that if the child died the balance of accumulated trust income was to belong to the child's estate *Commissioners of Inland Revenue v Dewar and another (Charles Bruce's Trustees)* (1931) A C 566 16 Tax Cases 84 (H L.)

Trustee—Correcting mistakes—Under a will several annuities were directed to be given free of deduction The trustees had paid the annuities for some years without deducting income-tax It was held that the annuities were not free of income-tax and that the trustees were entitled to deduct the income-tax they had paid out of residue from future payments of annuities on the ground that the Court will always when possible allow the correction of errors of account as between trustees and their

cestus que trust The rule that a man cannot recover moneys paid under a mistake in law does not apply to cases of this kind, *see In re Musgrave, Machell v Parry*, (1916) 2 Ch 417 In India such annuities cannot be taxed at source—*see* notes under sections 7 and 12, but the main principle of this decision, regarding the right of a trustee to correct past mistakes on account of income-tax will presumably apply in India also

Agent of non resident—Liability personal—The liability of an agent of a non resident to pay tax is personal *See Plunkett v Narayan Parasuram*, 1 I T C 1, 22 Bom 332 *see Rigden v Commissioner of Inland Revenue and Commissioners of Inland Revenue v Urwick's Executors* 19 Tax Cases 542 The ruling though decided under the 1886 Act is still applicable The only change since made in the law is that the agent should be served with a notice (*see* section 43) and given an opportunity to show cause why he should not be treated as an agent The fact that the liability of the agent is personal does not affect the right of the agent to recoup himself from his principal All that the personal liability means is that the Crown does not look beyond the agent for the recovery of tax

Indemnity—The agent or trustee is protected under section 65 of the Act—*q v*

41 (1) In the case of income, profits or gains chargeable under this Act which the Courts of Wards, the Administrators General, the Official Trustees or any receiver or manager (including any person whatever his designation

who in fact manages property on behalf of another) appointed by or under any order of a Court, or any trustee or trustees appointed under a trust declared by a duly executed instrument in writing, whether testamentary or otherwise, (including the trustee or trustees under any Wakf deed which is valid under the Mussalman Wakf Validating Act, 1913), are entitled to receive on behalf of any person, the tax shall be levied upon and recoverable from such Court of Wards, Administrator General, Official Trustee, receiver or manager or trustee or trustees in the like manner and to the same amount as it would be leviable upon and recoverable from the person on whose behalf such income, profits or gains are receivable, and all the provisions of this Act shall apply accordingly

Provided that where any such income, profits or gains or any part thereof are not specifically receivable on behalf of any one person, or where the individual shares of the persons on whose behalf they are receivable are indeterminate or unknown, the tax shall be levied and recoverable at the maximum rate but where such persons have no other personal income chargeable under this Act and none of them is an artificial juridical person, as if such income, profits or gains or such part thereof were the total income of an association of persons

Provided further that when part only of the income, profits and gains of a trust is chargeable under this Act, that proportion only of the income, profits and gains receivable by a beneficiary from the trust which the part so chargeable bears to the whole income, profits and gains of the trust shall be deemed to have been derived from that part.

(2) Nothing contained in sub section (1) shall prevent either the direct assessment of the person on whose behalf income, profits or gains therein referred to are receivable, or the recovery from such person of the tax payable in respect of such income, profits or gains

History—That part of the section which does not refer to trustees generally is the same as section 32 of the 1918 Act and corresponds to sections 22 and 23 of the 1886 Act. Till 1939 the section applied to the special cases mentioned and not to trustees generally. The section was extended to cover all trusts in 1939 when reference was also made to the receivability of income instead of actual receipt as before. The provisos to sub section (1) as also sub section (2) were added at the same time. In 1941 reference was made to testamentary trusts which would otherwise not be covered by this section. See *Commissioner of Income tax, Madras v Venkatachalam Chettiar*, 1944 I T R 261. In 1946 the last part of the first proviso to sub-section (1) was added. The amendment of 1941 was not retrospective. See *Income tax Appellate Tribunal v Shri Radho Madho Trust* 1946 I T R 470 (Nag).

Executor—Under will—1, *Forbes v Secretary of State* 1 I T C 8 42 Cal 151 19 CWN 138 a case under the 1886 Act, which however was substantially the same as the present Act in this particular matter it was held that the income accruing to an executor of a will was taxable. The contention on behalf of the executor was that he was not the beneficial owner of the income and that there was no express provision in the Act to tax him as there was in the case of trustees guardians etc. See also *In re P C Mullick* 65 IA 150 I L R (1938) 2 Cal 214 1938 I T R 206 A I R. 1938 P C 118 (P C).

Official Assignee—The question whether the Official Assignee can be taxed under this section in respect of property falling under section 9 belonging to an estate under this management under the Presidency Towns Insolvency Act has been raised but not decided. *In re Official Assignee, Bengal (Estate of Jnanendranath Pramanik)*, 1937 I T R 233 I L R (1937) 2 Cal 192 41 CWN 683. This question cannot arise after the amendment of this section in 1939 which has enlarged the scope of section 41.

In the United Kingdom according to *Inland Revenue v Fleming* 14 Tax Cases 78 a claim for the purpose of repayment of tax on the income from the estate of a bankrupt during its administration by a trustee cannot be made either by the trustee or by the bankrupt if and when he is re-invested with the property.

Scope of section—To bring a case under this section it is not enough that the property is managed by or under the order of a Court but it should be managed on behalf of another. Therefore where co-owners (in definite shares) manage a property even if under the orders of a Court, for

their own benefit and not for that of an unascertained owner, the case does not fall under this section. In *re Keshar Deo Chamria*, 1937 I T R 246, I L R (1937) 2 Cal 358, A I R 1937 Cal 583 affirmed by the Privy Council on appeal in *Keshardeo Chamria v Commissioner of Income tax, Bengal*, 1939 I T R 394 (P C) see also notes under section 9 as to ownership of property. The fact that one of the parties is a minor will make no difference. *Jannalabdin v Commissioner of Income tax, Madras*, 1944 I T R 285.

Whether section mandatory—The question whether, if the conditions laid down therein are fulfilled, the tax can be assessed directly on the beneficiary at the option of the Crown was raised before 1939 but not decided. In *re Keshar Deo Chamria* supra. Sub-section (2) now confers the option in terms.

Trustees under a duly executed deed—Before 1939 the section applied only to Courts of Wards, Administrators General, Official Trustees and Receivers and Managers appointed by or under the order of a Court. Now it extends to all trustees under duly executed deeds. The reference to the Mussalman Wakf Validating Act, is out of abundant caution. Before 1941, the section did not apply to testamentary trusts now it does.

Cases of trusts without duly executed deeds—which, however, will be rare—should evidently be dealt with on the principles of *Williams v Singer*, 7 Tax Cases 387 (1921) 1 A C 65 (H L) and *Holt Trust v Commissioner of Income tax*, 5 I T C 8, 11 Lah 725, A I R 1930 Lah 929, *see*, in accordance with the facts of each case, tax being levied where income is found.

A receiver appointed by debenture holders is taxable, whether he is the agent of the company or of the debenture holders. *Inland Revenue v Thomson*, (1935) 2 All E R 651. The goodwill of a business cannot be separated from it. *Inland Revenue v Muller & Co's Margarin Ltd*, 1901 A C 217, therefore, if a share of the goodwill of a partnership is assigned to a non partner all that is meant is that if the partnership is sold, a share of the price attributable to the goodwill, should be given to the non partner. The mere fact the partners are obliged to share the profits with the non partner will not make the partners trustees for the non partner they are only debtors to that extent. *Inland Revenue v Harris Lebus' Executors*, 1946 K B D.

Misdescription—Mere description for example, not relating the assessment note to a trustee as such, will not invalidate an assessment, for, he will be entitled to the equities arising from his trusteeship if in fact he is a trustee. *Martin v Commissioners of Inland Revenue*, 17 A T C 513 (C S).

When section 16 (1) (c) and (3) apply—To the extent that sections 40 and 41 are machinery provisions, they are obviously subject to the provisions of sections 16 (1) (c) and (3), 23-A, 44-D, *et seq* which seek to treat the income of one person as that of another in certain stated circumstances. The primary charging section is section 3, of which all these sections are modifications and where a case is not covered by any of these specific sections, the income has to be assessed under section 3 on the person to whom on the facts of the case and the personal and other law applicable the income belongs.

See notes under section 3 as to trustees generally and also under the heading 'Association of Individuals'

Indeterminate shares—The first proviso levies the maximum rate of income tax (but not the maximum rate of super tax—see section 58) on incomes of trusts where the income is neither received specifically on behalf of any one person nor the shares of the persons are defined and known. While in the case of a firm the Crown has the option to treat it as registered if evasion is discovered, the Crown has no such weapon in respect of trusts used for evasion but not falling within section 16 (1) (c) or (3) or section (44-D).

Where a *Waqf* says that the beneficiaries shall benefit concurrently and in the same proportion and the number of beneficiaries can be determined the case is not governed by the first proviso of section 41 (1) and each beneficiary should be taxed separately, *Khan Bahadur Habibur Rahman v Commissioner of Income tax*, 1945 I T R 189 (Pat). On the other hand where the income of each beneficiary year by year is dependent on the sole discretion of the trustees, the individual shares of the beneficiaries are necessarily indeterminate and the income of the trust as a whole will be taxed at the maximum rate. *Estate Harendra Kumar Ray v Commissioner of Income tax, Bengal*, 1944 I T R 68. See also *Arur v Commissioner of Income tax, Bombay* 1945 I T R 465. It will be noted that income tax is levied not at the rate applicable to the total income of the trust (as in the case of an unregistered firm or similar association of persons) but at the maximum rate.

Also the entire taxable income of the trust from all sources (section 8 to 12) will be taxed. See *Harendra Kumar Ray v Commissioner of Income tax Bengal* 1944 I T R 68. But if the beneficiaries have no other taxable income and none of them is an artificial juridical person the trust will be dealt with like an association or Hindu joint family and taxed at the rate appropriate to its total income see the concluding part of first proviso to sub-section (1) which was added in 1946. The word 'or' in the first proviso must be read conjunctively otherwise there is no point in the alternatives. Also the use of the word 'individual' before shares shows that what is to be determined is not only the quantum but the person beneficially entitled. *Yakub Versay Lalji etc v Commissioner of Income tax Bombay* 1946 I T R 548.

Partially taxed trusts—The second proviso to sub-section (1) removes doubts that might otherwise arise as to the extent of taxability (also inclusion in total income) in the hands of the beneficiary of what he receives from the trustee who in turn derives income partly from sources taxable in British India and partly from sources not so taxable.

Specifically—The word is used for mere emphasis obviously. Beneficiaries with contingent interests (not yet vested) will fall within the mischief of the first proviso. If the shares of the beneficiaries are indeterminate the fact that the trustee in his discretion distributes specific amounts will not save such cases from the proviso. If A, B, C and D are beneficiaries the shares of A and B specific and C and D indeterminate the trustee should apparently be taxed with reference to C and D together at the maximum rate and with reference to A and B each separately at the appropriate rates.

Person—Need not be an individual. See section 2 (9)

As regards certain shares of a company included in the trusts, the directors of the company, in a meeting in February, 1917, sanctioned the transfer of the shares to the joint names of the assessee and his wife. The Company opened a joint account in the names of the trustees in March, 1917. Thereafter dividends were paid to the trustees, but till the trust deed was completed, the shares remained in the assessee's name. The assessee had orally told his wife that he was holding the shares in trust pending their transfer to trustees. Held, that an effective trust had not been created in January, 1917. The oral declaration merely showed an intention to settle the shares and was not an immediate and complete declaration of trust. *Allen v Inland Revenue*, 9 Tax Cases 234 (H L)

Mr Stott owned certain preference shares in a Company, which he transferred, by a deed, dated 29th April, 1919, to himself and Mr B jointly as trustees for Mr B's minor sons. A trust deed was executed on the 30th April, providing, *inter alia*, that 'the trustees will henceforth stand possessed of the said shares, and of the income thereof on trust' for the minors. On the same day, *viz*, the 30th April, Mr Stott received arrears of dividends on the shares for several years. The cheque for the dividend was dated the 29th April. The Company registered the transfer of shares on the 6th of May. On the 9th of May, a dividend warrant was endorsed by Mr Stott, and paid into the trustees' joint account. The Commissioners held, following *Duncan v Inland Revenue*, 8 Tax Cases 433, that the trust became effective from the 30th April, and that the dividend belonged to Mr Stott. Held, reversing the decision of the Commissioners, and following that part of the ruling of the Irish Court of Appeal in *Allen v Inland Revenue*, 9 Tax Cases 234, which had not been appealed against to the House of Lords, that the trust became effective on the transfer of the shares. *Trustees of Brennan Minors v Scanlan*, 9 Tax Cases 427, 41 T L R 452

Under a will certain lands of the testator were, subject to certain interests of the widow, to be held in trust for the eldest son living at the time of his death absolutely on his attaining the age of 21 years, and the residue of the estate, both personal and real, to be converted into money and invested. The capital and income of such investment was to be held in trust for all the children in equal shares and were an "interest or interests absolutely vested" on the testator's death. The trustees had discretion to apply the whole or part of the income to which any child was entitled to its maintenance, and the balance was to be accumulated by investment. There were three daughters and one son. The widow remarried and was entitled only to an annuity from the residuary estate. The son was sought to be assessed to super tax on the income from real property plus one fourth of the income of the residuary estate on the ground that the interest of the minor was vested and not contingent. Rowlatt, J, decided as follows:—
 "it does not matter whether the interest is vested or contingent in as much as there is a trust to accumulate a fund during the infancy of the eldest son subject to a power to the trustees to apply such sum as they think proper for his maintenance, the part of the income which is accumulated is not the income of the minor. In a case of that kind the income must come to the infant in the end if the interest which he takes is a vested interest; but it will not come to him as income, it will come to him in future in the form of capital. His income, which is held in trust for him in the sense, that he will ultimately receive it, but it is not in trust for him in the sense that the trustees have to pay the in

come to him year by year while he is an infant the case is quite different from a case where the infant has the right to the money now but the money remains in the hands of his trustees, not because of any directions in the will which directed it to be accumulated but because he is an infant and cannot receive the money and give a receipt for it. The Court of Appeal remanded the case for a definite finding as to whether the minor's interest was contingent or vested. The finding was that it was contingent, and the question as to the liability if the interest was vested was not considered by the Court of Appeal and the *obiter dicta* of Rowlatt J. have been neither affirmed nor overruled. *Inland Revenue v Blackwell's trustees*, 10 Tax Cases 235.

By a will dated 1906 a testator who died in 1908 gave the residue of his estate—containing real property under mortgages—after payment of legacies and annuities to servants and clerks to his four children. Until the youngest child was 25—i.e. till 1916—the rents were to be used in reducing the mortgages and then the property was to be divided and not sold unless the trustees thought it advisable. The rents were spent even after 1916 in reducing the mortgages and no legacies were paid before December 1919. The Crown taxed the children on their income from 1916 on the ground that they were entitled to the corpus from 1916 and could have enforced the conveyance of their shares to themselves subject to the charges. Held that since the executors had power to pay off the mortgages—without the consent of the beneficiaries—before distributing the residue and they chose that course the residue had not been ascertained in 1916 so no tax was payable by the children. *Daw v Inland Revenue* *Duff Dimber v Inland Revenue* 14 Tax Cases 58.

Executors.—Income received by the executors of a will during administration is ordinarily their income and not that of the beneficiaries. A residuary legatee is entitled to nothing until the residue has been first ascertained. Therefore when he receives the residue even though it may include income during administration he is not taxable as it is not his income. *Marie Celeste Samaritan Society v Inland Revenue* 11 Tax Cases 226, exp. *Barnardo's Home* 7 Tax Cases 646 (H.L.). Similarly a residuary life tenant also is entitled to nothing until the residue has been ascertained. *Rev Lionel Corbett v Inland Revenue* (1937) 4 All E.R. 700 (C.A.). It is a different question however whether when it has been ascertained it is taxable and if so to what extent and on what basis whether on that of accrual or on that of receipt.

The position and the estate of trustees however differ from that of executors for where trustees are in receipt of income which it is their duty to pay over to beneficiaries either with or without deduction of something for the trustee's expenses on the way, the income is at its very inception the income of the beneficiaries. *Rev Lionel Corbett v Inland Revenue* (1937) 4 All E.R. 700 (C.A.).

This last ruling however has been nullified by the United Kingdom Finance Act of 1938 under which amounts paid during administration to beneficiaries with 'absolute interest' (which has been specially defined) will be deemed to be the income of the beneficiary.

Super tax on trustees.—In *Inland Revenue v Pakenham* 13 Tax Cases 573 it was held by the House of Lords that income-tax provisions relating to representative assessments on trustees and guardian were not applicable to super tax. The latter was a tax on total income while income tax was

schedular. The trustee may not be in a position to return the total income of the ward and even if he was he might not be able to indemnify himself. In view of the words 'so far as they are applicable' and not *mutatis mutandis*, the House of Lords considered that in view of the possible injustice otherwise super tax should be levied only on the beneficiary and not on the trustee. The Indian basis of super tax and income-tax is, however, different. Under section 55, super tax can be levied not only on individuals but on others and both income-tax and super tax are levied on the basis of total income. The difficulty however about the trustees returning the total income of the beneficiary arises in India also and this is an argument for taxing the beneficiary by preference where possible. Sections 40 and 41 as amended in 1939 give effect to this purpose. See also section 58 which excludes from super tax the first proviso of section 41 (1).

In the United Kingdom an association of individuals is not liable to super tax. So questions arise whether a trustee who is accumulating funds is receiving income year by year on behalf of the beneficiary, whether the latter has a contingent or vested interest and so forth, section 41 in India covers many of these difficulties.

Expenses of trustees.—Trustees in Scotland received remittance from abroad in respect of income from trust property abroad and distributed the net income to the beneficiaries. Held that the full amount received by the trustees was taxable without any deduction for management expenses in the United Kingdom. *Per* the Lord President—It is for them (the trustees) to point to the section of the statutes which entitled them to make such a deduction. I think they have entirely failed.—*per* Lord MacLaren. The management of the trustees is I venture to think of the nature of what is described in one of the rules as a private or domestic use.

The only kind of deductions allowed is expenditure incurred in earning the profits. There is no distinction under any circumstances allowable for expenditure incurred in managing profits which have been already earned and reduced into money—pounds shillings and pence. *Aikin v Macdonald's Trustees* 3 Tax Cases 306 (C S.)

An assessee was entitled under a will to a share of the net annual income of the residuary estate. Legacy duty was paid by the trustees to the Crown and the trustees paid the net amounts to the assessee after deducting the duty. Held that though the trustees were accountable to the Crown for the duty it was in effect a personal obligation of the assessee. The income receivable under the bequest was therefore part of his taxable income and the amount to be included was his full share of the net residuary income plus income tax applicable thereto without deduction of legacy duty paid on his behalf. *Cobville v Ireland Revenue* 8 Tax Cases 442 (C S.)

- 42** (1) All income, profits or gains accruing or arising, whether directly or indirectly, through or from any business connection in British India, or through or from any property in British India, or through or from any asset or source of income in British India, or through or from any money lent at interest and brought into British India in cash or in kind, shall be deemed to be income accruing or arising within British India, and where the person entitled to the income, profits or gains is not resident

Non-residents

in British India, shall be chargeable to income tax either in his name or in the name of his agent, and in the latter case such agent shall be deemed to be, for all the purposes of this Act, the assessee in respect of such income tax

Provided that where the person entitled to the income, profits or gains is not resident in British India, the Income-tax so chargeable may be recovered by deduction under any of the provisions of section 18 and that any arrears of tax may be recovered also in accordance with the provisions of this Act from any assets of the non resident person which are, or may at any time come, within British India

Provided further that any such agent, or any person who apprehends that he may be assessed as such an agent, may retain out of any money payable by him to such non resident person a sum equal to his estimated liability under this sub section, and in the event of any disagreement between the non resident person and such agent or person as to the amount to be so retained, such agent or person may secure from the Income-tax Officer a certificate stating the amount to be so retained pending final settlement of the liability, and the certificate so obtained shall be his warrant for retaining the amount

Provided further that the amount recoverable from such agent or person at the time of final settlement shall not exceed the amount specified in such certificate except to the extent to which such agent or person may at such time have in his hands additional assets of such non resident person

(2) Where a person not resident or not ordinarily resident in British India, carries on business with a person resident in British India, and it appears to the Income-tax Officer that owing to the close connection between such persons, the course of business is so arranged that the business done by the resident person with the person not resident or not ordinarily resident produces to the resident either no profits or less than the ordinary profits which might be expected to arise in that business, the profits derived therefrom or which may reasonably be deemed to have been derived therefrom, shall be chargeable to income-tax in the name of the resident person who shall be deemed to be, for all the purposes of this Act, the assessee in respect of such income tax

(3) In the case of a business of which all the operations are not carried out in British India, the profits and gains of the business deemed under this section to accrue or arise in British India shall be only such profits and gains as are reasonably attributable to that part of the operations carried out in British India

RULES

The relevant rules issued under this section are set out below

Rule 33—In any case in which the Income tax Officer is of opinion that the actual amount of the income profits or gains accruing or arising to any person residing out of British India whether directly or indirectly through or from any business connection in British India or through or from any property in British India or through or from any asset or source of income in British India or through or from any money lent at interest and brought into British India in cash or in kind cannot be ascertained, the amount of such income, profits or gains for the purposes of assessment to income tax may be calculated on such percentage of the turnover so accruing or arising as the Income tax Officer may consider to be reasonable, or on an amount which bears the same proportion to the total profits of the business of such person (such profits computed in accordance with the provisions of the Indian Income-tax Act) as the receipts so accruing or arising bear to the total receipts of the business or in such other manner as the Income tax Officer may deem suitable

Rule 34—The profits derived from any business carried on in the manner referred to in section 42 (2) of the Act may be determined for the purposes of assessment to income-tax according to the preceding rule

History—The first two sub sections of this section were first introduced in the 1918 Act and were evidently influenced by the alterations in the English law in 1915 though unlike the provisions in the United Kingdom law these sub sections were not mere machinery but imposed liability. The only change made in 1922 was the addition of the words 'or property' after the words 'business connection' in section 42 (1). In 1928, a sub-section (3) was added deeming the entire profits of sales in British India of imports into it to accrue or arise in British India and forbidding the deduction of royal commissions (not actually paid) from such profits (*Steel Brothers' Case* 2 I T C 119). This sub section was replaced by the present sub section in 1939. Extensive changes were also made in 1939 in sub sections (1) and (2). The first part of sub-section (1) was extended so as to cover income whether of residents or non residents (but the object has apparently failed—see *Western India Life Insurance Case* below) and income "through or from any asset or source of income in British India, or through or from any money lent at interest and brought into British India in cash or in kind". Explicit provision was also made to tax either the principal or the agent and also for deduction of tax at source in certain cases. The second and third provisos to sub section (2) were also added. Sub-section (2) was amended partly to place a British Subject (or a subject of an Indian State) in no worse position than a non British subject or a non Indian State subject and partly as a consequence of the recasting of the basis of taxation (see sections 4 4-A and 4-B) with reference to residence and ordinary residence also partly to strengthen the hands of the Income-tax authorities, viz, by removing the former condition that the non-resident (or not ordinary resident) person should exercise control over the business of the resident. Now, 'close connection' and abnormally low profits are enough for the Income-tax Officer to take action.

Sub-section (3) which from 1928 sought to tax the entire profits on sales in British India of imported goods was probably intended to be relaxed

so as to tax merchanting profits only, but, as drafted it applies only to income 'deemed' under sub-section (1) to accrue, etc., in British India and not to cases of accrual or receipt in British India which are caught directly by section 4. The latter will be taxable in full and only income 'deemed' to accrue in British India will be taxed in part. According to the Bombay decision in *Western India Life Insurance Case*, this sub-section can apply only to non residents.

Residence and ordinary residence.—See sections 4-A and 4-B and notes under those sections.

Section applies only to non-residents.—Notwithstanding the amendment in 1939, it has been held that the section applies only to non residents, for (1) the marginal note referring to non residents has been retained (but it is not usual to amend marginal notes), (ii) if the first part of the section applied both to residents and non residents, its proper place would be in the definition clauses, viz., section 2, (iii) by making the whole of the first paragraph as one and connecting it with the other by 'and', the statute makes it clear that the section applies only to non residents, and (iv) the categories of income referred to in section 42 point to non residents only, and (v) it is not a fair method of construing section 4 (1) (b), first to separate income into two parts, viz. (A) accruing within British India and (B) accruing outside and then to take a portion of (B) back into (A) by referring to some other part of this Act. *Commissioner of Income tax v Western India Life Insurance Co*, 1945 I T R 405 (Bom).

Accruing or arising.—As to the meaning of these words see notes under section 4. This section no longer (i.e., after April, 1939) refers to accrual to a person, and the first part of sub-section (1) makes no distinction between residents and non residents. The sum and substance of the first part is, broadly, that even indirect accrual from sources in British India (of income which accrues, i.e., is receivable abroad) is equivalent to accrual in British India. The question can, obviously, arise only in respect of income receivable outside British India for otherwise section 4 would be sufficient to catch such income.

Though as pointed out in *Rogers Pyatt Shellac Case*, 52 Cal 1, and *National Mutual Association*, 1 I T R 350, 57 Bom 519, section 42 is a charging section in the sense that it renders a non resident liable to tax in respect of sources of income to which he would not be otherwise liable, the section cannot be read without reference to sections 3 and 4, which impose the charge generally. This general charge is merely given a particular application by section 42. *Hira Mills v Income tax Officer, Coimbatore*, 1946 I T R 417.

Directly or indirectly, through or from.—These alternatives appear in this collocation in order to cast the net as wide as possible.

Business connection.—See decisions set out below. This phrase relates to something different from, but not unrelated to, business, of which there is a definition in section 2 (4) of the Act, *Commissioner of Income-tax, Bombay v Currimbhoy Ebrahim and Sons Ltd*, 1935 I T R 395 (P.C.) See *In re Nandlal Bhandari Mills, Ltd, Coimbatore*, 1939 I T R 452, A.I.R. 1939 All 593.

Property.—The word as it occurs in this sub-section is an ordinary English word to be taken in its usual signification subject to the context.

provided by the rest of the sub-section and there is nothing in the sub-section to exclude from its scope any of the six classes of income mentioned in section 6. The property, however, should be something tangible and situate in British India; it would therefore, exclude a chose-in-action (though the latter might for purposes of administration or succession or for purposes of jurisdiction to attach a debt, be naturally considered to be situate in British India) but include furniture in British India the hire for which is paid outside British India. The phrase 'property in British India' should be taken literally and simply. *Commissioner of Income-tax Bombay v Currimbhoy Ebrahim and Sons, Ltd*, 1935 ITR 395 (PC).

Asset or source of income—One of the alternatives would seem to be superfluous and has been put in evidently out of abundant caution.

Money lent at interest brought into British India—The section will now apply to such cases even if there is no business connection as a consequence of the lending see *Commissioner of Income-tax Bombay v Currimbhoy Ebrahim and Sons Ltd* 1935 ITR 395 (PC). Cases of money borrowed in British India from a non resident i.e. not borrowed outside and then brought in are not mentioned evidently because normally interest in such cases would be governed by a British Indian contract and payable in British India.

In cash or in kind—See notes on remittances under section 4 (1) particularly on constructive remittances.

Should agent be entitled to receive the profits—It will be seen that while sections 40 and 41 require the trustee agent or receiver to be entitled to receive or be in receipt of the profits, section 42 does not require the agent to be so entitled. Section 42 (1) seeks to catch profits that accrue or arise outside British India from a business connection in British India and are normally received outside British India *ex hypothesi* the agent in British India would not ordinarily be entitled to receive the profits though he may be in receipt of funds or goods belonging to his non resident principal. Similarly section 42 (2) seeks to catch profits that actually accrue or arise in British India but are not necessarily received there being concealed by the manipulation of transactions between the non resident principal and the resident agent. In such cases the profits are more likely to be received by the non resident principal abroad than by the resident dummy agent in British India. That is why the sub-section does not require the agent to be in actual receipt of the profits. In either case i.e. under sub-section (1) as well as under sub-section (2) of section 42 the agent would have to recoup himself somehow from the moneys or assets in his hand belonging to his non resident principal. But in cases falling under section 42 (1) the Income-tax Officer may at his option recover the tax direct from the assets in British India of the non resident principal. In cases falling under section 42 (2), the agent is really a creature of the non resident and no special provision is necessary to enable him to recover the tax from his principal.

See also notes under section 43.

In his name or in the name of his agent—This removes the difficulty created by the ruling of the Allahabad High Court in *Sir Aditya Narain Singh (Maharaja of Benares) v Commissioner of Income-tax* 1938 ITR 217 I.L.R. (1938) All 432 A.I.R. 1938 All 310. See also notes under section 40. The option is evidently that of the Income-tax authorities.

Deductions at source—The old proviso has been expanded in order to authorise explicitly deduction at source which is enjoined by section 18

Certificate of estimated liability—The second proviso explicitly authorises the agent to retain money to meet tax, if there is disagreement on this point between him and his principal, the Income tax Officer, if approached is bound to give a certificate to the agent stating the amount to be provisionally retained pending final assessment and the agent can thereafter retain the amount on the strength of the certificate. If the agent fails to retain money, it is at his own risk for he is deemed for all purposes, to be the assessee

The third proviso restricts the liability of the agent to the amount of the certificate referred to above *plus* any other assets of the principal in his possession at the time of final assessment

Computation of taxable profits—The receipts in the hands of the local agent in cases falling under sub-section (1) will be ordinarily gross profits since all the relevant expenditure of the non resident may not be incurred through him, the computation of taxable profits should be made under Chapter III, and if that is not possible, under Rules 33 and 34. Rule 33 is necessary because the actual records of profits received by non residents through trading in this country will, generally speaking, not be available, and there must therefore be some arbitrary method by which such profits can be ascertained. Similarly, Rule 34 is necessary because *ex hypothesi* in cases in which as the result of artificial manipulation the true profits have been obscured it is possible to ascertain the profits only by some arbitrary method

Under the pre 1939 law no deduction was permissible on account of manufacturing profits in the case of goods manufactured abroad and sold in British India. In *re Port Said Salt Association, Ltd* 59 Cal 1226, 6 I T C 123 36 C W N 563. This ruling is obsolete in view of the amendment to sub-section (3) in 1939

Sub section (3)—Note the word deemed. The sub-section therefore does not apply to income, in fact accruing or arising in British India. Therefore if goods are sold in British India, this sub-section will not apply, but it will apply if the goods are brought or processed or manufactured in British India and sold abroad. See *Hira Mills v Income tax Officer, Cawnpore*, 1946 I T R 417. How the profits attributable to British India are to be estimated is a different matter

On the other hand according to the Bombay High Court, see *Commissioner of Income tax v Western India Life Insurance Co*, 1945 I T R 405, this section can apply only to non residents

Non-residents—Income arising from business in India—The following executive instructions have been issued

Indian branches of non resident firms are liable to assessment under the Act. In order to secure an accurate assessment in such cases, sections 22 (4) and 37 enable an Income-tax Officer to require the production of the balance sheet and profit and loss account of the firm as a whole, in addition to that of the Indian branch and also to require the submission of a detailed statement of all the profits credited to the head office on account of transactions carried out on its behalf. In some instances, however, the form adopted for the accounts and balance sheets of the head office or the Indian branch does not enable the share of profits properly due to the Indian branch to be gauged accurately. Rule

33 gives the Income tax Officer wide powers to determine how the profits of the Indian branch shall in these circumstances be calculated, and enables him to fix as the income of the Indian branch for assessment purposes either a percentage of the turn over of the business done by the branch or, where this procedure proves unsuitable, an amount which bears the same proportion to the total profits of the business as the Indian receipts bear to the total receipts of the business, or in such other manner as he deems suitable.

Indian agents of non resident firms of which they are not technically either branches or subsidiary firms are liable for the payment, on account of their principals, of the tax on their principals' Indian profits under the provisions of sections 42 (1) and 43 of the Act. It will be observed that these provisions permit the levy of the tax on a non resident's business not only where he has established a regular *agency* in India but also where he conducts his business regularly through a particular *agent* or casually through various *agents*. Tax cannot, however, be levied on any part of the income of a non resident which does not accrue or arise or is not received in British India or which can not be deemed to accrue or arise or to be received in British India. No attempt will be made by the Income tax Officer to deem the income of a non resident to arise in British India, if it is clear that the business operations in which he is engaged consist entirely of trading *with* British India as distinct from trading either wholly or partially *in* British India. It is the nature of the operations and not the nature of the agency which determines liability, and even though a person resident may regard the agency as of a casual nature this will not exclude the possibility of assessment as an agent if the non resident either through one or more persons is really trading *in* British India. Each case will be dealt with on its merits, and such factors as the bearing of bad debts by the resident the non existence of privity of contract between the non resident principal and the principal in British India have to be taken into account but no one of them alone is conclusive. For general guidance a few examples are appended but it must be understood that they are only for the purpose of general illustration, and having regard to the complexity of business relations they cannot be comprehensive nor must the precise wording in any illustration be taken as binding the department in any case in which the facts warrant the taking of a different view.

(a) *B*, a distiller in Glasgow, sells whisky direct to *A* an importer in Bombay. The relationship is that of principal and principal, and not that of principal and agent. Moreover as *B* has no agent or connection in British India, he must be treated as trading *with* British India and not trading *in* British India. Even if *B* agreed to sell to no other person in British India but *A*, the position for income-tax purposes is the same provided that the selling in British India is definitely *A's* business and does not constitute sales by *A* on behalf of *B*.

(b) *A*, an Indian resident and a large supplier of mill stores, has a monopoly for the sale in India of the belting of a non resident *B*. *A* is paid commission by *B* on all orders executed. *A* does not confine his purchases of belting to *B*. So long as *B* exercises any control over the pricing of goods or the method by which his agent *A* conducts the business he (*B*) must be deemed to have a business connection in British

India, and is assessable accordingly, either directly or through an agent (which may be *A* or somebody else) If, on the other hand, *B* sends the goods to *A* for sale at the best price obtainable, *A* undertaking for a commission to sell entirely at his discretion how he likes and to whom he likes, and *A* bearing any bad debts, *B* is really trading only with British India and not in British India The relationship between *A* and *B* may, however, be closer than the mere description of the terms of the agreement would indicate and in that event, the Income-tax Officer may determine that *B* is really trading in British India through an agent

(c) *A* is the Indian agent for hardware and sundries of *B* a British manufacturer *A* receives salary and commission from *B*, and bad debts fall on *B* Here the position is that *B* is actually trading in British India through his employee and quite clearly, he is liable to tax either directly or through any person (including *A*), who can be deemed to be agent under section 43

(d) *A* is a broker in British India who in the ordinary course of his business, agrees to sell on commission certain standardised commodities *B*, *C*, *D*, and *E* and many other exporters of such commodities from England send their goods regularly to *A* who entirely at his discretion and according to the rules of the market in which he deals, sells all such goods sent to him at current market prices *A* is responsible for any bad debts incurred and on the sale of goods remits the proceeds to *B*, *C*, *D*, *E* etc less his regular commission *B*, *C*, *D*, *E*, etc, are trading with British India and not in British India

In all these cases *A*'s own commission or profits as agent are of course liable to tax whether or not he has to pay as agent in respect of his foreign principal's profits

Casual agents for non resident firms to whom goods are from time to time consigned have been dealt with above and no attempt should be made to tax the profits of a non resident through the agent on his class of business

As regards taxation of interest on money lent by a non resident to a resident in British India it has been held by the Privy Council in the case of the Bombay Trust Corporation as agent of the Hongkong Trust Corporation that there can be a business connection within the meaning of sections 42 and 43 of the Act between a resident borrowing money from a non resident and a non resident lending money to a resident and that the former can be treated as the statutory agent of the latter, under section 43 of the Act This decision is to be followed wherever it is applicable Where however a resident takes for a short period, a casual and isolated loan from a non resident with whom he has no regular or continuous dealings, it need not be held on the strength of that fact alone that there is a business connection within the meaning of the above section and that the resident is liable as agent on the interest paid to the non resident (*Income tax Manual*) The latest edition of the *Income tax Manual* has omitted the above illustrations

Special Income tax Officers—The Income tax Manual has the following instructions

Non residents whose income arises in more than one province and who are assessed direct, and not through statutory agents under section 43 of the Act will be assessed by the Income tax Officer Non resident

construed so as to make it workable. An assessment under section 34 automatically involves an enquiry under section 23, and a preliminary enquiry before taking action under section 34 would merely duplicate the enquiry without any purpose. *Commissioner of Income tax, Bengal v Mahabram Ramjidas*, 1940 I T R 442 (P C). See also *In re The Indians National Tannery*, 1941 I T R 618 (Cal) following the above.

Where a supplementary assessment was made on two main grounds, *viz*, (a) the profit was small in relation to the turnover, (b) the closing value of stock was understated the High Court held that there were no materials to find that income had escaped assessment. Ground (a) was a *non sequitur*, for, it was at least equally probable that other circumstances which were not in dispute, could have accounted for the low profits. As for (b) since the opening and closing balances of each year had been valued on the same basis, and the opening balance of each year had agreed with the closing balances of the preceding year, no income could have escaped assessment, *Commissioner of Income tax, Burma v Dey Bros*, 1936 I T R 209. Merely because (a) the expenditure is high in relation to the volume and value of trade and (b) the sales are smaller than in earlier years it cannot be assumed that the accounts are false or that income has escaped assessment, *Natal Kishore Kharaitilal v Commissioner of Income tax, Punjab*, 1936 I T R 287, 168 I C 181.

The present section, according to the Bombay High Court must be taken as a whole, and when it is so taken, there must be definite information which has come into the possession of the Income tax Officer, which results in his discovering that income has escaped assessment or been underassessed etc., and there must be some information as to a fact. And the fact may be as to the state of the law *e.g.*, that a case had been overruled or that a statute had been passed of which the Income tax Officer had not been aware, but a mere change of opinion on the part of the Income-tax Officer as to the meaning of the law or the correction of the opinion of the Income tax Officer by a superior officer would not be such 'definite information'. *Commissioner of Income tax v Sir Yusuf Ismail*, 1944 I T R 8.

In another case proceedings were started on the ground that 'income from Madras branches of the assessee had escaped taxation'. The Appellate Tribunal found that the Income tax Officer had in his mind the existence of the Madras branches when making the original assessment. In the absence of any other reason stated by the Income tax Officer as inducing him to take action under section 34, it was held by the Patna High Court that there was no 'definite information' in the possession of the Income-tax Officer as required by this section and that therefore the notice issued under section 34 was not tenable in law. *Fazl Dhala v Commissioner of Income tax* 1944 I T R 341. According to the Madras High Court, *Raghavulu Naidu & Sons v Commissioner of Income tax*, 1945 I T R 194, in view of the words "in consequence of definite information" the word 'discovers' means something more than 'has reason to believe' or 'satisfies himself', the English decisions as to the meaning of 'discovers' were therefore not relevant. The definite information need not relate to a pure question of fact, and definite information with regard to the state of the law will bring the section into operation. No general rule can be laid down as to when the section can be applied but it cannot be invoked merely because an Income tax Officer changes his mind about the interpretation of the law or a new

Income tax Officer differs from the old. Accordingly when an Income tax Officer applied to an assessment the rates of the Finance Act of a particular year and his successor sought to revise the rates with reference to the Act of the next year which in his view should have been applied, it was held that there was no 'definite information' to justify the reopening of the assessment *Income tax Appellate Tribunal v B P Byramji & Co*, 1946 I T R 175 (Nag)

In a particular year, the share of profits of a minor admitted to the benefits of partnership was omitted to be aggregated with the father's income owing to a mistaken idea of the law, in the next year, it was so aggregated and the High Court held the aggregation to be in order. Before the High Court passed orders a notice was issued under section 34 in respect of the omission in the first year, and the High Court held that there was no definite information before the Income-tax Officer to justify his notice. If the notice had followed the High Court's decision instead of preceding it, it would have been in order, for there would then have been definite information in respect of the state of the law, *Commissioner of Income tax, Madras v Lakshmana Iyer* 1942 I T R 242

The word discovers means that the officer should have formed an honest and reasonable belief on material that could reasonably support such belief, and which definite information must be more than gossip or rumour, it need not necessarily be though ordinarily it would be, information of fact, nor need it be information of actual escape of tax. It may be circumstantial evidence. Where therefore an officer in examining a return found that it was false and this made him suspect for similar reasons that the assessee had escaped tax in earlier years his action in reopening the earlier assessments was upheld. *In re Badar Shor Stores* 1946 I T R 431 (All)

Additional assessments can be more than one—So long as the conditions of this section are satisfied i.e., within the time limit laid down on the basis of definite information, the Income tax Officer may make as many additional assessments as the case may require. There is no estoppel or *res judicata* in respect of Income-tax matters.

It follows from the above rulings that if having started proceedings under section 34 the Income-tax Officer feels that there has been no under-assessment he is under no obligation to continue the proceedings and the assessee cannot insist on such continuation on the ground that he is eligible for some relief. The assessee's remedy in such a case is under section 35 section 48 or section 49 A *et seq* or section 25 or other appropriate section as may apply to his case.

To what extent the assessment is to be re-opened—Section 34 refers to a specific case viz the case where an item of income chargeable to income tax has escaped assessment or has been assessed at too low a rate. The section does not require the whole assessment to be re-opened. In one sense, of course, the Income-tax Officer must fix the taxable income to enable him to fix the rate of tax but he is not bound to re-open the items which are not in question. On the other hand he is bound to confine himself to the omitted item or items or to the enhancing of the rate as the case may be. *P & M P L Palaniappa Chettiar v Commissioner of Income tax, Madras* A I R, 1930 Mad 126 4 I T C 196 *Commissioner of Income tax*

Burma v T S T S Chettiyar Firm, 9 Rang 28, 5 ITC 194, *Mayaram Durgadas v Commissioner of Income-tax*, U P, 5 ITC 471. The words "assess or re assess such income" refer only to the income which escaped assessment and the section therefore does not give a general power of review. In *re Kashinath Bogla* AIR 1932 All 1, 4 ITC 472, *Thackersey v Commissioner of Income tax Bombay*, 7 ITC 216 1935 ITR 457.

It is of course open to the assessee to show in any way he can that the income alleged to have escaped assessment has in fact not so escaped. He can therefore show that the income was really assessed under some other head or source, even though the Income tax Officer has not re-opened the assessment under that head or source but if income has in fact escaped assessment the assessee cannot claim to have the assessment under other heads reopened merely on the ground that under those heads he had been overassessed. In *re Satyendra Mohan Roy Chowdhury*, 58 Cal 326, 4 ITC 447, *Thackersey v Commissioner of Income tax supra*.

The question whether the income thought to have escaped has been included under some other head or not is a question of fact but an assessee who denies the existence of a particular source of income and withholds relevant information cannot afterwards plead that the income was in fact included under some other head. *Thackersey v Commissioner of Income tax supra*, see also *Jawala Prasad Chobey v Commissioner of Income tax, Bengal*, 1935 ITR 295. If the additional assessment arises as a result of a complete change in the basis of computation or of the law as applied to the case and it is not possible to isolate the additional items constituting the supplementary assessment, it is clear that the entire assessment must in effect be re opened. Such cases however will be rare.

Law applicable—An additional assessment has to be made in accordance with the law applicable in the assessment year during which the escaped income should have been initially assessed in the normal course. *Krishna Hydraulic Press v Commissioner of Income tax, Bengal*, 1943 ITR 504. The question of limitation within which proceedings should be started or furnished in respect of additional assessments would however, be governed by the law at the time the proceedings are started or furnished.

Appeal against re assessment—It is clear from the foregoing that the Assistant Commissioner dealing with an appeal against an assessment made under section 34 read with section 23 (3) is precluded from granting any further relief beyond the extra tax imposed under section 34. In *re Kashinath Bogla* 4 ITC 472 AIR 1932 All 1. He cannot re-open the original assessment as a whole; except in regard to the disposal of the specific points arising out of the re assessment. *Rajendra Narayan Deo v Commissioner of Income tax Bihar and Orissa* 2 ITC 82 5 Pat 13 AIR 1925 Pat 581. *Burjorjee v Commissioner of Income tax, Burma* 5 ITC 270, 9 Rang 161, AIR 1931 Rang 101.

He cannot also enhance a supplementary assessment if that has been made without jurisdiction. In *re North British & Mercantile Insurance Co., Ltd.*, 1937 ITR 349 I.L.R. (1937) 2 Cal 540. Further he cannot by way of enhancement add new items to those detected in the supplementary assessment on appeal ignoring the limitations of sections 34 and 35. *Commissioner of Income tax, Punjab v Nawab Shah Nawaz Khan* 1938 ITR 370, I.L.R. (1938) Lah 359, AIR 1938 Lah 741.

The principles of the above rulings would seem to apply, with full vigour, to the Appellate Tribunal also

Delayed completion of assessments—Till 1939 this section was not intended to meet cases in which proceedings already begun under section 23 and connected sections had not been closed within the year. There was no limitation as to the period within which assessment proceedings, if begun in time, whether ordinary assessments or those under section 34 or 35, should be completed, *Commissioner of Income-tax, Punjab v Nawal Kishore Kharaitul* 1938 I T R 61 (P C) *Commissioner of Income-tax, Bengal v Rajendranath Mukherjee* 1934 I T R 71 (P C). The limitation laid down by this section applied only to the issue of the notice initiating the supplementary assessment proceedings. In *re Kedarnath Kesrwal*, 4 I T C 407, 58 Cal 254, In *re Burn & Co, Calcutta*, 1934 I T R 30, 61 Cal 132, and the rest of the proceedings was not further limited as to time. As to delay arising out of orders on agents of non residents under section 43, see notes under that section.

Since 1939 with the insertion of sub-section (2), definite time limits have been laid within which assessments, both original and supplementary have to be concluded. The proviso to sub-section (2) was added in 1941 in order to exclude from this time limit re assessments made under appellate orders or under the orders of the High Court or the Privy Council. Such re assessments are subject to no time limit, but it would stand to reason that they should be completed at least within four years of the receipt of the orders necessitating re assessment. As already observed, re assessments arising out of appellate and other orders are different from additional assessments governed by sections 34 and 35.

Once a final assessment has been made it cannot be re-opened except in accordance with sections 34 and 35 which are exhaustive and which prescribe the only circumstances in which and the only time within which supplementary assessments can be made and fresh notices of demand issued. *Commissioner of Income tax, Bombay v Khemchand Ramdas*, 1938 I.T.R. 414 65 I A 236, I L R 1938 Bom 487 A I R 1938 P C 175. This was however, before the amendment of section 48. Under that section in order to grant a refund a re assessment may often be necessary.

"In any year"—In any year refers to the twelve months in which the first assessment would be normally initiated, i.e., to the financial year, *re Burn & Co Calcutta* 1934 I T R 30 38 C W N 204, 61 Cal 515. A I R 1934 Cal 515.

The end of the year—The section does not prevent the income-escaped assessment being assessed during the year of original assessment itself. This section only defines the latest date up to which proceedings could be started for assessing the 'escaped income' (as 1939).

The Income-tax Officer can rely on facts coming to his notice through the issue of a notice under this section, *Muthappa Chettiar v Commissioner of Income tax, Madras*, 1938 I.T.R. 725, but the supplementary assessment has to be concluded before the periods laid down in section 34.

Assessment by estimate—The question whether section 34^{applies in} is useful to re-open assessments under section 23 (4)—assessments by

Counsel contends that this income in question has not escaped assessment. These words he maintains cannot be applied to a portion of homogeneous income but only to income of a different class and to a case where the assessee derives his income from different sources e.g., money lending and house property. In this case, the whole of the income of the assessee is derived from money lending. The words used in my opinion do not admit of this interpretation, and for every and any income whether it be of the same class or type as that originally assessed or of a different class or type clearly comes within the scope of section 34. —Per *Harrison J* in *Bulagi Shah v Crown* 1 I T C 256

It makes no difference whether the escaped income escaped altogether or was taxed in the hands of some one else by mistake *Ganesh Das v Commissioner of Income tax Punjab* 2 I T C 316 8 Lah 354 *Commissioner of Income tax, Burma v Vednath Singh* 1940 I T R 222 and the section clearly applies to cases in which the Income-tax Officer thinks in the first instance that the assessee has made a loss and then discovers that he has made profits *Vir Bhan Bansilal v Commissioner of Income tax Punjab* 1936 I T R 111, 170 I C 607

The section applies to cases in which —(a) No assessment at all has been made on the person receiving the income, (b) an assessment has been made but some part of the income has for some reason or other not been assessed and (c) the rate charged has been too low. In all other cases the assessment already made is final and cannot be revised *Commissioner of Income tax Burma v Dey Brothers* 1936 I T R 209. The words are clearly wide enough to cover cases of concealment of income by the assessee in the first instance *Commissioner of Income tax, Bombay v Lokumal Bhoomal* 1939 I T R 51 (Sind)

The remark of the Privy Council in *Rajendranath Mukherjee's case*, 1934 I T R 71 61 I A 10 61 Cal 285 7 I T C 143 that has escaped assessment is not equivalent to has not been assessed merely means that in that case as the assessment had not been completed or no final order of assessment made it could not be said that income had escaped assessment. It clearly does not mean that if no notice has been issued under section 22(2) no additional assessment can be made later under section 34 for the Privy Council say in the same judgment. It may be that if no notice calling for a return under section 22 is issued within the tax year then section 34 provides the only means available to the Crown of remedying the omission. Section 34 therefore can be applied in cases in which there has been no assessment at all no notice having issued under section 22(2). *Commissioner of Income tax Bombay v Pirojba Contractor* 1937 I T R 338

Escaped assessment is not confined to mistakes of omission only. The words in the second alternative assessed at too low a rate show that the escape need not necessarily be due to inadvertence. It is therefore open to an Income tax Officer to re-open an assessment deliberately wrongly made. In re *Sri Krishna Chandra Gajapati Narayan Deo* 2 I T C 104 49 Mad 22 A I R 1926 Mad 287

The *Musadras* view was endorsed by the Calcutta High Court *Anglo Persian Oil Co v Commissioner of Income tax*, 1933 I T R 129 60 Cal 840 A I R 1933 Cal 777 but not by the Lahore High Court who

held that income known or disclosed to the authorities cannot be said to have escaped assessment. The word escape connotes failure by the taxing authority to tax the income owing to accidental or deliberate omission of the assessee to declare it or to some similar circumstances. It does not according to the Lahore view include cases where income is known or disclosed to the taxing authorities and has been the subject of assessment which has been set aside by superior authority owing to some mistake in procedure or to the income being treated in a wrong category. *Drwan Kishan Kishor v Commissioner of Income tax Punjab* 1933 I T R 143 6 I T C 345 14 Lah 255 A I R 1933 Lah 284. In a later case the same High Court after reviewing all the rulings decided that in view of the words for any reason occurring before the words escaped assessment the interpretation placed by the Calcutta and Madras High Courts was the more correct one. *Amar Singh Sher Singh v Commissioner of Income tax Punjab* 1935 I T R 171 A I R 1935 Lah 361. The words 'have been under assessed' now occurring in the section obviate these difficulties.

According to the Allahabad High Court *Chotey Lal v Commissioner of Income tax U P* 5 I T C 466 A I R 1932 All 83 if an individual is wrongly assessed in the first instance as an undivided Hindu family, section 34 can be used later on to rectify the mistake and recover additional super tax. While section 23 uses the word 'assess' to denote the determination of income section 34 clearly refers to assessed at too low a rate. A similar conclusion was reached by the Lahore High Court in *In re Lakshminarain Gadodia* 1943 I T R 491. Under the section as it now stands the income of the assessee in such a case is *ex hypothesi* either assessed at too low a rate or been the subject of excessive relief.

The remark of the Privy Council in *Rajendra Nath Mukherjee's case* 1934 I T R 71 61 I A 10 61 Cal 285 that the words 'escaped assessment' are not equivalent to 'has not been assessed' was made in connection with the question of when an assessment should be completed. The Privy Council were concerned more with the word 'assessment' to which they gave a wide interpretation than with the word 'escaped' and all that they decided about the latter was that it was not wide enough to include income as to which no final assessment order had been made. The section therefore is not confined to cases where income had not been returned at all and applies to cases where an item has been returned but has not been assessed and to cases where items have been assessed but the assessment has been cancelled by the appellate or revisional authority. *Madan Mohan Lal v Commissioner of Income-tax, Punjab* 1935 I T R 438. *Nawal Kishore Kharaital v Commissioner of Income tax Punjab* 1936 I T R 281 168 I C 181.

The Bombay High Court also have adopted the view that the section can be used to cover mistakes of law in the first instance on the part of the taxing authorities. *Commissioner of Income tax v D R Naick* 1939 I T R 362 also Calcutta see *In re Malik and Aich* 1940 I T R 236.

Where the Income tax Officer allowed a credit (of tax collected at source) in the initial assessment and the assessee claimed a large credit on a different basis (the claim being eventually upheld by the High Court) it was held that it was not open to the Income tax Officer to invoke section 34 in order to alter the initial basis since no income had escaped assessment all of it having been checked and assessed. *In re North British and Mercantile Insurance Co Ltd* 1937 I T R 349 I L R (1937) 2 Cal 540. This ruling

has been neutralised by the words 'have been under assessed' which have been since added to the section

Super-tax—The section clearly applies both to super tax and to income tax *Chotey Lal v Commissioner of Income tax, U P*, 5 ITC 466, *Commissioner of Income tax, Bombay v D R Naik*, 1939 ITR 362 See section 58

Discovers—In the United Kingdom where the corresponding provisions are to the effect that 'If the surveyor discovers that ^{have} been omitted from the first assessment, etc' (Section 125, Income tax Act, 1918) It has been held even if all the facts were fully known to the Inspector (Surveyor) and he had wrongly decided at the first assessment not to tax some income, it would be open to him or to his successor to make a re assessment. He need not discover any new facts all that he has to discover is the fact of under assessment, *Williams v Grundy*, 12 A T C 530, 1934 ITR 236 (KBD) (see also *Commissioners of Inland Revenue v Trustees of McKimlay*, 17 A T C 345 (CS), 22 Tax Cas 305) But this view was questioned by the Court of Appeal in *British Sugar Manufacturers, Ltd v Harris* 16 A T C 421, 21 Tax Cas 528

The word "discovers" has been variously interpreted as equal to 'comes to the conclusion', *Bray, J*, in *R v Kensington Commissioners* (Ex parte *Armayo*), 6 Tax Cases 279 (H L) 'has reason to believe' *Avory, J* in *Grundy v Dunham* 7 Tax Cases 12 and 'satisfies himself' *Lush, J*, in *Williams v Trustees of Grundy*, 18 Tax Cases 271, (1934) 1 K B 524

Irregular proceedings under sections 22 and 23—If proceedings are started under sections 22 and 23 by the Income-tax Officer having jurisdiction and these proceedings are continued by an Income tax Officer not having jurisdiction the proceedings can be resumed at any time by the first officer at the stage at which he left them the subsequent irregular proceedings being ignored. In such cases section 34 does not apply since income cannot be said to have escaped assessment when assessment proceedings are still pending and there is no time limit for completing them. (Since these rulings were given, a time limit has been imposed by sub section (2) of section 34 on assessments whether under section 23 or under section 34) 'Escaped assessment' is not the same as "has not been assessed" and 'assessment' is not confined to the definite act of making an order of assessment under section 23, *In re Lachhram Basantlal*, 58 C 909, 35 CWN 310, A I R 1931 Cal 545, 5 ITC 144, *Rajendranath Mukerjee v Commissioner of Income tax, Bengal*, 61 IA 10 61 Cal 285, A I R 1934 PC 30 1934 ITR 71 (PC), *In re Burn & Co, Calcutta* 1934 ITR 30, 38 CWN 204

This however does not mean that an assessment is not concluded when the amount of tax payable by an assessee has been determined and a notice of demand (under section 29) issued. The words "cancel the assessment", 'make a fresh assessment' "annul or enhance the assessment" in sections 27, 30 and 31 respectively show that proceedings after the issue of the demand notice do not form part of assessment. It is not therefore open to the Income tax authorities to claim that the revision of the quantum of profits on the basis of the existing records is not the same as assessing income which has escaped assessment, *Navalkishore Kharaitlal v Commissioner of Income tax, Punjab*, 1936 ITR 287

Book keeping problems—As to questions arising under section 34 out of problems of book keeping see notes under section 13 especially in regard to Stock Values Reserves and Bad Debts Interest, Devices to conceal income and Double taxation due to change in accounting also notes under previous year, section 2 (11)

In a case the facts of which were unusual the Income tax Officer dealt with a part of the balance in a suspense account as if it was a secret profit, and in a later year, when the limitation under section 34 had expired he sought to tax further amounts of the suspense balance when adjusted (not by credit to profit). The High Court disallowed the action of the Income-tax Officer, *M K Muhammad Ibrahim v Commissioner of Income tax, Madras*, 1942 I T R 64. This ruling by no means disallows the taxation of suspense items as and when credited to profits but merely held that on the facts the profit that escaped assessment had arisen long before.

Accrued interest.—Where interest accrues and is compounded and is not paid and no tax is levied on the interest each year as it accrues section 34 does not come into operation when eventually tax is levied on the interest in the year of payment. But the onus would be on the Revenue to show that tax had not been levied in preceding years as the interest accrued *Rajah Bhunesh Pratap Narain Singh v Commissioner of Income tax UP* 6 I T C 167 (All)

Calling for past accounts—See *Kandasami Pillais case* 3 I T C 297 referred to under section 23 regarding the calling of accounts in the course of an assessment under section 23 with a view to finding out whether a supplementary assessment should be made in respect of the preceding year.

Default in complying with notice—Since the procedure under this section is to be so far as may be the same as would be applied to an original notice under section 22 (2) the provisions of section 23 (4) would be attracted to re-assessments made under this section if any of the defaults referred to in section 23 (4) occur, *In re Kedarnath Kesrwal* 4 I T C 407 58 Cal 254 A I R. 1931 Cal 209.

Where an assessee lumped together his income from two branches and the Income tax Officer afterwards suspected that a part of the income from one of the branches had escaped assessment and accordingly issued a notice under section 34 asking for a return of income of that branch the assessee instead of furnishing the return merely drew the Income-tax Officer's attention to the fact that he had already submitted a return in the first instance. Held, that the assessee did not comply with the requirements of the Income-tax Officer whose object in issuing the notice was to know separately the income of the two branches and that an assessment under section 23 (4) was in order, *Ramachandra Kashinath v Commissioner of Income tax, Bihar and Orissa*, 5 I T C 58. A mere reference to the previous return is not a valid return in response to the notice under section 34 so an assessment can be made under section 23 (4) *In re Pitamber Prasad* 1942 I T R 370.

Penalty for concealment of income—As to penalties in respect of concealment at time of original assessment discovered at the time of supplementary assessment see notes under section 28.

Registration of firm assessed under section 34—Before 1928 a firm that was being assessed under section 34 could not claim the benefit of registration. The application for registration may be made now even in

respect of assessments under section 34 if no part of the income of the firm has been assessed in the usual course under section 23. The benefit of registration is denied to a firm that conceals a part of its income or keeps quiet over a manifest mistake made by the Income tax Officer but not to a firm that was not assessed at all in the first instance.

Partners of firms—The taxation of partners of firms at source is more a liability than a right and a partner cannot claim that the firm must be assessed and not he. Therefore if profits escape assessment through the firm not being taxed proceedings can be started under section 34 against the partners direct without such proceedings being started against the firm. In *re Neemchand Daga* 35 CWN 534 58 Cal 120 AIR 1931 Cal 686 5 ITC 206. In *re Burn & Co* 6 ITC 135 (Cal) *M A L A R Arjan Chelhyar v Commissioner of Income tax Madras* 1937 ITR 600. The Act does not say that a firm should be assessed first and it is open to the Income-tax Officer to assess either the firm or the partners.

In such a case it is immaterial that the proceedings against the firm would be time barred so long as the proceedings against the partner are not.

This question will seldom arise after 1939 in view of the new basis of taxation of firms adopted in 1939. See sections 14 and 23 (5).

Estoppel and res judicata.—See notes under section 23.

Insurance Company.—See notes under section 10 (7) and schedule.

Succession.—See notes under section 26 in regard to supplementary assessments in cases of succession.

Sections 34 and 35 not mutually exclusive.—Where both sections apply it is open to the Income tax Officer to proceed under either section. *Commissioner of Income tax Bombay v D R Naik* 1939 ITR 362.

Payment of tax by instalments.—In order to mitigate possible hardship in an assessee's having to pay additional tax for several past years all at once Government promised to issue executive instructions to Income tax Officers to allow payment by instalments in deserving cases.

35 (1) The Commissioner or Appellate Assistant Commissioner may, at any time within four years from the date of any order passed by him in appeal or, in the case of the Commissioner, in revision under section 33 A and the Income-tax Officer may, at any time within four years from the date of any assessment order or refund order passed by him, on his own motion, rectify any mistake apparent from the record of the appeal, revision, assessment or refund as the case may be, and shall within the like period rectify any such mistake which has been brought to his notice by an assessee.

Provided that no such rectification shall be made, having the effect of enhancing an assessment or reducing a refund unless the Commissioner, the Appellate Assistant Commissioner or the Income tax Officer, as the case may be, has given notice to the

assessee of his intention so to do and has allowed him a reasonable opportunity of being heard.

Provided further that no such rectification shall be made of any mistake in any order passed more than one year before the commencement of the Indian Income-tax (Amendment) Act, 1939.

(2) The provisions of sub-section (1) apply also in like manner to the rectification of mistakes by the Appellate Tribunal.

(3) Where any such rectification has the effect of reducing the assessment, the Income-tax Officer shall make any refund which may be due to such assessee.

(4) Where any such rectification has the effect of enhancing the assessment or reducing a refund the Income-tax Officer shall serve on the assessee a notice of demand in the prescribed form specifying the sum payable, and such notice of demand shall be deemed to be issued under section 29, and the provisions of this Act shall apply accordingly

History—Before 1922 the Collector could rectify mistakes only when brought to his notice by the assessee, in 1928 the power of rectification of mistakes which had been confined only to the Income tax Officer in respect of original assessments was extended to other authorities. In 1939, the time limit was extended to four years, subject however to no retrospective effect for this limit, *i.e.*, in respect of pre-1939 assessments and orders

Scope of section—This section does not confer on Officers a general power of review or revision or authorise any assessee to introduce any new facts in connection with the said assessment. Sections 34 and 35 are not mutually exclusive, and if both sections apply to a given case the Income tax Officer may proceed under either section. *Commissioner of Income tax, Bombay v Nank*, 1939 I T.R. 362

Mistake—"Mistake" is not mere forgetfulness (per *Esher, M R Barrow v Isaacs*), it is a slip "made, not by design, but by mischance" (per *Russell, C J, Sandford v Beal*, 65 L.J.Q.B. 74 74 L.T. 406), *Prescott v Lee*, *infra*, Cf 4 Bl Com 27 (Stroud)

Appeals.—No appeal lies against an order under section 35, as indeed it cannot, when the object of the section is to provide for the correction of an *obvious* mistake. No reference to the High Court can be made in respect of cases under section 35. Before the Appellate Tribunal was set up, the Commissioner could refer *suo moto* any question of law for the opinion of the High Court, and a question under section 35 was so referred under the 1918 Act, in *Jubilee Mills v Commissioner of Income-tax, Bombay*, 2 I T.C. 25; A I R. 1925 Bom 257

United Kingdom Law—For similar provisions see sections 120 (2) and 121 (6) of the United Kingdom Act of 1918

Notice of demand—If this rectification leads to an additional demand for tax, a fresh demand notice should be issued under section 29, and if it leads to a refund a refund order will be issued

Before 1939, the limitation in this section ran from the date of demand and not that of the assessment order, and a question arose as to what was the demand. See *Fricumchand Dan Singh v Chief Revenue Authority* 2 I T C 436, 55 Cal 565, which is of little interest now.

Revisional powers—The Commissioner cannot under his powers of revision under section 33 A correct a mistake in the face of the time bar under section 35 even though the assessee had moved the Commissioner under section 33 A within the time limit in respect of other matters. *Jesaram v Commissioner of Income tax, Punjab*, 8 Lah 357, 2 I T C 342, A I R 1921 Lah 421, *Commissioner of Income tax, Bombay v Khemchand Ramdas*, (P C) 1938 I T R 414 65 I A 236, I L R (1938) Bom 487, A I R 1938 P C 175.

Mistakes apparent from the record—In *Jubilee Mills v Commissioner of Income tax*, 2 I T C 25, A I R 1925 Bom 257 a case under section 26 of the 1918 Act it was held that the section was intended only to rectify mistakes caused by the demand not corresponding to the assessment and not to provide appeals to the Commissioner from an order of the Collector under section 26 either rectifying a mistake or refusing to rectify it. The words 'apparent from the record' bring out the substance of the first part of this decision. There were no such words in the 1918 Act.

A firm possessed five collieries which had been assessed separately in the names of three persons. When the Income tax Officer came to know that the same firm possessed all the five collieries he issued a notice purporting to issue under section 35 (but really under section 34) a notice of proposed supplemental assessment. This evoked an application from the assessee firm (purporting to be heard under section 35) alleging that the previous returns had omitted certain losses and asking for a refund of excess tax paid. The Commissioner rejected the application for refund and also dropped the proceedings under section 34. Held that there was no mistake apparent on the face of the record of the assessment within the meaning of section 35, *Trikamji Jivan Das v Commissioner of Income tax*, 1 I T C 406, 4 Pat 224 A I R 1925 Pat 352.

Cases remanded on appeal—In a case remitted by the Assistant Commissioner on appeal the Income-tax Officer decided the points in issue in favour of the assessee but at the same time rectified a mistake without however, giving an opportunity to the assessee to show cause against. The Assistant Commissioner cancelled this rectification but reduced the assessment to the original figure instead of cancelling the assessment altogether. A question of law was held to arise out of the Assistant Commissioner's appellate order. *Delhi Cloth and General Mills Ltd v Commissioner of Income-tax* 117 I C 383 A I R 1929 Lah 326.

36 In the determination of the amount of tax or of a refund payable under this Act, fractions of an anna less than six pies shall be disregarded, and fractions of an anna equal to or exceeding six pies shall be regarded as one anna.

Tax to be calculated to the nearest anna

Departmental instructions—Fractions of a rupee in income are disregarded in practice.

37 The Income-tax Officer, Appellate Assistant Commissioner, Commissioner and the Appellate Tribunal shall, for the purposes of this Chapter, have the same powers as are vested in a Court under the Code of Civil Procedure, 1908, when trying a suit in respect of the following matters, namely —

(a) enforcing the attendance of any person and examining him on oath or affirmation,

(b) compelling the production of documents, and

(c) issuing commissions for the examination of witnesses, and any proceeding before an Income-tax Officer, Appellate Assistant Commissioner, Commissioner or Appellate Tribunal under this Chapter shall be deemed to be a "Judicial proceeding" within the meaning of sections 193 and 228 and for the purposes of section 196 of the Indian Penal Code

History—Corresponds to section 27 of the 1918 Act and sections 28 and 37 of the 1886 Act

The words "for the purposes of section 196" were added by Act XXII of 1930. These words neutralise the effect of the ruling of the Calcutta High Court in *Lal Mohan Saha v. The Crown* 2 ITC 428 31 CWN 996

Scope of section—This section does not by itself make an Income-tax Officer or Assistant Commissioner or Commissioner a Court or a Judge for all purposes. All that this section does is to confer specific powers on these officers in order to enable them to achieve a specified object *viz.*, the assessment of tax in as reasonable and equitable a manner as possible which requires the eliciting of information whether from the assessee or from others which is necessary for the assessment. The ordinary rules of procedure in regard to evidence as followed in Courts do not necessarily apply to these proceedings before officers under the Income-tax Act. See however notes under section 23 and section 52.

Payment to witnesses—Under departmental instructions witnesses before Income-tax authorities summoned under section 37 are paid the same allowance as before civil courts in the same area.

Effect on section 61—Though section 61 permits the assessee to appear through an agent it does not exempt the assessee from being summoned by the Income-tax Officer under this section if the Income-tax Officer considers the assessee's personal attendance necessary. If the Income-tax Officer needs the assessee's personal presence he should issue a summons under section 37, it is not enough if he issues a notice under some other section for in that case it is open to the assessee to appear through his representative.

Commissioner—The Commissioner has been given powers under this section to enable him to dispose of matters under section 33 A (revision) section 64 (jurisdiction of Income-tax Officer), section 58-B (provident funds) and the like.

Commissions—This section gives power to issue commissions only for the examination of witnesses and not for that of books, *Bhivani Sahas v Commissioner of Income-tax, Punjab*, 1936 I.T.R 222

Penalties—The penalties for disobeying the summons of the officers of the Income tax Department issued under this section are the same as for disobeying similar summons issued by a Civil Court. An assessment cannot be made under section 23 (4) merely because an assessee fails to respond to a summons under this section, or even if he perjures himself. An assessment can be made under section 23 (4) only if the conditions therein set out are satisfied.

As regards the penalties for absconding in order to evade summons or notice being served, disobeying summons to appear or to produce documents, or for refusing to be sworn in, see section 172 *et seq* in Chapter X, Indian Penal Code.

See also sections 195 and 476 *et seq* of the Criminal Procedure Code, regarding the procedure for prosecuting such offenders etc.

Civil Procedure Code—Applicability of—Details of—Extracts from Orders V, XIII XVI and XXVI of the Civil Procedure Code, 1908, have been set out in an Appendix. The rules in these orders will apply to proceedings in the Income-tax Department to the extent set out in the section, *viz*—(a) enforcing the attendance of persons and examining them on oath or affirmation (b) compelling the production of documents, and (c) issuing commissions for the examination of witnesses.

Income tax Officer—Revenue Court—In *re Punamchand Maneklal* 38 Bom 642, it was held that an Income tax Officer is a Revenue Court for the purpose of clauses (b) and (c) of section 195 of the Criminal Procedure Code. Following the above it was held by the Lahore High Court, that an Income tax Officer is a 'tribunal' for the purpose of section 135 (2), Civil Procedure Code, and that a person on his way to appear before the officer in response to a notice from him is exempt from arrest, *Basheshar Nath v Amolak Ram*, 1933 I T R 9, A I R 1933 Lah 214.

"For the purposes of this Chapter"—That is, in respect of matters connected with deduction at source, assessments appeals, revision, etc. The powers cannot be exercised in respect of proceedings under other Chapters, *e g*, Recovery of tax (Chapter VI), Penalties (Chapter VIII) or original order of refund (Chapter VII).

False evidence—Sections 193 and 196, Indian Penal Code—'193 Whoever intentionally gives false evidence in any stage of a judicial proceeding, or fabricates false evidence for the purpose of being used in any stage of a judicial proceeding shall be punished with imprisonment of either description for a term which may extend to seven years and shall also be liable to fine,

and whoever intentionally gives or fabricates false evidence in any other case, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine.

Explanation 1—A trial before a Court martial is a judicial proceeding.

Explanation 2—An investigation directed by law preliminary to a proceeding before a Court of Justice, is a judicial proceeding though that investigation may not take place before a Court of Justice

Illustration

A, in an enquiry before a Magistrate for the purpose of ascertaining whether *Z* ought to be committed for trial makes on oath a statement which he knows to be false. As this enquiry is a stage of a judicial proceeding *A* has given false evidence

Explanation 3—An investigation directed by a Court of Justice according to law and conducted under the authority of a Court of Justice is a stage of a judicial proceeding, though that investigation may not take place before a Court of Justice

Illustration

A in an enquiry before an officer deputed by a Court of Justice to ascertain on the spot the boundaries of land makes on oath a statement which he knows to be false. As this enquiry is a stage of a judicial proceeding *A* has given false evidence

196 Whoever corruptly uses or attempts to use as true or genuine evidence any evidence which he knows to be false or fabricated shall be punished in the same manner as if he gave or fabricated false evidence

Using evidence known to be false
Intentional insult or interruption to Income tax Officer—Section 228, Indian Penal Code—228 Whoever intentionally offers any insult or causes any interruption to any public servant while such public servant is sitting in any stage of a judicial proceeding shall be punished with simple imprisonment for a term which may extend to six months or with fine which may extend to one thousand rupees or with both

Section 196 Indian Penal Code—Prosecution under—The ruling of the Calcutta High Court in the case of *Lal Mohan Saha* 2 I T C 428, 31 C W N 996, 104 I C 903 that in view of section 37 of the Income-tax Act no punishment was possible under section 196 Indian Penal Code in respect of corrupt use of false or fabricated evidence before Income-tax authorities had overlooked the fact that the first part of section 193, Indian Penal Code refers to giving or fabricating false evidence in a *judicial proceeding* and the second to giving or fabricating such evidence in *any other case*, and that section 196 Indian Penal Code which deals with the corrupt use of such evidence applies as much to cases in which such use is made in judicial proceedings as to those in which it is made otherwise. This decision however is now obsolete in view of the insertion in section 37 of the Income tax Act of the words 'for the purposes of section 196'

United Kingdom Law—Under section 144 of the United Kingdom Act of 1918 the General Commissioners can summon witnesses and examine them on oath. The penalty for disobedience or refusal to be sworn in or to answer questions is £20. But the Special Commissioners cannot except in certain circumstances summon witnesses. Their enquiries however, are answered by affidavits before the local General Commissioners.—see sections 67 (3) *ibid*

(1) require any firm, or Hindu undivided family to furnish him with a return of the members of the firm, or of the manager or adult male members of the family, as the case may be, and of their addresses,

(2) require any person whom he has reason to believe to be a trustee, guardian, or agent, to furnish him with a return of the names of the persons for or of whom he is trustee, guardian, or agent, and of their addresses,

(3) require any assessee to furnish a statement of the names and addresses of all persons to whom he has paid in any year rent, interest, commission, royalty or brokerage, or any annuity not being an annuity taxable under the head "Salaries," amounting to more than four hundred rupees together with particulars of all such payments made

History—Corresponds to section 28 of the 1918 Act. Sub section (3) introduced in 1933 was substituted for another which has now been incorporated in section 22 (5). It crystallises previous departmental practice and obviates the inconvenient alternative of action under section 37.

Rent—*See* notes under section 10 (2) (i). According to the Concise Oxford Dictionary Rent means 'Tenants' periodical payment to owner or landlord for use of land or house or room.

Interest—*See* notes under section 10 (2) (iii) and section 42 as to what is meant by 'interest'.

Annuity not being of the nature of salaries—*See* section 7. The annuity contemplated is of the kind paid by an Insurance Company or out of an estate.

Penalties.—For penalties for failure to comply *see* section 51 (c).

Form of notice—No form of notice has been prescribed under this section, at his option the Income-tax Officer may summon any of these persons under section 37 and obtain the required information from them.

False statements—Section 52 provides for prosecution only in respect of false declarations under sections 22 (3) and 32 (2) however a false statement furnished under section 38 could be dealt with under section 177 Indian Penal Code : *see* the person proceeded against for giving false information.

Time limit.—No time-limit has been fixed within which the information need be furnished under this section. Before a prosecution is started under section 51, the Income tax Officer should give the persons concerned reasonable time within which to comply with his demands.

United Kingdom Law—There are no directly corresponding provisions in the United Kingdom Law but *see* the *Fifth Schedule* of the 1918 Act, Part XVI.

39 The Income-tax Officer or Assistant Commissioner,

or any person authorised in writing in this behalf by the Income tax Officer or Assistant Commissioner, may inspect and, if necessary, take copies, or cause copies to be taken, of any register of the members,

Power to inspect the register of members of any company

debenture-holders or mortgagees of any company or of any entry in such register

Fees not payable—As the right is conferred on the officers of the department by statute, they need not pay any fees for inspection under sections 36 and 125 of the Indian Companies Act (1913)

CHAPTER V**LIABILITY IN SPECIAL CASES****40.** (1) Where the guardian or trustee of any person being a minor, lunatic or idiot (all of

Guardians trustees and agents,

which persons are hereinafter in this sub-section included in the term "beneficiary")

is entitled to receive on behalf of such beneficiary or is in receipt on behalf of such beneficiary of, any income, profits or gains chargeable under this Act, the tax shall be levied upon and recoverable from such guardian or trustee as the case may be, in like manner and to the same amount as it would be leviable upon and recoverable from any such beneficiary if of full age or sound mind, and in direct receipt of such income, profits or gains, and all the provisions of this Act shall apply accordingly

(2) Where the trustee or agent of any person not resident in British India, and not being a minor, lunatic or idiot (such person being hereinafter in this sub-section referred to as a "beneficiary") is entitled to receive on behalf of such beneficiary, or is in receipt on behalf of such beneficiary of, any income, profits or gains chargeable under this Act, the tax if not levied on the beneficiary direct, may be levied upon and received from such trustee or agent, as the case may be, in like manner and to the same amount as it would be leviable upon and recoverable from the beneficiary if in direct receipt of such income, profits or gains, and all the provisions of this Act shall apply accordingly

Previous Law—This section corresponds to section 31 of the Act of 1918 and sections 20 and 21 of the Act of 1886. In 1939 the words "entitled to receive" replaced in respect of, and it was stated in items that a non resident may be taxed either directly or through an agent. In 1941 the section was recast into two sub-sections dealing respectively with incapacitated persons on the one hand and with non-residents on the other, and the words "or resident in British India" omitted. The failure to delete

these words in 1939 led to the unintended result that a non resident beneficiary would be taxed on his world income

Machinery Chapter—This chapter mixes up substantive provisions with those relating to machinery as will be seen from sections 41 and 42. Section 40 however is essentially a machinery section

Scope of section—The section applies only to four specific cases of trustees and agents, *viz*, of a minor, lunatic, idiot or non resident. As regards other cases section 41 applies and in certain cases section 42

Some of the questions which arise are common to both sections 40 and 41 and the notes below therefore overlap and cover both the sections

Sub-section (2) of section 40 and sub-section (1) of section 42 also overlap and the agent of the non resident may be caught by either section

Property—According to departmental instructions where any property (in the widest sense of the word and including a business) is held under trust the owner of the property for the purposes of the Income-tax Act is the beneficiary and the income is the income of the beneficiary. The Act does not permit double taxation of the income of trusts once in the hands of the trustees and again in those of the beneficiary

United Kingdom Law—*See* Rule 4 of the General Rules. The Rule does not require the trustee, etc. to be actually in receipt of profits, all that is necessary is that he should have the 'direction control or management of the property or concern' of the beneficiary. But it has been suggested in *Huxley's case* 7 Tax Cases 49, (1916) 1 K B 788 cited below that if the infant himself is directly taxed the guardian will not be liable unless he is in receipt of the profits

Rule 5 which relates to non resident beneficiaries says that the resident trustee agent etc., shall be taxed whether he is in receipt of the profits or not as though the beneficiary were resident in England and in receipt of the profits or gains

Rule 1 is as below. Every body of persons shall be chargeable to tax in like manner as any person is chargeable under the provisions of this Act "

In the *Hots Trust case*, 11 Lah 724, A I R 1930 Lah 929 5 I T C 8 the Lahore High Court observed *a propos* of the taxation of associations (other than firm companies etc.) that there was little difference between this Rule 1 of the United Kingdom Law and sections 3 and 10 of the Indian Act

Trusts not covered by sections 40 and 41—The provisions in these sections and section 38 (2) do not exclude the taxation whether as trustees finally or merely as agents on behalf of beneficiaries of trustees not falling strictly within the provisions of sections 40 and 41. *See Williams v Singer*, 7 Tax Cases 387, *infra* and the decision of the Privy Council in *Currimbhoy Ebrahim Trust v Commissioner of Income tax Bombay* 1934 I T R 148 A I R 1933 Bom 422 6 I T C 439. These special provisions are primarily machinery and of enabling nature and do not prevent the Revenue from proceeding under other sections at their option. *Mrs Saldanha v Commissioner of Income tax, Madras* 55 Mad 891, 6 I T C 114, A I R 1932 Mad 378. *Trustees of the Tribune Ltd v Commissioner of Income tax, Punjab*, A I R 1939 P C 208 16 Lah 829 1939 I T R 415. Since these rulings were given section 41 has been

amended so as to cover all trusts under duly executed trust deeds whether testamentary or otherwise but cases not covered by deeds still remain to be dealt with under section 3. Also certain special types of trusts have to be dealt with under section 16.

Extent of liability of trustee—In India before 1939 it was clear that the liability of the trustee should be confined to the profits that came into his hands this was provided for by the words 'being in receipt on behalf of the beneficiary of any income etc.' In 1939 the words were altered into 'entitled to receive' and in 1941 both the sub sections adopted the words 'is entitled to receive' or 'is in receipt of'. Thus a resident agent or trustee would even apart from section 44-D be liable if being entitled to receive but without himself receiving the profits he diverted them in such a manner that in the form of ultimate receipt by the beneficiary the income was not taxable though if the non resident had been in direct receipt of the profits he would have been taxable. On the other hand income which merely accrues on paper and may not be received at all would not be ordinarily liable to tax. See notes under section 13. According to the notes on clauses attached to the Statement of Objects and Reasons in 1938 the object of the amendment was to cover all cases. The Crown cannot in any case recover tax due from the beneficiary on other accounts through the trustee or guardian or agent the liability of the latter being confined to what he is entitled to receive or receives under the trust. On the other hand the liability need not be confined to what the trustee has with him on the income account but may extend to what he has with him on the capital account of the trust since conceivably the tax on profits may exceed actual profits as received in cash (because of the disallowance of various deductions for income-tax purposes).

Minor may be taxed direct if no guardian—In *R v Newmarket Commissioners (Ex parte Huxley)* 7 Tax Cases 49 (1916) 1 K B 788 in which the assessee was a minor without a guardian it was contended on behalf of the assessee that though he earned substantial sums from his profession of a jockey he could not be taxed because he was not a 'person' and that a minor could be taxed only if there was a guardian or trustee. In the King's Bench Division a bench of three judges unanimously held that the minor could not be taxed but the decision was reversed unanimously by the Court of Appeal.

Per Phillimore L J—It was urged that the making of a return is a matter of difficulty and that an infant is not supposed by the law to be capable of doing such difficult business matters that every subject who is assessed has a right of appeal and that an appeal is in the nature of a *lis* and that no *lis* in which an infant is concerned can be conducted in the Courts unless he has a guardian *ad litem*. I think the answer is that in most, if not quite all of the rare cases in which an infant becomes chargeable it would be because of his exceptional and precocious skill that such infant may be presumed to be capable of either making a return or of instructing and paying some competent adviser and that the analogy of a *lis* must not be pushed too far.

It is not necessary to consider what might be the decision if the infant had a guardian having the direction and control of his property and the Crown was minded nevertheless to require a

return from the infant But in that case, the decision in another part of the same section, *viz* — *Tischler v Apthorpe*, 2 Tax Cases 89, 52 L T 814 approved as it was in this Court in the case of *Werle & Co v Colquhoun*, 2 Tax Cases 402 20 Q B D 753 would have to be reckoned with

Per Warrington L J — Huxley contends that the law treats all infants whether babies in arms or men of twenty years of age as equally incapable But I think the legal doctrine of equality of incapacity has reference to the question of status before the law and for the purpose of construing such an Act as the present it has no applicability

Per Phillimore L J — But guardians will not be liable for the infant's default if they have not received or had the control of the infant's income

Non resident may be taxed direct if accessible — The words if not levied on the beneficiary direct occurring in sub section (2) codify the following decisions *viz* *Chief Commissioner of Income tax v Bhanjee Ramjee & Co* 1 I T C 147 44 Mad 773, A I R 1921 Mad 212 *Commissioner of Income tax Bombay v National Mutual Life Association of Australasia* 1933 I T R 350 57 Bom 519, A I R 1933 Bom 427 6 I T C 426 and *Maharaja of Patiala v Commissioner of Income tax Bombay (Central)* 1943 I T R 202 and neutralise the decision in *Sir Aditya Narayan Singh (Maharaja of Benares) v Commissioner of Income tax U P* 1938 I T R 217 1 L R 1938 All 432 A I R 1938 All 310 which held the contrary view In view of the addition of these words to the statute the corresponding rulings in the United Kingdom on the subject in *Tischler v Apthorpe* 2 Tax Cas 89 *Werle & Co v Colquhoun* 2 Tax Cas 402 (C L) *Whitney v Inland Revenue* 10 Tax Cas 88 (H L) and *Macdine & Co v Eccote* 10 Tax Cas 481 (H L) are of little interest now

Who should be taxed—Beneficiary or trustee—Section 40 is not a charging but a machinery section and under the law the person charged with tax is neither the trustee nor the beneficiary but whoever is in actual receipt of control of the income which it is sought to reach *Hots Trust v Commissioner of Income tax Punjab* 11 Lah 724 A I R 1930 Lah 929 5 I T C 8 In re *Punjab Stud Farm* 1936 I T R 114 A I R 1936 Lah 602 8 I T C 439 *Commissioner of Income tax Bombay v Abu Baker Abd Rahman* 1939 I T R 139 The amendments in 1939 to sections 40 and 41 give explicit option to the Crown to recover tax either from the trustee or from the beneficiary

In the case of the *Hots Trust* the trustees carried on business and administered the properties of the testatrix for the benefit of her children all of whom were of full capacity and ordinarily resident in British India The trustees had to keep proper accounts and get them audited They had to set aside a part of the profits every year as a reserve for business purposes and this reserve if not utilised in the business was to be divided among the beneficiaries at the end of ten years and thereafter periodically according to circumstances The trustees could extend the business at their discretion and could borrow for this purpose Half the profits was to be earmarked for the purpose of repaying such loans No beneficiary could hypothecate or alienate his or her share except by selling it equally to all the other beneficiaries Held that the trustees should be taxed on

the profits of the business as an association of individuals *Holz Trust v Commissioner of Income tax Punjab* 5 I T C 8 11 Lah 724 A I R 1930 Lah 929

Following the above ruling the Madras High Court held that a business carried on by a Christian mother on behalf of herself and her minor sons of whom she was the guardian belonged to an association of individuals within the meaning of section 3 and was taxable under section 10 *Mrs Saldanha v Commissioner of Income tax* 55 Mad 891 6 I T C 144 A I R 1932 Mad 378

A trust was created by statute to maintain the dignity of a Baronetcy. There were four trustees of whom the beneficiary Baronet was one and managed the properties. The trustees paid out certain sums, retained others and paid the balance to the Baronet. It was decided by the Privy Council confirming the decision of the Bombay High Court that the trustees were taxable both in respect of what they spent or retained and what they paid to the Baronet *Trustees of Sir Currimbhoy Ebrahim Baronetcy Trust v Commissioner of Income tax Bombay* 1934 I T R 148 7 I T C 195 61 I A 209 5 Bom 317 A I R 1934 P C 166 (P C). It was suggested in argument before the Privy Council that the result would be that both the beneficiary and the trustee would be taxed, that the assessment of trustees involved the graduation of the tax with reference to the total income of the trustees with reference to the income of other trusts or even the personal income of the trustees and that on the other hand there would be no graduation with reference to the total income of the beneficiary either in his favour if he enjoyed only a small benefit out of a large estate with slender other resources or in favour of the revenue in other cases. As regards double taxation the Privy Council declined to express an opinion since the position as argued might or might not be correct. As regards graduation the Privy Council considered that it may be found compatible with the scheme and machinery of the Act to have the scale of tax adjusted according to the total income of the Baronet individually. Departmental practice is based on this ruling.

Remittances from non resident trustees—Resident beneficiaries—

In *Drummond v Collins*, (1915) A C 1011, 6 Tax Cases 525 a non resident left property situate abroad upon trust for the children of his deceased son. The trustees under the will were directed to accumulate the income of the respective shares of the children on certain conditions. The will also directed that out of the net income of the property—cases of the trust estate held in trust for any child the trustees might 5 uncontrolled discretion provide from time to time for maintenance if education of such child. The children lived with their guardian—cases of mother in the United Kingdom. From time to time the trustees paid moneys to the mother on behalf of the children. It was contended that these moneys were not liable to tax firstly because they were voluntary payments and secondly because the mother had no control of the foreign property. Held that the payments in question were taxable in

Per Lord Loreburn—‘I do not assent to the proposition that voluntary payments can never be charged but it is enough to add that these were not voluntary payments in any relevant sense. They had been payments made in fulfilment of a testamentary disposition for the benefit of the children in the exercise of a discretion conferred on the will. They were in fact the children’s income’ relevant to

Per Lord Parker —

Though they might be incapable because of their age of giving a receipt for the money, it is in my opinion none the less clear that the money in question was as soon as the trustees had exercised their discretionary trust held in trust for these infants as beneficiaries.

Per Lord Wrenbury — Let me however assume that the interest of the infants is contingent that is to say the income of another (the person entitled under the gift over) in another contingency.

It remains however that in this case the trustees exercise their discretion in favour of the child the interest of the child ceases to be contingent and becomes vested. Whether the money is paid to the child or to the guardian of the child or to the school master or to the tailor or other person who supplies the wants of the child it is paid to or to the use of the child and is the income of the child.

Does liability of trustee depend on liability of beneficiary?—On the question whether the liability of the trustee depends on the liability of the beneficiary the following judgments in the United Kingdom may be noticed

Indeed I understood Mr Cunliffe to go so far as to say that when funds are vested in trustees the Revenue authorities are entitled to look to those trustees for the tax and are neither bound nor entitled to look beyond the legal ownership.

My Lords I think it clear that such a proposition cannot be maintained.

If the legal ownership alone is to be considered a beneficial owner in moderate circumstances may lose his right to exemption or abatement by reason of the fact that he has wealthy trustees or a wealthy beneficiary may escape super tax by appointing a number of trustees in less affluent circumstances. Indeed if the Act is to be construed as Counsel for the appellant suggests a beneficiary domiciled in this country may altogether avoid the tax on his foreign income spent abroad by the simple expedient of appointing one or more foreign trustees. Accordingly I put this contention aside. On the other hand I do not think it would be correct to say that whenever property is held in trust the person liable to be taxed is the beneficiary and not trustee. Section 41 of the Income-tax Act 1842 renders the trustee guardian or other person who has control of the property of an infant

Abu Baker woman or lunatic chargeable to income tax in the place of infant married woman or lunatic.

And even apart from these special provisions I am not prepared to deny that there are many cases in which a trustee in receipt of trust income may be chargeable with the tax upon such income. For instance a trustee carrying on a trade for the benefit of creditors or beneficiaries.

or a trustee who is under an obligation to apply the trust income to satisfaction of charges or to accumulate it for future distribution. Then appears to come within this category and other similar cases may be posed. The fact is that if the Income-tax Acts are examined it will be found that the person charged with tax is neither the trustee nor the beneficiary as such but the person in actual receipt and control of the income which it is sought to reach. The object of the Acts is to be sure for the State a proportion of the profits chargeable and this could be obtained (speaking generally) by the simple and effective ex-
to all the o

pendent of taxing the profits where they are found. If the beneficiary receives them he is liable to be assessed upon them. If the trustee receives and controls them he is primarily so liable. If they are under the control of a guardian or committee for a person not *sui juris* or of an agent or receiver for persons resident abroad they are taxed in his hands. But in cases where a trustee or agent is made chargeable with the tax, the statutes recognise the fact that he is a trustee or agent for others and he is taxed on behalf of and as representing his beneficiaries or principals.

In short the intention of the Acts appears to be that where a beneficiary is in possession and control of the trust income and is *sui juris* he is the person to be taxed and that while a trustee may in certain cases be charged with the tax he is in all such cases to be treated as charged on behalf or in respect of his beneficiaries who will accordingly be entitled to any exemption or abatement which the Acts allow.

—Per Viscount Caire in *Williams v. Singer and others* and *Pool v. Royal Exchange Assurance* 7 Tax Cases 387 at 410 (1921) 1 A C 65.

It was suggested by Counsel for the appellant that the Income tax Acts except in certain special and rather narrow instances took no account of the position of trustees but regarded only the legal ownership. On the other hand from some of the language in the judgments of the Court of Appeal especially that of Lord Justice Warrington it would appear that a contention that the Income-tax Acts looked generally to the beneficiary and disregarded the trustee except as a means of reaching the beneficiary in certain rare cases had found favour. I do not propose to express an opinion whether either or which if either of these two extreme views is right.

It may perhaps be said that where there is a trust for accumulation or for payment of debts no person can be said to be entitled to the receipt of the profits and that in such case the trustee is to be the person to be assessed. It is possible also that where trustees have the management of a business they should be the persons to be assessed or charged. There are disbursements which may have to be made in the course of conducting a business which a prudent owner would consider as deductions from profits and which trustees would make before they paid the net income over to the beneficiary but which nevertheless for income-tax purposes as the law at present stands are not considered as legitimate deductions from income—cases of which the decision of this House in *Strong & Co. v. Woodfield* 5 Tax Cases 215 (1906) A C 448 is an example. In these cases if the Revenue is to receive its full quota it would seem that the assessment must be put upon the trustee and not upon the beneficiary and that in such cases the trustee is the person to be assessed. The case now before your Lordships is not one of such cases.

Per Lord Phillimore (*Ibid*).

We hear of no matters in which a conflict between capital and income and their respective interests has arisen nor of any business carried on by the trustee as to which the more complex case of trading profits would replace the plain case of dividends paid. If there had been annuitants with a prior right to be paid or several beneficiaries entitled to share in the income, if there had been reversioners who could claim that part of the annual profits were in the nature of accretions to

capital, if there was a trust for accumulation or a power to vary the amounts payable from time to time as between minors the impracticability of saying that any or all of the beneficiaries entitled to the income owned the whole or any part of that income from the moment it became payable and was paid to the full extent of the amount paid would be evident —Per Lord Sumner in *Baker v Archer Shee* 11 Tax Cases 749 (1927) A C 844

In *Williams v Singer*, 7 Tax Cases 387, it was decided that where the income is under a mandate from the trustees payable direct to the beneficiary or his bankers, the liability to tax should be determined by the circumstances (e g, in respect of residence domicile allowances and reliefs) of the beneficiary and this principle was recognised in later cases as of universal application *Reid's Trustees v Commissioners of Inland Revenue*, 14 Tax Cases 512 (1929 S C 439) approved in *Kelly v Rogers* (1935) 2 K B 446 (C A), 19 Tax Cas 692

It will be noted that sections 40 and 41 of the Indian Act have specifically provided for the various contingencies referred to in the above rulings. It has to be ascertained with reference to the facts of each case whether the trustee is entitled to receive the income specifically on behalf of a beneficiary or not.

Expenses of management of trust—It was held at one time that if a will or settlement created a trust providing for the payment of the cost of management and a gift of the remainder of the income to a beneficiary the income of the beneficiary was the net income after deducting the expenses of management of the trust *Murray v Commissioners of Inland Revenue* 11 Tax Cases 133 but this view was overruled by the House of Lords in *Baker v Archer Shee* 11 Tax Cases 749 (1927) A C 844. If the trust does not provide for the expenses of management the income of the beneficiary should be taken as the gross income of the trust in all cases irrespective of the circumstances. It is a different matter whether the trustee can claim to deduct from his taxable income as trustee expenses of management of the trust in those cases in which he is taxed (and not the beneficiary). In such cases expenses of management would not ordinarily be allowed as a deduction as such expenses would not be necessary for earning the income that is the subject of charge see *Aikin v Macdonald's Trustees* 3 Tax Cases 306.

Under a trust made by himself as assessee was the life-tenant with remainders over. All the expenses and liabilities were to be met by the trustees out of the income. One of the terms of the trust gave the assessee the right to receive the whole or any part of the income and spend it on legitimate payments connected with the estate. It was held that this condition amounted to his being given a mandate to administer the estate on behalf of the trustees and that his own income was the net income after deduction of expenses *Commissioners of Inland Revenue v Lord Hamblin of Dalzell* 10 Tax Cases 406.

Business carried on by trustees—A testator who died in 1906 directed his trustees *inter alia* to pay to his sister the life rent of certain insurance monies and to pay the full annual proceeds of the residue of the estate to his widow for her maintenance and that of his children. The widow died in 1908 leaving two minor daughters. (Both these daughters and the aunt, the testator's sister were alive in 1914 when the case arose.) Under the will each daughter was to acquire on attaining majority an

absolute interest in one half of the trust estate subject to the aunt's life rent. If either sister died in minority leaving issue which attained the age of 21 years or married (if a female), such issue was to take the parent's prospective share. Failing issue the prospective share of the predeceased was to go to the surviving sister. During minority the daughters had no absolute right to any part of the income, and the trustees had discretion to apply the whole or part of the prospective share of each sister to her maintenance and education. In addition to the insurance money the estate consisted of heritable property and the wine merchants business of the testator. The trustees acting in the exercise of an express power to that effect carried on the business. The entire net profits were paid over annually to or on behalf of the minor daughters. Held that the business was that of the trustees and not that of the beneficiaries.

The real reason why business has not been handed over by the trustees to the Misses Shiels was not any technical difficulty in the way of obtaining a discharge from minors unprovided with a guardian but the much more formidable difficulty that the trustees could not have denuded in favour of minor beneficiaries without committing a breach of trust. Such a trustee could not have been regarded either as a simple trustee who was bound to denude in their favour when called upon per *Lord Sterrington in Fry v Shiels Trustees*, 6 Tax Cases 583-585.

Examples of trustees carrying on business not for the benefit of specific beneficiaries can also be found in clubs and institutions carrying on trade with outsiders. See *Inland Revenue v Stonehaven Recreation Trustees* 15 Tax Cas 419. *Carlisle and Silloth Golf Club v Smith* 6 Tax Cas 198 and other cases referred to under 'Mutual Concerns' in the notes under section 3.

Income—Whether belonging to trustee or beneficiary.—In *Baker v Archer-Shee*, 11 Tax Cases 749. Lady Archer-Shee's father, who was a foreigner, had directed by his will that his estate should be held in trust and that the trustees should apply the whole of his income to the daughter's use. The trust fund consisted of American securities and the trustees were in America where the income was realised. From time to time the trustees placed sums of money to the credit of Lady Archer-Shee in an American Bank after retaining sums necessary to pay income tax etc., in America. The trustees had power to change the investments at their discretion. The question was whether having regard to the United Kingdom Law the assessment should be made only on the amount remitted to the United Kingdom or whether the whole of the amount placed to the credit of Lady-Shee in America could be taxed. It was contended that the lady was entitled only to the interest from the estate and that this interest was not a foreign possession and that the owners of the securities viz the trustees, were non residents and that therefore only the amounts actually brought into the United Kingdom by the lady could be taxed.

Rowlatt J, (1927) 1 K B 109, while conceding that what the lady had was not a right to specific property but only the right in equity to compel the trustee to discharge his trust properly, held that the trustees should be dropped out for the purpose of determining liability to income tax and that, since had the trustees been in England they would have been assessed the beneficiary should be assessed in the absence of the trustees.

who were outside the United Kingdom His reading of the decision of the House of Lords in *Williams v Singer*, 7 Tax Cases 410, (1921) 1 A C 65 was that in that case the beneficiary being abroad herself her interest was from a foreign source and as she was herself not taxable her trustees were also not taxable and that if the beneficiary had been in England she would have been liable to tax on those stocks and shares on which it was held the trustees were not liable

The Court of Appeal reversed Rowlatt J's decision on the ground that what the beneficiary received was not the dividends *in specie* but the balance after the trustees had carried out their trust and defrayed expenses and the sums paid were 'no longer clothed in the form in which it was originally received having no trace of its ancestry (per *M R Hansworth*) They followed *Sudeley v Attorney General* (1897) A C 11 and emphasised the fact that Lady Archer Shee had only an equitable right and not a specific right in the income

The House of Lords in 11 Tax Cases 749 (1927) A C 844 reversed the decision of the Court of Appeal by a majority of three to two Lord Sumner considered that the stocks etc belonged only to the trust and not to the beneficiary who had only an equitable right Lord Blanesburgh agreed with him and emphasised the fact that the assessee was sole beneficiary only by accident and that at one time her mother was also a beneficiary Incidentally he approved of the ruling in *Murray v Commissioners of Inland Revenue* 11 Tax Cases 133 Lords Atkinson Wrenbury and Carson on the other hand held that on the facts of the case the administration of the estate had been concluded that Lady Archer Shee's interest had become vested in her and that the trustees were only her agents The majority's decision resulted in the overruling of the Scottish Court's decision in *Murray* case referred to above

Later on with reference to further evidence on the American Law which for English Courts is a question of fact the House of Lords unanimously held that the correct view was that taken by Lords Sumner and Blanesburgh above *Garland v Archer Shee* 15 Tax Cases 693 (1931) A C 212

An educational endowment policy was taken out by trustees for the benefit of a child If the child died before the age of fifteen the trust funds were to revert to the father otherwise the child received an annuity for four years from the age of fifteen and also the accumulated trust funds on attaining the age of twenty one The annual premiums covered the bulk of the trust fund It was held by the House of Lords that the money spent on premiums was not the income of the child Though the conclusion was unanimous the judgments differed in the reasoning and what weighed most was the absence of provision in the trust that if the child died the balance of accumulated trust income was to belong to the child's estate *Commissioners of Inland Revenue v Dewar and another (Charles Bruce's Trustees)*, (1931) A C 566 16 Tax Cases 84 (H L)

Trustee—Correcting mistakes—Under a will several annuities were directed to be given free of deduction The trustees had paid the annuities for some years without deducting income-tax It was held that the annuities were not free of income tax and that the trustees were entitled to deduct the income tax they had paid out of residue from future payments of annuities on the ground that the Court will always when possible allow the correction of errors of account as between trustees and their

cestui que trust The rule that a man cannot recover moneys paid under a mistake in law does not apply to cases of this kind *see In re Musgrave Machell v Parry* (1916) 2 Ch 417 In India such annuities cannot be taxed at source—*see* notes under sections 7 and 12 but the main principle of this decision regarding the right of a trustee to correct past mistakes on account of income-tax will presumably apply in India also

Agent of non resident—Liability personal—The liability of an agent of a non resident to pay tax is personal *See Plunkett v Narayan Parasuram* 1 I T C 1 22 Bom 332 *see Rigden v Commissioner of Inland Revenue and Commissioners of Inland Revenue v Urwick's Executors* 19 Tax Cases 542 The ruling though decided under the 1886 Act is still applicable The only change since made in the law is that the agent should be served with a notice (*see* section 43) and given an opportunity to show cause why he should not be treated as an agent The fact that the liability of the agent is personal does not affect the right of the agent to recoup himself from his principal All that the personal liability means is that the Crown does not look beyond the agent for the recovery of tax

Indemnity—The agent or trustee is protected under section 65 of the Act—*q v*

41 (1) In the case of income, profits or gains chargeable under this Act which the Courts of Wards the Administrators General the Official Trustees or any receiver or manager (including any person whatever his designation

who in fact manages property on behalf of another) appointed by or under any order of a Court, or any trustee or trustees appointed under a trust declared by a duly executed instrument in writing, whether testamentary or otherwise (including the trustee or trustees under any Wakf deed which is valid under the Mussalman Wakf Validating Act, 1913), are entitled to receive on behalf of any person, the tax shall be levied upon and recoverable from such Court of Wards, Administrator General, Official Trustee, receiver or manager or trustee or trustees in the like manner and to the same amount as it would be leviable upon and recoverable from the person on whose behalf such income, profits or gains are receivable, and all the provisions of this Act shall apply accordingly

Provided that where any such income, profits or gains or any part thereof are not specifically receivable on behalf of any one person, or where the individual shares of the persons on whose behalf they are receivable are indeterminate or unknown, the tax shall be levied and recoverable at the maximum rate but where such persons have no other personal income chargeable under this Act and none of them is an artificial juridical person, as if such income, profits or gains or such part thereof were the total income of an association of persons

Provided further that when part only of the income, profits and gains of a trust is chargeable under this Act, that proportion only of the income, profits and gains receivable by a beneficiary from the trust which the part so chargeable bears to the whole income, profits and gains of the trust shall be deemed to have been derived from that part

(2) Nothing contained in sub-section (1) shall prevent either the direct assessment of the person on whose behalf income, profits or gains therein referred to are receivable, or the recovery from such person of the tax payable in respect of such income, profits or gains

History—That part of the section which does not refer to trustees generally is, the same as section 32 of the 1918 Act and corresponds to sections 22 and 23 of the 1886 Act Till 1939, the section applied to the special cases mentioned and not to trustees generally The section was extended to cover all trusts in 1939 when reference was also made to the receivability of income instead of actual receipt as before The provisos to sub-section (1) as also sub-section (2) were added at the same time In 1941, reference was made to testamentary trusts, which would otherwise not be covered by this section See *Commissioner of Income tax, Madras v Venkatachalam Chettiar*, 1944 I T R 261 In 1946, the last part of the first proviso to sub-section (1) was added The amendment of 1941 was not retrospective See *Income tax Appellate Tribunal v Shri Radho Madho, Trust*, 1946 I.T.R. 470 (Nag)

Executor—Under will—In *Forbes v. Secretary of State* 1 I T O 8, 42 Cal 151, 19 CWN 138 a case under the 1886 Act, which however was substantially the same as the present Act in this particular matter, it was held that the income accruing to an executor of a will was taxable. The contention on behalf of the executor was that he was not the beneficial owner of the income and that there was no express provision in the Act to tax him as there was in the case of trustees, guardians, etc See also *In re P C Mullick*, 65 IA 150, I L R (1938) 2 Cal 214 1938 I T R 206, AIR 1938 P C 118 (P C)

Official Assignee—The question whether the Official Assignee can be taxed under this section in respect of property falling under section 9 belonging to an estate under this management under the Presidency Towns Insolvency Act, has been raised but not decided, *In re Official Assignee, Bengal (Estate of, Gnanendramuth, Prunankh)*, 1937 I T R 233, I L R (1937) 2 Cal 197, 41 CWN 683 This question cannot arise after the amendment of this section in 1939 which has enlarged the scope of section 41

In the United Kingdom, according to *Inland Revenue v Fleming* 14 Tax Cases 78 a claim for the purpose of repayment of tax on the income from the estate of a bankrupt during its administration by a trustee cannot be made either by the trustee or by the bankrupt, if and when he is re-invested with the property

Scope of section—To bring a case under this section it is not enough that the property is managed by or under the order of a Court but it should be managed on behalf of another Therefore, where co-owners (in default of shares) manage a property, even if under the orders of a Court, for

their own benefit and not for that of an unascertained owner, the case does not fall under this section. In *re Keshar Deo Chamria* 1937 ITR 246, I L R (1937) 2 Cal 358 A I R 1937 Cal 583 affirmed by the Privy Council on appeal in *Keshardeo Chamria v Commissioner of Income-tax, Bengal* 1939 ITR 394 (P C) see also notes under section 9 as to ownership of property. The fact that one of the parties is a minor will make no difference. *Jainalabdin v Commissioner of Income tax Madras* 1944 I T R 285.

Whether section mandatory—The question whether if the conditions laid down therein are fulfilled the tax can be assessed directly on the beneficiary at the option of the Crown was raised before 1939 but not decided. In *re Keshar Deo Chamria* supra. Sub-section (2) now confers the option in terms.

Trustees under a duly executed deed—Before 1939 the section applied only to Courts of Wards Administrators General Official Trustees and Receivers and Managers appointed by or under the order of a Court. Now it extends to all trustees under duly executed deeds. The reference to the Mussalman Wakf Valuing Act is out of abundant caution. Before 1941 the section did not apply to testamentary trusts now it does.

Cases of trusts without duly executed deeds—which however will be rare—should evidently be dealt with on the principles of *Williams v Singer* 7 Tax Cases 387 (1921) 1 A C 63 (H L) and *Holt Trust v Commissioner of Income-tax* 5 I T C 8 11 Lah 725 A I R 1930 Lah 929 &c in accordance with the facts of each case tax being levied where income is found.

A receiver appointed by debenture holders is taxable whether he is the agent of the company or of the debenture holders. *Inland Revenue v Thomson* (1935) 2 All E R 651. The goodwill of a business cannot be separated from it. *Inland Revenue v Muller & Co's Margarin Ltd*, 1901 A C 217 therefore if a share of the goodwill of a partnership is assigned to a non partner all that is meant is that if the partnership is sold a share of the price attributable to the goodwill should be given to the non partner. The mere fact the partners are obliged to share the profits with the non partner will not make the partners trustees for the non partner they are only debtors to that extent. *Inland Revenue v Harris Lebus' Executors* 1946 K B D.

Misdescription—Mere description for example not relating the assessment note to a trustee as such will not invalidate an assessment for he will be entitled to the equities arising from his trusteeship if in fact he is a trustee. *Martin v Commissioners of Inland Revenue* 17 A T C 513 (C S).

When section 16 (1) (c) and (3) apply—To the extent that sections 40 and 41 are machinery provisions they are obviously subject to the provisions of sections 16 (1) (c) and (3) 23 A 44-D *et seq* which seek to treat the income of one person as that of another in certain stated circumstances. The primary charging section is section 3 of which all these sections are modifications and where a case is not covered by any of these specific sections the income has to be assessed under section 3 on the person to whom on the facts of the case and the personal and other law applicable the income belongs.

See notes under section 3 as to trustees generally and also under the heading 'Association of Individuals'.

Indeterminate shares—The first proviso levies the maximum rate of income tax (but not the maximum rate of super tax—see section 58) on incomes of trusts where the income is neither received specifically on behalf of any one person nor the shares of the persons are defined and known. While in the case of a firm the Crown has the option to treat it as registered if evasion is discovered the Crown has no such weapon in respect of trusts used for evasion but not falling within section 16 (1) (c) or (3) or section (44 D).

Where a *Waqf* says that the beneficiaries shall benefit concurrently and in the same proportion and the number of beneficiaries can be determined the case is not governed by the first proviso of section 41 (1), and each beneficiary should be taxed separately, *Ahan Bahadur Habibur Rahman v Commissioner of Income tax*, 1945 I T R 189 (Pat). On the other hand where the income of each beneficiary year by year is dependent on the sole discretion of the trustees, the individual shares of the beneficiaries are necessarily indeterminate and the income of the trust as a whole will be taxed at the maximum rate. *Estate Harendra Kumar Ray v Commissioner of Income tax, Bengal* 1944 I T R 68. See also *Arur v Commissioner of Income tax, Bombay* 1945 I T R 465. It will be noted that income-tax is levied not at the rate applicable to the total income of the trust (as in the case of an unregistered firm or similar association of persons) but at the maximum rate.

Also the entire taxable income of the trust from all sources (section 8 to 12) will be taxed. See *Harendra Kumar Ray v Commissioner of Income tax, Bengal* 1944 I T R 68. But if the beneficiaries have no other taxable income and none of them is an artificial juridical person the trust will be dealt with like an association or Hindu joint family and taxed at the rate appropriate to its total income see the concluding part of first proviso to sub-section (1) which was added in 1946. The word 'or' in the first proviso must be read conjunctively otherwise there is no point in the alternatives. Also the use of the word 'individual' before shares shows that what is to be determined is not only the quantum but the person beneficially entitled. *Jakub Versey Lalji etc v Commissioner of Income tax Bombay* 1946 I T R 548.

Partially taxed trusts—The second proviso to sub-section (1) removes doubts that might otherwise arise as to the extent of taxability (also inclusion in total income) in the hands of the beneficiary of what he receives from the trustee who in turn derives income partly from sources taxable in British India and partly from sources not so taxable.

Specifically—The word is used for mere emphasis obviously. Beneficiaries with contingent interests (not yet vested) will fall within the mischief of the first proviso. If the shares of the beneficiaries are indeterminate the fact that the trustee in his discretion distributes specific amounts will not save such cases from the proviso. If *A, B, C* and *D* are beneficiaries the shares of *A* and *B* specific and *C* and *D* indeterminate the trustee should apparently be taxed with reference to *C* and *D* together at the maximum rate and with reference to *A* and *B* each separately at the appropriate rates.

Person—Need not be an individual. See section 2 (9)

Refunds.—See section 48 Where the first proviso applies there will be no refund since no one can show that tax was paid at source on his behalf In other cases, the tax will be paid on behalf of each beneficiary separately and the latter can claim refund if any, admissible under section 48

United Kingdom Law—There is no provision in the United Kingdom statutes corresponding to the first proviso to sub-section (1), and there has been very considerable litigation as to who should be taxed and on what basis Broadly speaking, if a Trustee spends for the benefit of a ward the money spent is *prima facie* of the nature of the latter's income *Sutton v Inland Revenue*, (1929) 45 T L R 565, 14 Tax Cas 662, but the rights of the beneficiary have to be determined, not with reference to what the trustee has in fact done, but with reference to the deed of trust *Archer Shee v Baker*, 15 Tax Cas 19, see also *Inland Revenue v Kidston, etc*, 20 Tax Cas 610 The question *when* income accrues to a beneficiary will depend on the law of the country governing the trust as to when income vests in the beneficiary *Jones v Down*, 20 Tax Cas 279 In the absence of specific appropriation by the trustee of particular items of capital or other items to meet particular payments what a beneficiary receives comes out of the trust funds as a whole, and he cannot claim that his income came from a particular source *e g*, tax free securities or (say) agricultural income *Inland Revenue v Crawshaw*, 19 Tax Cas 715

Under his father's will an assessee was entitled (in the events which happened) during the subsistence of the trust of the residuary estate, to occupy a mansion house and grounds so long as the trustees should find it expedient to retain it in the hands unlet The trustees were to hold it in trust 'for the life rent use' of the assessee so long as his mother should remain alive and subject to certain other conditions The assessee had no power to let the property The residuary estate was to be held in trust till the mortgages on the testator's estate had been reduced to a certain figure the ultimate remainder being to the assessee absolutely and in fee if then living and in default to his issue Assessments under Schedules A & B were made on the assessee but discharged by the trustees Held for the purpose of supertax, that the annual value of the house and grounds was not part of the income of the assessee *Inland Revenue v Wemyss*, 8 Tax Cases 551

Under his ante-nuptial marriage contract, an assessee assigned to trustees, his interest in certain shares in a company in trust to pay the income to him self for life but in the event of the yield from certain shares exceeding a certain limit, the excess was to be retained by the trustees and applied by them in reducing the charges created by the assessee on the funds Subject to a life interest of the assessee's wife, the settled funds were to go to the children and in default of children to attain a vested interest to revert to the assessee The assessee also had power to redeem the trust funds for a fixed sum to be held on the same trusts Held that the excess income was not part of the assessee's income for super tax *Inland Revenue v Wemyss*, 8 Tax Cases 551

In 1916 an assessee decided to provide for his wife and daughter A settlement was drafted in 1917, but the deed was completed only in 1919 He and his wife were the trustees The trusts relating to property vested in the trustees on or before January, 1917 were to be effective from then, and those relating to other properties, when they were vested in the trustees

As regards certain shares of a company included in the trusts, the directors of the company, in a meeting in February, 1917, sanctioned the transfer of the shares to the joint names of the assessee and his wife. The Company opened a joint account in the names of the trustees in March 1917. Thereafter dividends were paid to the trustees but till the trust deed was completed, the shares remained in the assessee's name. The assessee had orally told his wife that he was holding the shares in trust pending their transfer to trustees. Held that an effective trust had not been created in January, 1917. The oral declaration merely showed an intention to settle the shares and was not an immediate and complete declaration of trust. *Allen v Inland Revenue*, 9 Tax Cases 234 (H.L.)

Mr Stott owned certain preference shares in a Company which he transferred by a deed dated 29th April 1919 to himself and Mr B jointly as trustees for Mr B's minor sons. A trust deed was executed on the 30th April providing *inter alia* that 'the trustees will henceforth stand possessed of the said shares and of the income thereof on trust' for the minors. On the same day *viz* the 30th April Mr Stott received arrears of dividends on the shares for several years. The cheque for the dividend was dated the 29th April. The Company registered the transfer of shares on the 6th of May. On the 9th of May, a dividend warrant was endorsed by Mr Stott, and paid into the trustees' joint account. The Commissioners held following *Duncan v Inland Revenue* 8 Tax Cases 433 that the trust became effective from the 30th April and that the dividend belonged to Mr Stott. Held reversing the decision of the Commissioners and following that part of the ruling of the Irish Court of Appeal in *Allen v Inland Revenue* 9 Tax Cases 234 which had not been appealed against to the House of Lords that the trust became effective on the transfer of the shares. *Trustees of Brennan Minors v Scanlan* 9 Tax Cases 427 41 T.L.R. 452.

Under a will certain lands of the testator were subject to certain interests of the widow to be held in trust for the eldest son living at the time of his death absolutely on his attaining the age of 21 years and the residue of the estate both personal and real to be converted into money and invested. The capital and income of such investment was to be held in trust for all the children in equal shares and were an interest or interests absolutely vested on the testator's death. The trustees had discretion to apply the whole or part of the income to which any child was entitled to its maintenance and the balance was to be accumulated by investment. There were three daughters and one son. The widow remarried and was entitled only to an annuity from the residuary estate. The son was sought to be assessed to super tax on the income from real property plus one fourth of the income of the residuary estate on the ground that the interest of the minor was vested and not contingent. Rowlatt J. decided as follows:

It does not matter whether the interest is vested or contingent in as much as there is a trust to accumulate a fund during the infancy of the eldest son subject to a power to the trustees to apply such sum as they think proper for his maintenance the part of the income which is accumulated is not the income of the minor. In a case of that kind the income must come to the infant in the end if the interest which he takes is a vested interest but it will not come to him as income it will come to him in future in the form of capital. His income which is held in trust for him in the sense that he will ultimately receive it but it is not in trust for him in the sense that the trustees have to pay the in-

come to him year by year while he is an infant . the case is quite different from a case where the infant has the right to the money now but the money remains in the hands of his trustees, not because of any directions in the will which directed it to be accumulated, but because he is an infant and cannot receive the money and give a receipt for it. The Court of Appeal remanded the case for a definite finding as to whether the minor's interest was contingent or vested. The finding was that it was contingent, and the question as to the liability if the interest was vested was not considered by the Court of Appeal, and the *obiter dicta* of Rowlatt J. have been neither affirmed nor overruled. *Inland Revenue v Blackwell's trustees*, 10 Tax Cases 235.

By a will, dated 1906 a testator, who died in 1908 gave the residue of his estate—containing real property under mortgages—after payment of legacies and annuities to servants and clerks, to his four children. Until the youngest child was 25—i.e., till 1916—the rents were to be used in reducing the mortgages and then the property was to be divided, and not sold unless the trustees thought it advisable. The rents were spent even after 1916 in reducing the mortgages, and no legacies were paid before December, 1919. The Crown taxed the children on their income from 1916 on the ground that they were entitled to the corpus from 1916 and could have enforced the conveyance of their shares to themselves subject to the charges. Held, that since the executors had power to pay off the mortgages—without the consent of the beneficiaries—before distributing the residue and they chose that course, the residue had not been ascertained in 1916, so no tax was payable by the children. *Dau v Inland Revenue*. *Duff Dimber v Inland Revenue*, 14 Tax Cases 58.

Executors—Income received by the executors of a will during administration is ordinarily their income and not that of the beneficiaries. A residuary legatee is entitled to nothing until the residue has been first ascertained. Therefore when he receives the residue even though it may include income during administration he is not taxable as it is not his income. *Marie Celeste Samaritan Society v Inland Revenue*, 11 Tax Cases 226, exp *Barnardo's Home*, 7 Tax Cases 646 (H.L.). Similarly a residuary life tenant also is entitled to nothing until the residue has been ascertained. *Rev Lionel Corbett v Inland Revenue*, (1937) 4 All E.R. 700 (C.A.). It is a different question, however, whether, when it has been ascertained, it is taxable, and if so to what extent and on what basis, whether on that of accrual or on that of receipt.

The position and the estate of trustees however, differ from that of executors, for where trustees are in receipt of income which it is their duty to pay over to beneficiaries either with or without deduction of something for the trustee's expenses on the way, the income is at its very inception the income of the beneficiaries. *Rev Lionel Corbett v Inland Revenue*, (1937) 4 All E.R. 700 (C.A.).

This last ruling however, has been nullified by the United Kingdom Finance Act of 1938 under which amounts paid during administration to beneficiaries with 'absolute interest' (which has been specially defined) will be deemed to be the income of the beneficiary.

Super tax on trustees—In *Inland Revenue v Pakenham* 13 Tax Cases 573, it was held, by the House of Lords that income-tax provisions relating to representative assessments on trustees and guardian were not applicable to super tax. The latter was a tax on total income while income-tax was

schidular The trustee may not be in a position to return the total income of the ward and even if he was, he might not be able to indemnify himself. In view of the words, 'so far as they are applicable' and not *mutatis mutandis*, the House of Lords considered that in view of the possible injustice otherwise, super tax should be levied only on the beneficiary and not on the trustee. The Indian basis of super-tax and income tax is, however, different. Under section 55, super-tax can be levied not only on individuals but on others, and both income-tax and super-tax are levied on the basis of 'total income'. The difficulty, however, about the trustees returning the total income of the beneficiary arises in India also, and this is an argument for taxing the beneficiary by preference where possible. Sections 40 and 41 as amended in 1939, give effect to this purpose. See also section 58 which excludes from super tax the first proviso of section 41 (1).

In the United Kingdom, an association of individuals is not liable to super-tax. So, questions arise whether a trustee who is accumulating funds is receiving income year by year on behalf of the beneficiary, whether the latter has a contingent or vested interest and so forth, section 41 in India covers many of these difficulties.

Expenses of trustees—Trustees in Scotland received remittance from abroad in respect of income from trust property abroad and distributed the *net* income to the beneficiaries. Held that the full amount received by the trustees was taxable, without any deduction for management expenses in the United Kingdom. *Per* the Lord President—'It is for them (the trustees) to point to the section of the statutes which entitled them to make such a deduction. I think they have entirely failed'—*per* Lord MacLaren. 'The management of the trustees is, I venture to think, of the nature of what is described in one of the rules as a private or domestic use. the only kind of deductions allowed is expenditure incurred in earning the profits. there is no distinction under any circumstances allowable for expenditure incurred in managing profits which have been already earned and reduced into money—pounds, shillings and pence. *Aikm v. Macdonald's Trustees*, 3 Tax Cases 306 (C S.)

An assessee was entitled under a will to a share of the net annual income of the residuary estate. Legacy duty was paid by the trustees to the Crown, and the trustees paid the net amounts to the assessee after deducting the duty. Held that though the trustees were accountable to the Crown for the duty, it was, in effect a personal obligation of the assessee. The income receivable under the bequest was therefore part of his taxable income, and the amount to be included was his full share of the net residuary income plus income tax applicable thereto, without deduction of legacy duty paid on his behalf. *Co'ville v. Inland Revenue* 8 Tax Cases 442 (C S.)

42 (1) All income, profits or gains accruing or arising, whether directly or indirectly, through or from any business connection in British India, or through or from any property

Non-residents

in British India, or through or from any asset or source of income in British India, or through or from any money lent at interest and brought into British India in cash or in kind, shall be deemed to be income accruing or arising within British India, and where the person entitled to the income, profits or gains is not resident

in British India, shall be chargeable to income tax either in his name or in the name of his agent, and in the latter case such agent shall be deemed to be, for all the purposes of this Act, the assessee in respect of such income tax

Provided that where the person entitled to the income, profits or gains is not resident in British India, the Income-tax so chargeable may be recovered by deduction under any of the provisions of section 18 and that any arrears of tax may be recovered also in accordance with the provisions of this Act from any assets of the non resident person which are, or may at any time come, within British India

Provided further that any such agent, or any person who apprehends that he may be assessed as such an agent, may retain out of any money payable by him to such non resident person a sum equal to his estimated liability under this sub section, and in the event of any disagreement between the non resident person and such agent or person as to the amount to be so retained, such agent or person may secure from the Income tax Officer a certificate stating the amount to be so retained pending final settlement of the liability, and the certificate so obtained shall be his warrant for retaining the amount

Provided further that the amount recoverable from such agent or person at the time of final settlement shall not exceed the amount specified in such certificate except to the extent to which such agent or person may at such time have in his hands additional assets of such non resident person

(2) Where a person not resident or not ordinarily resident in British India, carries on business with a person resident in British India, and it appears to the Income tax Officer that owing to the close connection between such persons, the course of business is so arranged that the business done by the resident person with the person not resident or not ordinarily resident produces to the resident either no profits or less than the ordinary profits which might be expected to arise in that business, the profits derived therefrom or which may reasonably be deemed to have been derived therefrom, shall be chargeable to income-tax in the name of the resident person who shall be deemed to be, for all the purposes of this Act, the assessee in respect of such income tax

(3) In the case of a business of which all the operations are not carried out in British India, the profits and gains of the business deemed under this section to accrue or arise in British India shall be only such profits and gains as are reasonably attributable to that part of the operations carried out in British India

RULES

The relevant rules issued under this section are set out below

Rule 33—In any case in which the Income tax Officer is of opinion that the actual amount of the income, profits or gains accruing or arising to any person residing out of British India whether directly or indirectly through or from any business connection in British India or through or from any property in British India, or through or from any asset or source of income in British India or through or from any money lent at interest and brought into British India in cash or in kind cannot be ascertained, the amount of such income, profits or gains for the purposes of assessment to income-tax may be calculated on such percentage of the turnover so accruing or arising as the Income tax Officer may consider to be reasonable, or on an amount which bears the same proportion to the total profits of the business of such person (such profits computed in accordance with the provisions of the Indian Income tax Act) as the receipts so accruing or arising bear to the total receipts of the business or in such other manner as the Income tax Officer may deem suitable

Rule 34—The profits derived from any business carried on in the manner referred to in section 42 (2) of the Act may be determined for the purposes of assessment to income-tax according to the preceding rule

History—The first two sub-sections of this section were first introduced in the 1918 Act, and were evidently influenced by the alterations in the English law in 1915 though, unlike the provisions in the United Kingdom law, these sub-sections were not mere machinery but imposed liability. The only change made in 1922 was the addition of the words 'or property' after the words 'business connection' in section 42 (1). In 1928 a sub-section (3) was added deeming the entire profits of sales in British India of imports into it to accrue or arise in British India and forbidding the deduction of royal commissions (not actually paid) from such profits (*Steel Brothers' Case*, 2 I T C 119). This sub-section was replaced by the present sub-section in 1939. Extensive changes were also made in 1939 in sub-sections (1) and (2). The first part of sub-section (1) was extended so as to cover income whether of residents or non residents (but the object has apparently failed—see *Western India Life Insurance Case* below) and income "through or from any asset or source of income in British India, or through or from any money lent at interest and brought into British India in cash or in kind. Explicit provision was also made to tax either the principal or the agent and also for deduction of tax at source in certain cases. The second and third provisos to sub-section (2) were also added. Sub-section (2) was amended partly to place a British Subject (or a subject of an Indian State) in no worse position than a non British subject or a non Indian State subject and partly as a consequence of the recasting of the basis of taxation (see sections 4 4-A and 4-B) with reference to residence and ordinary residence also partly to strengthen the hands of the Income-tax authorities viz, by removing the former condition that the non-resident (or not ordinary resident) person should exercise control over the business of the resident. Now, 'close connection' and abnormally low profits are enough for the Income tax Officer to take action.

Sub-section (3) which from 1928 sought to tax the entire profits on sales in British India of imported goods was probably intended to be relaxed

so as to tax 'merchandising' profits only, but, as drafted it applies only to income 'deemed' under sub-section (1) to accrue, etc., in British India and not to cases of accrual or receipt in British India which are caught directly by section 4. The latter will be taxable in full and only income deemed to accrue in British India will be taxed in part. According to the Bombay decision in *Western India Life Insurance Case* this sub-section can apply only to non residents.

Residence and ordinary residence—See sections 4 A and 4 B and notes under those sections.

Section applies only to non residents—Notwithstanding the amendment in 1939, it has been held that the section applies only to non residents, for (1) the marginal note referring to non residents has been retained (but it is not usual to amend marginal notes) (ii) if the first part of the section applied both to residents and non residents, its proper place would be in the definition clauses, viz., section 2, (iii) by making the whole of the first paragraph as one and connecting it with the other by 'and', the statute makes it clear that the section applies only to non residents, and (iv) the categories of income referred to in section 42 point to non residents only, and (v) it is not a fair method of construing section 4 (1) (b), first to separate income into two parts viz., (A) accruing within British India and (B) accruing outside and then to take a portion of (B) back into (A) by referring to some other part of this Act. *Commissioner of Income-tax v Western India Life Insurance Co*, 1945 I T R 405 (Bom).

Accruing or arising—As to the meaning of the words see notes under section 4. This section no longer (i.e., after April 1939) refers to accrual to a person, and the first part of sub-section (1) makes no distinction between residents and non residents. The sum and substance of the first part is broadly, that even indirect accrual from sources in British India (of income which accrues, i.e. is receivable abroad) is equivalent to accrual in British India. The question can obviously, arise only in respect of income receivable outside British India for otherwise section 4 would be sufficient to catch such income.

Though as pointed out in *Rogers Pyatt Shellac Case* 52 Cal 1, and *National Mutual Association* 1 I T R 350, 57 Bom 519 section 42 is a charging section in the sense that it renders a non resident liable to tax in respect of sources of income to which he would not be otherwise liable, the section cannot be read without reference to sections 3 and 4 which impose the charge generally. This general charge is merely given a particular application by section 42. *Hira Mills v Income tax Officer, Coimbatore* 1946 I T R 417.

Directly or indirectly, through or from—These alternatives appear in this collocation in order to cast the net as wide as possible.

Business connection—See decisions set out below. This phrase relates to something different from, but not unrelated to business, of which there is a definition in section 2 (4) of the Act, *Commissioner of Income-tax Bombay v Currimbhoy Ebrahim and Sons, Ltd* 1935 I T R 395 (P.C.). See *In re Nandlal Bhandari Mills Ltd., Coimbatore*, 1939 I T R 452, A.I.R. 1939 All. 593.

Property—The word as it occurs in this sub-section is an ordinary English word to be taken in its usual signification subject to the context.

provided by the rest of the sub-section, and there is nothing in the sub-section to exclude from its scope any of the six classes of income mentioned in section 6. The property, however, should be something tangible and situate in British India, it would, therefore, exclude a chose-in-action (though the latter might for purposes of administration or succession or for purposes of jurisdiction to attach a debt, be naturally considered to be situate in British India) but include furniture in British India the hire for which is paid outside British India. The phrase 'property in British India' should be taken literally and simply, *Commissioner of Income-tax, Bombay v Currimbhoy Ebrahim and Sons, Ltd*, 1935 ITR 395 (PC).

Asset or source of income—One of the alternatives would seem to be superfluous and has been put in evidently out of abundant caution.

Money lent at interest brought into British India—The section will now apply to such cases even if there is no business connection as a consequence of the lending, see *Commissioner of Income tax, Bombay v Currimbhoy Ebrahim and Sons, Ltd*, 1935 ITR 395 (PC). Cases of money borrowed in British India from a non resident, *i.e.*, not borrowed outside and then brought in, are not mentioned evidently because normally interest in such cases would be governed by a British Indian contract and payable in British India.

In cash or in kind—See notes on remittances under section 4 (1), particularly on constructive remittances.

Should agent be entitled to receive the profits—It will be seen that, while sections 40 and 41 require the trustee, agent or receiver to be entitled to receive or be in receipt of the profits, section 42 does not require the agent to be so entitled. Section 42 (1) seeks to catch profits that accrue or arise outside British India from a business connection in British India and are normally received outside British India *ex hypothesi* the agent in British India would not ordinarily be entitled to receive the profits, though he may be in receipt of funds or goods belonging to his non resident principal. Similarly section 42 (2) seeks to catch profits that actually accrue or arise in British India, but are not necessarily received there being concealed by the manipulation of transactions between the non resident principal and the resident agent. In such cases the profits are more likely to be received by the non-resident principal abroad than by the resident dummy agent in British India. That is why the sub-section does not require the agent to be in actual receipt of the profits. In either case *i.e.*, under sub-section (1) as well as under sub section (2) of section 42, the agent would have to recoup himself somehow from the moneys or assets in his hand belonging to his non resident principal. But in cases falling under section 42 (1), the Income-tax Officer may at his option recover the tax direct from the assets in British India of the non resident principal. In cases falling under section 42 (2), the agent is really a creature of the non resident, and no special provision is necessary to enable him to recover the tax from his principal.

See also notes under section 43.

In his name or in the name of his agent—This removes the difficulty created by the ruling of the Allahabad High Court in *Sir Aditya Narain Singh (Maharaja of Benares) v Commissioner of Income tax*, 1938 ITR 217, I.L.R. (1938) All 432, A.I.R. 1938 All 310. See also notes under section 40. The option is evidently that of the Income-tax authorities.

Deductions at source.—The old proviso has been expanded in order to authorise explicitly deduction at source which is enjoined by section 18.

Certificate of estimated liability.—The second proviso explicitly authorises the agent to retain money to meet tax, if there is disagreement on this point between him and his principal, the Income tax Officer, if approached is bound to give a certificate to the agent stating the amount to be provisionally retained pending final assessment and the agent can thereafter retain the amount on the strength of the certificate. If the agent fails to retain money, it is at his own risk for he is deemed, for all purposes, to be the assessee.

The third proviso restricts the liability of the agent to the amount of the certificate referred to above *plus* any other assets of the principal in his possession at the time of final assessment.

Computation of taxable profits.—The receipts in the hands of the local agent in cases falling under sub-section (1) will be ordinarily gross profits since all the relevant expenditure of the non resident may not be incurred through him, the computation of taxable profits should be made under Chapter III, and if that is not possible, under Rules 33 and 34. Rule 33 is necessary because the actual records of profits received by non residents through trading in this country will, generally speaking, not be available, and there must therefore be some arbitrary method by which such profits can be ascertained. Similarly, Rule 34 is necessary because *ex hypothesi* in cases in which as the result of artificial manipulation the true profits have been obviated it is possible to ascertain the profits only by some arbitrary method.

Under the pre 1939 law, no deduction was permissible on account of manufacturing profits in the case of goods manufactured abroad and sold in British India, *In re Port Said Salt Association, Ltd*, 59 Cal 1226, 6 ITC 123 36 CWN 563. This ruling is obsolete in view of the amendment to sub-section (3) in 1939.

Sub-section (3).—Note the word deemed. The sub-section therefore does not apply to income, in fact accruing or arising in British India. Therefore if goods are sold in British India, this sub-section will not apply, but it will apply if the goods are brought or processed or manufactured in British India and sold abroad. See *Hira Mills v Income tax Officer, Cantonpore*, 1946 ITR 417. How the profits attributable to British India are to be estimated is a different matter.

On the other hand, according to the Bombay High Court see *Commissioner of Income tax v Western India Life Insurance Co*, 1945 ITR 405, this section can apply only to non residents.

Non-residents.—Income arising from business in India.—The following executive instructions have been issued.

Indian branches of non resident firms are liable to assessment under the Act. In order to secure an accurate assessment in such cases, sections 22 (4) and 37 enable an Income-tax Officer to require the production of the balance sheet and profit and loss account of the firm—whole, in addition to that of the Indian branch and also that has the submission of a detailed statement of all the profits credited office on account of transactions carried out on its line province, and instances, however, the form adopted for the accounts, under section of the head office or the Indian branch does not officer, Non resident profits properly due to the Indian branch to be gauged.

33 gives the Income-tax Officer wide powers to determine how the profits of the Indian branch shall in these circumstances be calculated and enables him to fix as the income of the Indian branch for assessment purposes either a percentage of the turn over of the business done by the branch or, where this procedure proves unsuitable an amount which bears the same proportion to the total profits of the business as the Indian receipts bear to the total receipts of the business or in such other manner as he deems suitable.

Indian agents of non resident firms of which they are not technically either branches or subsidiary firms are liable for the payment on account of their principals of the tax on their principals' Indian profits under the provisions of sections 42 (1) and 43 of the Act. It will be observed that these provisions permit the levy of the tax on a non resident's business not only where he has established a regular *agency* in India but also where he conducts his business regularly through a particular *agent* or casually through various *agents*. Tax cannot however, be levied on any part of the income of a non resident which does not accrue or arise or is not received in British India or which can not be deemed to accrue or arise or to be received in British India. No attempt will be made by the Income-tax Officer to deem the income of a non resident to arise in British India, if it is clear that the business operations in which he is engaged consist entirely of trading *with* British India as distinct from trading *in* British India. It is the nature of the operations and not the nature of the agency which determines liability, and even though a person resident may regard the agency as of a casual nature this will not exclude the possibility of assessment as an agent if the non resident either through one or more persons is really trading *in* British India. Each case will be dealt with on its merits and such factors as the bearing of bad debts by the resident the non existence of privity of contract between the non resident principal and the principal in British India have to be taken into account but no one of them alone is conclusive. For general guidance a few examples are appended but it must be understood that they are only for the purpose of general illustration and having regard to the complexity of business relations they cannot be comprehensive nor must the precise wording in any illustration be taken as binding the department in any case in which the facts warrant the taking of a different view.

(a) *B* a distiller in Glasgow, sells whisky direct to *A* an importer in Bombay. The relationship is that of principal and principal and not that of principal and agent. Moreover as *B* has no agent or connection in British India he must be treated as trading *with* British India and not trading *in* British India. Even if *B* agreed to sell to no other person in British India but *A* the position for income-tax purposes is the same provided that the selling in British India is definitely *A*'s business and does not constitute sales by *A* on behalf of *B*.

In this case, *A*, an Indian resident and a large supplier of mill stores has a culy created by for the sale in India of the belting of a non resident *B*. *A* is *Narain Singh* (Assn by *B* on all orders executed. *A* does not confine his 1938 I T R 217, I belting to *B*. So long as *B* exercises any control over the notes under section 43 or the method by which his agent *A* conducts the business authorities 1st be deemed to have a business connect on in British

India, and is assessable accordingly, either directly or through an agent (which may be *A* or somebody else) If, on the other hand, *B* sends the goods to *A* for sale at the best price obtainable, *A* undertaking for a commission to sell entirely at his discretion, how he likes and to whom he likes, and *A* bearing any bad debts, *B* is really trading only *with* British India and not *in* British India The relationship between *A* and *B* may, however, be closer than the mere description of the terms of the agreement would indicate and in that event, the Income-tax Officer may determine that *B* is really trading in British India through an agent

(c) *A* is the Indian agent for hardware and sundries of *B*, a British manufacturer *A* receives salary and commission from *B*, and bad debts fall on *B* Here the position is that *B* is actually trading *in* British India through his employee, and quite clearly, he is liable to tax either directly or through any person (including *A*), who can be deemed to be agent under section 43

(d) *A* is a broker in British India who, in the ordinary course of his business, agrees to sell on commission certain standardised commodities *B*, *C*, *D*, and *E* and many other exporters of such commodities from England send their goods regularly to *A* who, entirely at his discretion and according to the rules of the market in which he deals, sells all such goods sent to him at current market prices *A* is responsible for any bad debts incurred and on the sale of goods remits the proceeds to *B*, *C*, *D*, *E*, etc less his regular commission *B*, *C*, *D*, *E*, etc, are trading *with* British India and not *in* British India

In all these cases *A*'s own commission or profits as agent are of course liable to tax whether or not he has to pay as agent in respect of his foreign principal's profits

Casual agents for non resident firms to whom goods are from time to time consigned have been dealt with above and no attempt should be made to tax the profits of a non resident through the agent on his class of business

As regards taxation of interest on money lent by a non resident to a resident in British India, it has been held by the Privy Council in the case of the Bombay Trust Corporation as agent of the Hongkong Trust Corporation that there can be a business connection within the meaning of sections 42 and 43 of the Act between a resident borrowing money from a non resident and a non resident lending money to a resident, and that the former can be treated as the statutory agent of the latter, under section 43 of the Act This decision is to be followed wherever it is applicable Where however, a resident takes for a short period a casual and isolated loan from a non resident with whom he has no regular or continuous dealings, it need not be held on the strength of that fact alone that there is a business connection within the meaning of the above section and that the resident is liable as agent on the interest paid to the non resident (*Income-tax Manual*) The latest edition of the *Income tax Manual* has omitted the above illustrations

Special Income tax Officers—The *Income tax Manual* has the following instructions

Non residents whose income arises in more than one province, and who are assessed direct, and not through statutory agents under section 43 of the Act will be assessed by the Income tax Officer, Non resident

Refund Circle Bombay, who will also deal with applications from them for relief, whether under section 48 or under section 49 of the Indian Income tax Act, 1922 or under any notification issued by Government under section 60 (1) of the Act and section 49 A of the Act providing for relief on account of double payment of income-tax. Persons not resident in British India, who have income arising in more than one province and are assessed direct and not through statutory agents under section 43 and a part of whose income is derived from horse-racing will be assessed by the Income tax Officer Poona.

Non residents whose income arises in a single province, and who are assessed direct and not through statutory agents under section 43 of the Act will be assessed by one or more Income tax Officers to whom such assessments are specially assigned by the Commissioner of Income tax.

Collection of tax—Limitation—Under proviso to sub section (1) arrears of tax may be recovered in accordance with the provisions of the Act at the option of the Income tax Officer *at any time* from the non residents assets in British India. See sub-section (7) of section 46 and notes thereunder.

Foreign Shipping Companies—Rule 33 provides the manner of ascertaining the income profits or gains of a non resident person when the actual amount of income profits or gains chargeable to tax in British India cannot be arrived at directly from the accounts.

In respect of foreign shipping Companies carrying on business in British India the following instructions have been issued.

(1) If a company furnishes annual accounts for the whole of its business Indian and foreign the second method provided by Rule 33 will reasonably be applied. Depreciation has only to be considered in calculating the world profits. These are to be calculated according to the Indian Income tax Act. Profits calculated according to the United Kingdom Act will therefore require certain adjustments. Deductions permitted in the United Kingdom but not permitted in India will have to be added back and deductions permissible in India but not permissible in the United Kingdom will have to be allowed. If any company however prefers to claim the depreciation allowed by the United Kingdom Income-tax authorities the Commissioners of Income-tax may adopt that figure. Otherwise depreciation will have to be calculated according to the Indian rules. What follows applies to the calculation of depreciation according to the Indian rules. For this purpose a complete depreciation record has to be maintained for the entire fleet. Depreciation begins to run from the first year in which the company is 'assessed' in India that is the first year in which its profits (or loss) were determined for the purpose of deciding whether it was liable to Indian income-tax. Unabsorbed depreciation i.e. any balance of depreciation which cannot be allowed in any year owing to the profits not sufficing to cover the full amount permissible under the Indian rules will be carried forward and allowed as far as possible in calculating the world profits according to the Indian method in the following year and if necessary in subsequent years. [What has been said above about depreciation applies equally to obsolescence (discarding).]

Proportion Indian receipts [Total receipts is applied to the world profits calculated according to the Indian method (if there are any

such profits) and the result is the Indian income liable to tax. No further deduction is permissible from the amount thus arrived at on account of depreciation (unabsorbed or otherwise) or anything else. The due proportion of all allowances permissible is automatically set off against the Indian profits by the above method.

This method is equally applicable whether a Company works out the profits for each voyage or follows any other method of accounting provided that it prepares complete annual accounts for the *whole* business, Indian and foreign and furnishes the accounts of gross receipts Indian and foreign.

Some lines do not furnish complete annual accounts for their world business. They keep separate complete annual accounts for their Indian trade—that is for all round voyages to and from Indian ports. The proper course is then to apply the method just described treating the profits of the Indian trade and the gross receipts of the Indian trade as though they were the world profits and the world receipts respectively. In fact the business other than the Indian trade is ignored.

(2) A difficulty sometimes arises in such cases owing to the fact that the ships employed in the Indian trade are constantly being changed. Unless United Kingdom depreciation is accepted as indicated above a depreciation record will have to be kept for every ship employed at any time in the Indian trade. Depreciation must be allowed on each ship employed in the Indian trade in a given year and the allowance must be a proportion of the annual rate calculated with reference to the number of days spent in the Indian trade whether at sea or in harbour. Any unabsorbed depreciation in any year must be distributed among the ships in the Indian trade in that year in proportion to the capital cost of each and the unabsorbed depreciation thus allotted to any ship can only be allowed in any subsequent year against the *same ship*.

The allowance should cease —

(a) on ships included in the fleet in the first year in which the Company becomes *liable* to assessment in India (irrespective of whether it was *actually* found to have a taxable income in that year or not), after the twentieth year beginning with that year.

(b) on ships subsequently added to the Company's fleet after they have been borne on the fleet for 20 years.

In both cases the period may be extended proportionately where the United Kingdom depreciation is allowed in calculating the "profits of the Indian trade" which take the place as already explained of the world profits.

Obsolescence (loss on discarding) cannot be allowed in these cases (*Income tax Manual*).

The above instructions will only apply to ocean going ships, in other cases depreciation will be on the written-down value. See section 10.

British Shipping Companies—Assessment of—The following instructions have been issued.

When assessing British Shipping Companies the Income tax Officers should accept a certificate granted by the Chief Inspector of Taxes in the United Kingdom stating (1) the ratio of the profits of any accounting period as computed for the purposes of the United Kingdom income-tax (computed without any allowance for wear and tear) to the

gross earnings of the Company's whole fleet and the ratio of the United Kingdom allowance for wear and tear to the gross earnings of the whole fleet or (2) the fact that there were no such profits. The expression 'gross earnings of the Company's whole fleet' means the total receipts of the Shipping Company excepting only receipts from non trading sources such as income from investments (*Income tax Manual*).

Whether section 42 (1) machinery section—In *Board of Revenue v. Madras Export Company* 1 I T C 194 46 Mad 360, A I R 1923 Mad 422 44 M L J 290 a firm which had its headquarters in Paris purchased hides and skins in British India on the orders of constituents in various parts of Europe and America. The profit of the firm consisted of the commission received on the sales. The skins were bought in British India for the firm by an agency called the Madras Export Company, which was resident in Madras. This company bought the material at the lowest prices possible subject however to a maximum fixed by the firm in Paris. The materials were shipped in the raw state as purchased. The Madras Export Company made no profits on the sales of the skins and no part of the profits of the firm in Paris were remitted to Madras. The Madras Export Company received from the Paris firm the necessary funds for purchases from time to time. *Held* by the Madras High Court that the Madras Export Company was not assessable section 33 (1) of the Income-tax Act 1918 (similar in essential respects to section 42 (1) of the present Act) being a machinery section only and not a charging section. But this decision has not been followed by other High Courts see *Rogers Pyatt Shellac case* 52 Cal 1 A I R 1925 Cal 34 1 I T C 363 and *Steel Brothers' case* 2 Rang 211 A I R 1924 Rang 337 1 I T C 326 cited *infra*.

Business connection—There had been much litigation as to what is business connection but many of the rulings have been neutralised by the very wide extension of the section in 1939 so as to cover income from any asset or source of income in British India and in particular interest on money borrowed abroad and brought into British India.

The *Rogers Pyatt Shellac Company* was incorporated in the United States of America with its headquarters in the City of New York. The Company had a branch office in Calcutta to buy gum shellac and other Indian products and a factory at Wyndhamgunj in the United Provinces in which the raw produce purchased locally was worked into a form suitable for export. No sales were conducted in India by the Company their transactions were limited to the purchase of shellac and other goods some of which were purchased on account of a Gramophone Company which paid the Company a fixed percentage on the purchase plus expense while the balance was sold in the open market. *Held* that the profits arising out of the transactions were taxable.

Per Clatterjee J—If by the expression business connection in section 33 (1) was meant something different from business in section 5 then it would be going beyond the classes of income which alone according to section 5 are chargeable to income tax. Section 6 of Act XI of 1922 uses the word heads instead of 'classes'. The former expression seems to have been substituted to make it more comprehensive we think the same thing was meant by the two expressions business and business connection.

Per *Mukherjee, J*—But even if it be argued that 'income derived from all other sources may not refer to income of this description—a question, with regard to which I do not wish to pronounce any definite opinion I do not see why 'profits and gains from business connection' should not be included in the general expression income derived from business' which is used in section 5. The expression it must be admitted, is dangerously vague and it is much to be regretted that in a fiscal enactment a more precise expression has not been used. The meaning, however, does not admit of much doubt, for the context shows that it is such gains or profits as may be calculated to have been made as being that part of the income of the non resident which is attributable to the connection he has with a business in British India. The word 'business' is one of large and indefinite import and connotes something which occupies the attention and labour of a person for the purpose of profit. The word means almost anything which is an occupation or a duty requiring attention as distinguished from sport or pleasure, and is used in the sense of an occupation continuously carried on for the purpose of profits *Smith v Anderson*, (1880) 15 Ch D 247 at page 258, *Rolls v Milner* (1884) 27 Ch D 71 at page 88. *Re Marine Steam Turbine Co*, (1920) 1 K B 193. A concern by reason of which one can be said to have connection with such an occupation is business connection." *Rogers Pyatt Shellac & Co v Secretary of State*, 1 I T C 363.

A company registered in England with its headquarters in London and admitted by the Crown to be non resident in British India, carried on business operations in Burma especially in rice, timber and cotton. It exported the goods partly in their raw state and partly after subjecting them to some process of conversion in their mills. The company contended that none of the profits arising from the export of goods from Burma which were sold in England should be assessed to income-tax. *Held*—

(i) following the *Rogers Pyatt* case and differing from the *Madras Export Company's* case that section 42 (1) is a charging section and not merely a machinery section, (ii) following *Commissioners of Taxation v Kirk*, (1900) A C 588 that in determining whether any income arises or accrues in British India one must look not only at the last stage of the accrual but also take into consideration the previous stages, (iii) that no distinction so far as liability to income tax is concerned can be drawn between profits on produce which has undergone a process of conversion or working up in British India and profits on produce purchased by the assessee in British India and exported in the same form as when purchased, (iv) that in calculating the net profits though due deductions had been made by the Commissioner in respect of the cost of the Home establishment this deduction was not sufficient, and that a further deduction should be made on account of the commission that would have been paid if the work at London had been done by a commission agent instead of by the Head Office, and (v) that profits arising on contracts of insurance entered into by the Head Office or rice cargoes consigned to it by the Rangoon branch did not accrue or arise from business connection with or in British India inasmuch as the profits were not merely earned in England but the contracts were entered into in England. *Steel Brothers v Commissioner of Income tax, Burma* A I R 1924 Rang 337 2 I T C 119; 2 Rang 211.

We admit the difficulty arising from the vague expression from any business connection. Taken in its wide sense, it would render liable to Indian income tax any profits made by a manufacturer in England on a single consignment of goods to an importer in India. This is the meaning which the Commissioner of Income tax seems to have attached to the phrase and is the meaning which the learned Government Advocate contends is the correct one. It is one, however, which we cannot adopt as such a meaning would be repugnant to the word 'business' in section 6 as defined by section 2 (4), and we can assign no wider meaning to it than the latter words of the definition as 'any adventure or concern in the nature of trade commerce or manufacture'. It was probably used as Mr Justice Chatterjee conjectures (in the *Rogers Pylt* case) as a compendious expression to cover such concerns in the nature of trade commerce or manufacture as arise through a branch factorship agency, receiver ship or management. *Steel Bros v Commissioner of Income tax Burma* 2 I T C 119.

Item (iv) in the above ruling was nullified by sub-section (3) inserted in 1928, the revision of this sub-section in 1939, however has changed the basis of taxation in such cases.

A non resident selling rice abroad obtained part of the rice from British India by purchase either through an agent or by himself at an office kept by him in British India and exported the rice to the place of sale. It was held that the profits made abroad on sale were taxable under this section. *Commissioner of Income tax Burma v Hajee Mahomed Haji Oosman* 1937 I T R 657.

A non resident systematically lending money to residents in British India derives income accruing to him from business connection in British India. *Commissioner of Income tax, Bombay v Bombay Trust Corporation* 57 I A 21 54 Bom 216 58 M L J 197 (P C) *Oriental Investment Corporation, Ltd v Commissioner of Income tax, Bombay*, 7 I T C 211. If the main business of the non resident is that of lending money e.g. the case of a finance company the income accrues not merely from business connection but from business in British India. In other cases it might arise from 'Other sources' as in the case of fixed deposits with banks or similar concerns in British India. *Bombay Trust Corporation v Commissioner of Income tax Bombay* 3 I T C 135 52 Bom 702 A I R 1928 Bom 448. On the other hand where a non resident having no general money lending business in British India lends his accumulated capital to a resident the transaction being an isolated one and the lender having no interest direct or indirect (apart from the lending) in the business of the borrower such lending is not business however large, and the relationship between the resident and the non resident is not a business connection. *Commissioner of Income tax Bombay v Currimbhoy Ebrahim Co Ltd*, 1935 I T R 395 (P C). The fact that the resident borrower uses the money in his business makes no difference.

A money lender (assessee) residing outside British India who was also a partner in a money lending business in British India made three loans to residents in British India and one to a non resident who had a business in British India and used the loan in that business but these loans were not made through the partnership in British India or the assessee's business connection with it but quite independently. It was held

that in the absence of evidence to show that these loans were not isolated but part of a series or that the interest of the assessee in the business of the borrowers suggested a business connection there were no materials to find that any income accrued in respect of the loans in question to the assessee directly or indirectly through business connection in British India. Each separate loan does not emanate from a business connection with the borrower, and the fact that the borrower is a money lender will not by itself create a business connection. *Commissioner of Income tax Burma v P J R M Visalakshi Achi* 1937 I T R 448

as in this section the reference is to actual profits or gains the expression business connection must denote something which produces profits or gains and not a mere state or condition which is favourable to the making of profit. Again if the word business only qualifies the word connection by describing the sort of connection (taking the word in the sense of a being connected) we meet with the same difficulty in the phrase profits arising through or from such connection since profits do not arise through or from the fact of connection. The word business therefore must have the same significance as indicated in section 2 (4) and the word connection must be used in the sense of that with which one is connected so that we may expand it (business connection) thus—any adventure or concern etc being a business with which the non resident is connected (*ibid*).

Raja A and his family effectively controlled two banks—X in British India and Y in an Indian State both being more or less family concerns. Y had a branch R in British India and B in Malay States and Y had a branch at K in Malay States. Large sums (exceeding 130 lakhs) were advanced by K to B which B lent to R. The loans which were advanced without security and for indefinite periods were more than half the paid up capital of Y the main function of which was to finance B. It was held that there was a business connection between X and Y and that X could be taxed as agent of Y on the interest on the loans made to R. *Commissioner of Income tax Madras v Bank of Chettinad* 1939 I T R 1. It is primarily a question of fact whether there is business connection or not and it is not necessary either that there should be contracts in British India between the agent under section 43 and the non-resident principal or that the income should accrue in British India. In affirming this decision the Privy Council referred to the Commissioners finding that in substance these loans represent money lent by Y to X and saw that the question was not whether in substance they were so but in fact whether they were so. There was no doubt that on the facts in this case the transactions were loans from Y to X. The business connection contemplated by this section need not be confined to transactions in British India and the fact that the transactions in this case took place in Malay States (and were in Malay currency and to be repaid in it) made no difference for the word of section 42 (1) were very wide. The words have become even wider since 1939.

A company at Indore was managed by a firm there which was remunerated *inter alia* by a commission on sales and on net profits. The company but not the firm had a branch at Cawnpore where sales were made. It was held that the branch could be taxed as agents of the Indore firm inasmuch

as the profits of the latter arose from sales in British India, *In re Nandlal Bhandari Mills Ltd* 1939 I T R 452, A I R 1939 All. 593

The Bombay High Court held that as a result of this section in conjunction with section 4, a non resident may be liable to tax in respect of income which neither accrues or arises in British India nor is received there. The income of an Insurance Company operating in British India arising from its foreign investments made out of its premia from British Indian business arises to the company directly or indirectly through or from a business connection in British India and is therefore taxable in British India. It being a mutual company will not enable it to escape tax since as a mutual company it can do business. *Commissioner of Income tax Bombay v National Mutual Life Association of Australasia* 1933 I T R 351. On the last point the Court followed *Commissioners of Inland Revenue v Cornish Mutual Life Insurance Co* (1926) A C 281. The judgment was reversed by the Privy Council in *National Mutual Life Association of Australasia v Commissioner of Income tax*, 1936 I T C 44 who held that in calculating the net assessable profit the principle of *Style's case* (14 A C 381) should have been followed (i.e. excluding so-called profits from mutual business).

Three closely connected companies—more or less family concerns—one a non resident investment company *H* another a resident one *B* and the third a resident one *S* with branches abroad arranged a transaction as below. A huge 'term deposit of *H* lying for several years with *B*—interest on which was taxed on *B* as agent of *H*, after prolonged litigation going up to the Privy Council—was converted into a call deposit, and the loan paid off through a book adjustment with *S* who credited *H* and debited *B*. The loans were without security, the concerns being closely inter related and the Commissioner considered that the adjustment did not represent a real transaction. The High Court disagreed. While it was natural that such family concerns should adopt such a course to evade tax there was no evidence to support the Commissioner's finding. *Bombay Trust Corporation v Commissioner of Income tax, Bombay*, 7 I T C 102. In affirming this decision the Privy Council observed that if the entries in the assessee's books had been inconsistent or there had been positive evidence that certain entries were erroneous or fraudulent the value of the books as evidence might be considered as overthrown. The only evidence in the case was the entries in the books and the connected correspondence with the parties and a mere refusal to believe in that evidence cannot entitle the Income tax authorities to assume that the repayment of the loan to *H* was a fiction and that its deposit with *B* continued. The question therefore should be decided according to the legal rights resulting to the parties from what they in fact did and agreed to and in this case the persons interested in the control of these closely associated companies had the strongest reasons for desiring to change their course of business and not merely for pretending to change it so as not in the future to attract the tax. *Commissioner of Income tax Bombay v Bombay Trust Corporation* 1938 I T R 323 40 Bom L R 1222.

Where an American Company owned almost all the shares in and controlled its Indian subsidiaries to whom it transferred its Indian business the Revenue authorities successfully taxed in the hands of one of the local Indian companies (as agent under section 43 for the American company) not only the dividends of the American Company from its shares in the Indian Companies (to super tax) but (both to super tax and to

income tax) the manufacturing profits of the American Company (at an estimated percentage on the value of the goods) on its sales in India through its subsidiaries, *Commissioner of Income tax Bombay v Remington Typewriter Co*, 55 Bom 243 60 M L J 609, A I R 1931 P C 42, reversing the High Court decision in A I R 1928 Bom 465, 52 Bom 726

In all such cases the course of transactions and the provisions of the contracts should be considered as a whole, and their substance as distinct from form should be looked at. Merely calling a person vendor or vendee will not make him such. So where there was neither a partnership between the resident agent and his non resident principal nor a sale from the one to the other but something like a licence to exhibit the principal's pictures and the agent paid 70 per cent of his gross earnings as the purchase price of the pictures submitting at the same time to various close restrictions imposed by the principal and receiving various allowances given by him and in particular rendering detailed accounts to the non resident and receiving an allowance for bad debts it was held that there was a business connection. Business connection involves some continuity of relationship and a single transaction would not ordinarily constitute such a connection. On the other hand the question is one of fact, taking all the facts of a case together *Commissioner of Income tax Bombay v Metro Goldwyn Mayer Ltd*, 1939 I T R 176

According to the Bombay High Court *Commissioner of Income tax v National Mutual Life Association of Australasia* 1933 I T R 350 the connotation of business connection is not restricted by the definition of 'business' in section 2 (4) but in any case the latter definition is not exhaustive. A bare relationship of creditor and debtor cannot however, as decided by the same Court in *Commissioner of Income tax Bombay v Currumbhoy Ebrahim, Ltd*, 1933 I T R 341 constitute business connection even though the debtor used the borrowed money in his business.

Where the local branch of a non resident non life insurance company remitted its receipts intact to its head office (apart from certain deposits in local banks carrying no interest), and received remittances from the head office to meet claims as they arose, it was held that the interest earned outside British India by the investment of funds sent from British India arose directly or indirectly through business connection in British India and out of assets of British India *Motor Union Insurance Co v Commissioner of Income tax Bombay*, 1945 I T R 272. It was also held that the interest could and should be divided into two portions with reference to sub-section (3) and tax levied only on the part attributable to operations in British India.

Some of the rulings referred to above have as already stated been in effect neutralised by the very wide extension of the section in other directions made in 1939.

As regards the doctrine of looking at the 'substance of transactions' see the remarks of the Privy Council in *Bank of Chettinad v Commissioner of Income tax Madras* 1940 I T R 522 already referred to.

Mere sales from abroad by a non resident to customers in British India through brokers in British India do not constitute a 'business connection'. Unless the brokers are retained by the non resident or the latter has some special claim on the good will of the brokers the 'connection' between the customers in British India and the non resident in such a case is too loose

220 and *Rover v South Africa Breweries*, (1918) 2 Ch 233, which support the proposition that in England when profits arising abroad are liable under the English Income tax Act to pay income-tax in England, a deduction is allowed in respect of the income or similar tax levied on such profits in the places where they arose, and if it were a question here of taxing under section 3 (1) of the Act profits arising outside British India on the ground that they were received in British India, those authorities would be applicable, but in my opinion they have no application to the present case. What have to be ascertained are the assessable profits arising in British India of the Eastern Extension Australasia and China Telegraph Company which is incorporated in England and has branches in India and elsewhere. But for the rule in question (corresponding to present rule 33) those profits would be ascertained by taking the Indian receipts and debiting against them the expenditure necessary to earn them and in such a calculation the amount of the tax itself would not be allowed as a deduction. The taxes levied locally on the assessable profits arising in other countries would not enter into the calculation at all. As, however, it would be difficult if not impracticable in the case of a business such as this to ascertain the expenditure properly debitable against the Indian receipts the Government in the exercise of its statutory powers has provided that the assessable profits of the Indian branch without deduction of the Indian income-tax shall be deemed to bear the same proportion to the total assessable profits of the company as the Indian receipts bear to the total receipts. As the Indian assessable profits are to be ascertained without deduction of the local income-tax, it must necessarily be the intention of the rule that the total assessable profits of the business should be arrived at in the same way, viz., without the deduction of the several local income-taxes and excess profits taxes which are enhanced income-taxes. Otherwise the whole basis of comparison would be gone."

Per *Kumaraswami Sastriar, J*—"There can be little doubt that as a matter of accountancy and book keeping and as between shareholders entitled to a dividend and the company income-tax paid is always entered as an expense which has to be deducted before the amount divisible as profits can be ascertained and enters into the debit charges in the same way as any other item of expenditure. It is equally clear that for purposes of levying income-tax you cannot deduct the amount paid or payable as income-tax on the ground that it is only what remains that goes to the person carrying on the business. The fact that as between the shareholders and the company you would estimate profits in a particular way is no ground for estimating profits on which income tax has to be calculated in a similar manner." *The Chief Commissioner of Income-tax, Madras v Eastern Extension Australasia and China Telegraph Co., Ltd*, 1 I T C 120.

The case referred to was under the 1918 Act, section 3 (1) corresponding to present section 4 (1), and section 9 to present section 10.

United Kingdom Law.—Rules 5 and 6 of the general rules corresponding to sections 42 (1) and 43 but there is nothing corresponding to the proviso under section 43 or to deeming income accruing abroad to be income accruing within British India. In the United Kingdom, the provisions are machinery while section 42 of that Indian Act is a substantive provision. Rule 7

is closely similar to section 42 (2) Rules 8 and 9 correspond to Rules 33 and 34 Rule 14 of the General Rules provides that the agent may recoup himself out of any money coming into his hands on behalf of the non resident principal—not necessarily the income that is charged to tax

The English law also provides that if a non resident carries on transactions with other non residents through the agency of a resident no liability to tax attaches unless the resident agent is in receipt of profits *see* Rule 11 and *Machine & Co v Eccot* 10 Tax Cases 481 Also if the non resident is a manufacturer and his goods are sold in the United Kingdom the profit is divided into two parts namely the manufacturing profits and the selling profits and the former part *viz* the profit that the non resident manufacturer would have got had sold his goods to a merchant in England are specifically exempted from tax—Rule 12 This corresponds to sub section (3) of section 42 here but it should be noted that under section 42 (3) the whole of the profits is taxable if the profits accrue or are received in British India and a part taxable only in cases where profits are deemed to accrue etc in British India Also under Rule 10 of the General Rules a non resident principal cannot be charged in the name of a broker or a commission agent in respect of sales carried out by the latter as part of his ordinary business This provision therefore gives rise to a complicated quest on as to what constitutes a regular agent as distinguished from a broker or a commission agent. *See Wilcock v Pinto* 9 Tax Cases 111 and *Belfour v Mace* 13 Tax Cases 539

43 Any person employed by or on behalf of a person residing out of British India, or having any business connection with such person, or through whom such person is in the receipt of any income, profits or gains upon

Agent to include persons treated as such

whom the Income tax Officer has caused a notice to be served of his intention of treating him as the agent of the non-resident person shall, for all the purposes of this Act, be deemed to be such agent

Provided that where transactions are carried on in the ordinary course of business through a broker in British India in such circumstances that the broker does not in respect of such transactions deal directly with or on behalf of a non resident principal but deals with or through a non resident broker who is carrying on such transactions in the ordinary course of his business and not as a principal such first mentioned broker shall not be deemed to be an agent under this section in respect of such transactions

Provided further that no person shall be deemed to be the agent of a non resident person, unless he has had an opportunity of being heard by the Income-tax Officer as to his liability

History.—Corresponds to section 34 of the Act of 1918 The words or through whom such person is in the receipt of any income profits or gains were added in 1922 in order to get over the decision in the *Imperial Tobacco Company case* 1 I T C 169 49 Cal 721 *infra* but see the

Bombay Trust Corporation case, 57 IA 49, 54 Bom 216, 4 ITC 312 which arose later and went up to the Privy Council. There was no corresponding section in the Act of 1886.

The first proviso was added in 1939, in order to protect British Indian brokers transacting 'hedging and straddling' business on behalf of customers. The reason for such protection would seem to be that the profits accruing in British India cannot be easily ascertained so that this person appointed agent under this section will not be in a position to retain the tax in his hands when settling accounts with the non resident. In *Govindram Sekaria v Commissioner of Income tax Bombay* 1938 ITR 584 for example according to this proviso the Bombay broker could not be held to be an agent of the New York broker (or broker's customers).

Through—This word according to the Dictionary means 'by means of' through the instrumentality, and is evidently wider than and includes 'from'. On the other hand it has been held that a person from whom a non resident receives income e.g. a person paying interest in British India to a money lender abroad cannot be deemed to be an agent under this section merely because he pays the income. *Commissioner of Income tax Burma v P V R M Visalakshi Achi* 1937 ITR 448.

Having any business connection—Means conducting a business being a business with which the non resident is connected. *Commissioner of Income tax, Burma v P V R M Visalakshi Achi supra*.

Several agents—If the non resident has more agents than one there is nothing to prevent the Income-tax Officer from serving notices on all the agents and finally selecting one among them and assessing him on the combined income of the principal through all the agents together. In such cases naturally, the Income-tax Officer will select the most important of the agents.

Once the agent has been selected by the Income tax Officer the assessment of the agent must be made with reference to section 64 if the agent has more than one place of business. For, under sections 42 and 43 the agent steps into the shoes of the principal and is the assessee for all purposes.

In *Commissioners of Inland Revenue v Longford Commissioners of Inland Revenue v Pakenham & others* 13 Tax Cases 573 Rowlatt J observed that though an agent need not be in receipt of the profits taxed he cannot be taxed on profits not made through his agency. It will be observed that section 43 of the Indian Act is much wider than this and that in cases not falling under section 40 but under section 42 an agent can be taxed even in respect of profits not made through his agency. The point however has not been before the courts in this country. In any case the second and third provisos to section 42 (1) protect the agent and authorise him to retain the estimated tax from the amounts he owes the non resident principal.

Machinery section—This section is really machinery for giving effect to section 42 and if there is no liability to tax under the latter the appointment of an agent under section 43 is of no object and cannot create liability. *Commissioner of Income tax Bombay v Metro Goldwyn Meyer, Ltd* 1939 ITR 176. Liability depends on sections 4 and 42 and if no agent is or can be appointed under section 43, there is nothing to prevent the assessment directly of the non resident principal and in fact sections 40, 41 and 42 expressly provide for such assessment. It should also be noted that unless there is some one who may be appointed agent under section 43 the duty imposed on makers of certain payments to non residents to deduct

tax at source and make over to Government cannot be avoided. See sections 8 9 (2) (iii) 10 (2) (iii) and 12.

The agent contemplated by section 43 is an artificial creation and actual agency is not necessary. Any person having a business connection or satisfying any of the conditions referred to in the section on whom the Income-tax Officer has served a notice and who has been given an opportunity to be heard as to his liability may be deemed to be agent under this section. *Bank of Chettinad v Commissioner of Income tax Madras* 1940 I T R 522 (P.C.). Section 5 of a Trinidad Ordinance of 1940 provided for the levy of tax on the income of any person accruing in or derived from or received in the colony in respect of (*inter alia*) dividends interest discounts and section 30 provided that any resident agent trust mortgagor or other person who transmits rent, interest or income derived from any source within the colony to a non resident person shall be deemed to be the agent of such non resident person and shall be assessed and pay the tax accordingly. A non resident company with a dominant interest in a resident company owed money for goods supplied by the resident company from the colony and this debt was by mutual agreement set off against dividends declared by the resident company in favour of the non resident company. The validity of section 30 was questioned as being extra territorial but this claim was rejected by the Privy Council. The person directly affected was the statutory agent and the obligation was directly imposed on him. The dividend was a debt situated in Trinidad and the set off in the books of the companies was not a formal affair but evidenced actual payment of debts on either side. *Trinidad Lake Asphalt Co v Commissioner of Income tax* (1945) I T R. 14 (Sup.) P.C.

Opportunity.—The assessment will be invalid unless the agent has been given an opportunity to represent his views. It is not necessary that orders should be passed under section 43 before a notice is issued on the agent under section 22 (2) and it is open to the Income-tax Officer to postpone the final determination of the question of agency until the time comes to make an assessment under section 23. *Commissioner of Income tax v Nawalkishore Kharaitilal* 1938 I T R 61 (P.C.) overruling 1934 I T R 350. No form has been prescribed for the notice to be served under section 43, nor has any time-limit been laid down within which the agent should dispute the proposal to tax him. He is entitled to a reasonable time.

If a resident has been once declared to be the agent of a non resident after proper opportunity given under this section it is not necessary for the Income-tax Officer to issue a notice under this section year after year. It is for the agent to ask for an opportunity if circumstances have changed. If the agent keeps quiet in the first instance when he comes to be assessed as agent in a particular year he cannot afterwards impeach the assessment on the ground that the want of notice under section 43 invalidated the assessment. *Nawalkishore Kharaitilal v Commissioner of Income tax Delhi* A I R 1930 Lah 1104 4 I T C 451.

The notice under this section is only a part of a series of facts which results in the resident being deemed agent by this section and if the notice under section 22 (2) details the particular year or years of reference the mere fact that the notice under section 43 did not so refer to the year will not invalidate the assessment. *Commissioner of Income-tax v Nawalkishore Kharaitilal*, 1938 I T R 61 (P.C.) overruling 1934 I T R. 350. It should be noted that under section 28 no penalty may be imposed on the agent of a non resident for failure to submit a return *suo motu* under section 22 (1).

A person deemed under section 43 to be an agent of a non resident principal does not automatically continue as such for future years but a supplementary assessment under section 34 may be made on such agent without further notice under section 43 for, the supplementary assessment is really part of the original assessment. In re *Govindram Seksania* 1943 I T R 104 (Bom.)

Default—If the agent returns the form of return unhilled on the ground that it is addressed to the non resident principal, the Income-tax Officer is entitled to treat the case as one of failure to furnish the return and make the assessment under section 23 (4), *Navalkishore Kharastilal v Commissioner of Income tax*, A I R 1930 Lah 1014 4 I T C 451

The issue of a notice under section 43 will not prevent the Income-tax Officer from treating the income in question as that of the agent himself if the Income-tax Officer has sufficient reason to think so and if the agent fails to respond to the notice *Nopechand Maghiram v Commissioner of Income-tax B and O*, 2 I T C 145

Appeal—There is no separate right of appeal to the Assistant Commissioner on the preliminary point of the selection of an agent in anticipation of the assessment on him but the question can be raised in the course of the appeal against the assessment *Gokuldas v Commissioner of Income tax, C P*, A I R 1932 Nag 152. In re *Schgal Bros*, 1943 I T R 553 (Lah.) Under executive instructions, if the question of agency is in dispute the assessment will not be held up but collection will be postponed till the dispute has been settled unless the agent has funds of the non resident in his possession.

Should Agent be in receipt of profits—It was held by the Calcutta High Court (*Woodroffe and Greaves, JJ* *Ghose, J*, dissenting) in the *Imperial Tobacco Co v Secretary of State*, 1 I T C 169 49 Cal 721, that section 34 of the 1918 Act (corresponding to section 43 of the present Act) merely defined who may be included as an agent under section 31 (corresponding to section 40) and that the agent under the section must be in receipt of the income under the latter section. Accordingly, if a British Indian Company distributes British Indian profits to shareholders residing outside British India the company cannot be deemed to be the agent of the foreign shareholders and assessed as such to super tax in British India. But this difficulty has since been specially met by section 18 (3-C) and (3-D) (formerly section 57) of the present Act which make express provision for the collection of super tax in such cases. *Ghose, J*, on the other hand, held that section 34 (present section 43) should be read with section 33 (present section 42) and not with section 31 (present section 40), and that section 34 merely extended the meaning of 'agent' so as to include persons treated as such—who are not really agents—and to assess them under section 33 (1) [present section 42 (1)]. In this view, therefore, it was not necessary for the person treated as agent under section 34 (present section 43) to be in actual receipt of income, and the mere fact of agency as determined under section 34 makes him liable to assessment.

A non resident's being in receipt of income through a resident may be different from the resident agent's being in receipt of income on behalf of the non resident principal. Cf *Rye and Eyre v Commissioners of Inland Revenue* 13 A T C 173 in which the Court of Appeal held that a

person through whom payment is received need not, under the ordinary law, be an agent of the ultimate recipient. A company does not receive its own dividends on behalf of its shareholders, they on the other hand receive dividends through it. It will be seen therefore that the words added to the section in 1922 make the above Calcutta decision obsolete.

Section 43 should no doubt, be read with all the three previous sections. As the law now stands, agents, etc., under sections 40 and 41 should be entitled to receive the profits, but not those under section 42. The object of section 42 is to catch profits not received or receivable in British India and the object would be defeated if the agent against whom the Income tax Officer had to proceed was to be entitled to receive the profits. That is why section 43 when it refers to persons having business connection with non residents says nothing as to their being entitled to receive profits. The words used are 'any person or through whom', not 'any person and through whom'.

The Bombay High Court ruled in the *Bombay Trust Corporation case*, 3 I T C 135, that sections 40 to 43 should be read together and that therefore the agent contemplated by section 43 should be in receipt on behalf of the principal of the profits sought to be taxed. [At that time sections 40 and 41 referred to trustees, agents, etc., being in actual receipt of profits.] But this view was overruled by the Privy Council on the ground that the plain meaning of section 43 cannot be set aside. The view taken by the High Court might have been tenable if section 42 had stood by itself, but section 43 which says nothing about the receipt of the profits on behalf of the principal is explicit to the effect that the agent satisfying the conditions of that section is to be deemed the agent of the principal for all the purposes of the Act. Section 42 is one of the purposes of the Act, and an agent under that section need not therefore be in receipt of profits on behalf of the principal. *Commissioner of Income tax, Bombay Trust Corporation*, 57 I A 49, 54 Bom 216, 58 M L J 197 (P C). Nevertheless to bring a person within section 43 as an agent the relation between him and the non resident should be something more than that of debtor and creditor, since the section should be construed reasonably. There are three categories contemplated by this section *viz*, (i) a person employed on behalf of the non resident, (ii) a person having business connection with him, (iii) a person through whom such person is in receipt of income and in the *Bombay Trust Corporation case*, the agent fell both under (ii) and (iii), and the Privy Council did not decide what is necessary to bring a person under (iii). *Commissioner of Income tax Bombay v Currimbhoy Fbrahim and Sons*, 1933 I T R 341.

An American Company doing business in India formed subsidiary Indian Companies to whom it sold its Indian business in consideration for shares in them. Practically all the shares belonged to the American Company, and though there was no contractual obligation on the Indian Companies to purchase goods only from the American Company the flow of business was secured by the ultimate and complete control of the Indian Companies by the American Company. The question arose whether under section 43 one of the Indian Companies could be deemed to be the agent of the American Company for the purpose of taxing its profits and was answered in the affirmative. The question was not whether the Indian Company was agent in law of the American Company but whether on the facts could be deemed to be agent under section 43. The answer depended on

the existence of a business connection and in the case there was clearly such connection, that being so there was no objection to treating the Indian Company as the agent of the American Company *Commissioner of Income tax, Bon lay v Remington Typewriter Co* 55 Bom 243 5 I T C 177 (P C)

44 Where any business, profession or vocation carried on by a firm or association of persons has been discontinued, or where an association of persons is dissolved, every person who was at the time of such discontinuance or dissolution a partner of such firm or a member of such association shall, in respect of the income, profits and gains of the firm or association, be jointly and severally liable to assessment under Chapter IV and for the amount of tax payable and all the provisions of Chapter IV, shall, so far as may be, apply to any such assessment

Liability in case of a discontinued firm or association.

History—This section first appeared in 1922 and was amended in 1939 so as to extend it to associations of persons and also to ensure that all privileges accorded by Chapter IV shall be available to persons assessed under this section

Association of persons—The reference apparently is only to association which are not firms companies or Hindu undivided families

Discontinuance—As to what is discontinuance see notes under sections 25 and 26 Section 44 applies only to a business etc., which has been discontinued and not to one in which there has only been a succession i.e. the business continues *Karupiah Pillai v Commissioner of Income tax Madras* 1941 I T R 1

Scope of section—This applies to the business etc. of a firm or association of persons that has been discontinued or dissolved. The partners and members will be jointly and severally responsible for the tax payable by the firm or association that is the tax will be calculated on the firm or association as such under sections 3 and 55 and the Schedule to the Finance Act and this tax payable by the firm or association as a whole will be recovered from the partners or members

CHAPTER V A

SPECIAL PROVISIONS RELATING TO CERTAIN CLASSES OF SHIPPING

44-A The provisions of this Chapter shall, notwithstanding anything contained in the other provisions of this Act, apply for the purpose of the levy and recovery of tax in the case of any person who resides out of British India and carries on business in British India in any year as the owner or charterer of a ship (such person hereinafter in this Chapter being referred to as the

Liability to tax of occasional shipping

principal), unless the Income-tax Officer is satisfied that there is an agent of such principal from whom the tax will be recoverable in the following year under the other provisions of this Act.

History.—The whole of this Chapter was inserted by the Income-tax (Further Amendment) Act, 1923, XXVII of 1923.

This Chapter applies to 'tramps' only. Regular liners have branches or agents in British India who are taxed under the other provisions of the Act. Under the 1886 Act, non-Indian shipping companies were specifically exempted. See section 5 (1) (a) of that Act. This exemption suggests that the profits were otherwise liable to tax under that Act. Under the 1918 Act, this exemption was given by a notification instead of by the statute itself. The exemption was withdrawn from foreign shipping companies in 1919 and from British and Dominion shipping companies in 1921. Now all shipping companies are taxed—tramp steamers under this Chapter and regular liners under the other provisions of this Act.

Occasional shipping.—(Tramp steamers, etc.)—As regards assessment of Tramp Steamers, etc., the following instructions are found in the Income-tax Manual:

Only one person can be taxed under Chapter V-A in respect of a particular ship taking up passengers, live-stock or goods at ports in British India, and that person is the "principal" within the meaning of section 44-A. Such principal may be either the owner or the charterer of the ship. It will be a question of fact to be determined in each case in which the ship has been chartered whether the owner or the charterer is the principal. For such determination, some general questions to be taken into account are referred to below.

These sections (44-A to C) are only applicable where the principal—(1) carries on business in British India as the owner or charterer of a ship, (2) does not reside in British India, and (3) does not employ an agent from whom the tax would be recoverable under section 42. The business of which the profits are to be calculated and assessed for income-tax under section 44-A, is the business of carrying passengers, live-stock or goods shipped at ports in British India. The criterion to be applied is, 'who is the person to whom or on whose behalf money is paid or payable on account of carriage of passengers, live-stock or goods from a port in British India?'

Generally speaking, where there is what is known as a 'Time' Charter, under which the owners may be said to let the ship out to the charterer for a fixed sum for a certain period, during which the owner retains no further control over the vessel or her movements, the owners (if they are non-resident) cannot be held in respect of such a vessel to be carrying on business in British India, or even to have a 'business connection' in British India, and are therefore not liable to Indian Income-tax either under section 44-B or under section 42.

Where, however, the ship has been chartered under what is known as a 'Voyage' or 'Trip' Charter the position is different. Under this kind of Charter party, the charterers are practically in the position of brokers, who guarantee to secure a certain quantity of cargo for the

owners at certain rates of freight. If the full amount of freight can not be secured, the charterers are liable to make good the deficiency. Any such deficiency is to be paid by the charterers to the Master, on behalf of the owners, in cash, *minus* a certain percentage, at the time and place of loading. Similarly, if freight is secured in excess of that stipulated, the Master of the ship is to pay such excess to the Charterers at the time and place of loading by demand draft on the owners. The Bills of Lading are signed by the Master on behalf of the owners and the cargo as soon as shipped is therefore in the constructive possession of the owners and at their risk. The ship is usually consigned to the Charterers or their agents who look after its interests when in port and for doing so are paid a commission by the owners. The owners also pay brokerage. In such a case the owners are carrying on business in British India through their agent the Master who receives cargo on their behalf and receives and makes payments on their account in British India, and thus the owners if they have no regular or permanent agent in British India are liable to tax under section 44-A on the profits of the business conducted by the Master on their behalf.

If a ship has arrived in a British Indian port either on owner's account or under a charter and the non resident owner or the non-resident charterer causes the ship to be chartered or transfers the existing charter, or effects a sub-charter of the vessel as the case may be such a transaction though it does constitute the carrying on of business in British India by the non resident does not of itself amount to carrying on business within British India as the owner or charterer of a ship within the meaning of section 44-A. But if the ship is loaded in any British Indian port the question whether the non resident owner or the non resident charterer is assessable to income-tax under section 44-B must be decided on the principles stated above. Whoever of these two persons causes the ship to be loaded with cargo and is paid the freight for carrying such cargo is the person who carries on business within the meaning of section 44-A.

Double taxation—Not permissible—Both the owner and charterer cannot be taxed simultaneously as *principals*. There is nothing however to prevent the owner being assessed as principal under this Chapter and the charterer under 'income from business' under ordinary sections (Chapter III) each in respect of his own profits.

44-B (1) Before the departure from any port in British India of any ship in respect of which the

Return of profits and gains.

provisions of this chapter apply, the master of the ship shall prepare and furnish to the Income-tax Officer a return of the full amount paid or payable to the principal, or to any person on his behalf, on account of the carriage of all passengers, live stock or goods shipped at that port since the last arrival of the ship thereat.

(2) On receipt of the return, the Income-tax Officer shall assess the amount referred to in sub-section (1), and for this purpose may call for such accounts or documents as he may require, and one twentieth of the amount so assessed shall be

deemed to be the amount of the profits and gains accruing to the principal on account of the carriage of the passengers, live-stock and goods shipped at the port.

(3) When the profits and gains have been assessed as aforesaid, the Income-tax Officer shall determine the sum payable as tax thereon at the rate for the time being applicable to the total income of a company, and such sum shall be payable by the master of the ship, and a port-clearance shall not be granted to the ship until the Customs-Collector, or other officer duly authorised to grant the same, is satisfied that the tax has been duly paid.

Scope of Section.—The provisions are self-explanatory. As it is not possible to calculate the profits in such cases—even the Master of the ship cannot do it—an arbitrary rate of profit has been laid down at 5 per cent of the freight payable to the principal. The Customs Collector will not let the ship go until the tax has been paid.

44-C. Nothing in this chapter shall be deemed to prevent a principal from claiming, in the year following that in which any payment has been made on his behalf under this chapter, that an assessment be made of his total income in the previous year, and that the tax payable on the basis thereof be determined in accordance with the other provisions of this Act, and, if he so claims, any such payment as aforesaid shall be treated as a payment in advance of the tax and the difference between the sum so paid, and the amount of tax found payable by him shall be paid by him or refunded to him, as the case may be.

History.—The words “the year” was substituted for “any year” in 1939, removing an obvious drafting defect which laid down no limitation of time.

Scope of Section.—As the provisions in this Chapter are only rough and ready provisions for recovering the tax, at source so to speak, in respect of tramp steamers, option has been given to the recipients of such income to be regularly assessed in the next year in the usual course if they prefer it. All the adjustments under this section are made by the Non-Resident Refund Circle at Bombay. See notification under section 5.

CHAPTER V-B

SPECIAL PROVISIONS RELATING TO AVOIDANCE OF LIABILITY TO INCOME-TAX AND SUPER-TAX.

44-D (1) Where any person has, by means of a transfer of assets, by virtue or in consequence whereof, either alone or in conjunction with associated operations, any income which if it were the income of such person would be chargeable to income-tax becomes payable to a person not resident or to a person resident but not ordinarily

Avoidance of income-tax by transactions resulting in the transfer of income to persons resident or ordinarily resident abroad

resident in British India, acquired any rights by virtue or in consequence of which he has within the meaning of this section power to enjoy such income, whether forthwith or in the future, that income shall, whether it would or would not have been chargeable to income-tax apart from the provisions of this section, be deemed to be income of such first mentioned person for all the purposes of this Act.

(2) Where any person receives or is entitled to receive, whether before or after any transfer of assets by virtue or in consequence whereof either alone or in conjunction with associated operations any income becomes payable to a person not resident or resident but not ordinarily resident in British India, any sum paid or payable by way of a loan or repayment of a loan or any other sum, being a sum which is not paid or payable for full consideration in money or money's worth, paid or payable otherwise than as income, such income shall, whether it would or would not have been chargeable to income-tax apart from the provisions of this section, be deemed to be the income of the first mentioned person for all the purposes of this Act.

(3) Sub-sections (1) and (2) shall not apply if such first-mentioned person shows to the satisfaction of the Income-tax Officer either—

(a) that neither the transfer nor any associated operation had for its purpose or for one of its purposes the avoidance of liability to taxation; or

(b) that the transfer and all associated operations were *bona fide* commercial transactions and were not designated for the purpose of avoiding liability to taxation.

(4) For the purposes of this section, an "associated operation" means, in relation to any transfer, an operation of any kind effected by any person in relation to any of the assets transferred or any assets representing whether directly or indirectly any of the assets transferred, or to the income arising from any such assets, or to any assets representing whether directly or indirectly the accumulations of income arising from any such assets.

§ (5) A person shall, for the purposes of this section, be deemed to have power to enjoy income if a person not resident, or resident but not ordinarily resident, in British India, if—

(a) the income is in fact so dealt with by any person as to be calculated at some point of time, and, whether in the form of income or not, to enure for the benefit of the first-mentioned person, or

(b) the receipt or accrual of the income operates to increase the value to such first-mentioned person of any assets held by him or for his benefit, or

(c) such first-mentioned person receives or is entitled to receive at any time any benefit provided or to be provided out of that income or out of moneys which are or will be available for the purpose by reason of the effect or successive effects of the associated operations on that income and on any assets which represent that income, or

(d) such first-mentioned person has power by means of the exercise of any power of appointment or power of revocation or otherwise to obtain for himself, whether with or without the consent of any other person, the beneficial enjoyment of the income, or

(e) such first-mentioned person is able, in any manner whatsoever and whether directly or indirectly, to control the application of the income.

(6) In determining whether a person has power to enjoy income within the meaning of this section, regard shall be had to the substantial result and effect of the transfer and any associated operations, and all benefits which may at any time accrue to such person as a result of the transfer and any associated operations shall be taken into account irrespective of the nature or form of the benefits.

(7) For the purposes of this section—

(a) the expression "assets" includes property or rights of any kind, and the expression "transfer" in relation to rights includes the creation of those rights;

(b) the expression "benefit" includes a payment of any kind;

(c) references to income of a person not resident or of a person not ordinarily resident in British India shall, where the amount of the income of a company for any year or period has been deemed to have been distributed under sub-section (1) of section 23-A, include references to so much of the income of the company for that year or period as is equal to the amount deemed to have been distributed to that person;

(d) references to assets representing any assets, income or accumulations of income include references to shares in or obligations of any company to which, or obligation of any other person to whom, those assets, that income, or those accumulations are or have been transferred;

(e) any body corporate incorporated outside British India shall be treated as if it were resident out of British India whether it is so resident or not.

(8) The provisions of this section shall apply for the purposes of assessment to income-tax and super-tax for the year ending on the 31st day of March, 1940, and subsequent years, and shall apply, in relation to transfers of assets and associated operations whether carried out before or after the commencement of the Indian Income-tax (Amendment) Act, 1939

(9) Where any person has been charged to tax on any income deemed to be his under the provisions of this section, and that income is subsequently received by him, whether as income or in any other form, it shall not again be deemed to form part of his income for the purposes of this Act

History—This section deals with a particular type of evasion. According to the notes on clauses in the statement of objects and reasons (1938)

One of the methods of avoiding the payment of tax without breaking the law is to transfer the assets from which the income arises to a Company which is resident outside British India and then to receive payments from that Company in a form and in such circumstances that the amounts received from the Company are never in fact repayable or repaid to it. The effect of these arrangements is that the real owner of the assets receives the income therefrom indirectly and in a capital form. These receipts cannot as the law stands at present be treated as income in the hands of the recipient, nor since the Company is a non resident Company, can it be subjected to the provisions of section 23 A which deals with a Company which to enable its proprietor to avoid super tax fails to distribute its income.

It is the object of the present clause to prevent the loss of tax through such devices. It will be seen that the first effect of a device of this kind is that the income which in reality is the income of a person liable to pay income-tax or super tax or both becomes the income of a non resident person (which term of course includes a Company) which is either not liable or liable for only a smaller amount of tax. By means of the loans the real proprietor continues to have power to enjoy the income from the assets.

It is difficult if not impossible to draft a simple preventive clause which a skilled lawyer cannot evade. The clause has therefore been drafted in wide terms and follows the wording of section 18 of the United Kingdom Finance Act 1936. Its terms are very comprehensive and the net effect intended is that wherever income which really belongs to a person liable to income-tax and super tax becomes by means of an artificial set of transactions the income of somebody liable to pay less tax or no tax at all, such income can for tax purposes be treated as the income of the person to whom it really belongs. In fact the section follows also the amendments made in the United Kingdom, since 1936 by way of tightening up the provisions.

The changes made in Select Committee are as follows. "Transfers to persons resident in but not domiciled in British India are now covered, and by sub-section (2) evasion by transfers resulting in payment of income disguised in the form of loans or payments made without adequate consideration is provided for. By sub-section (3) it is provided that a transfer must be untainted by any purpose of avoidance in order to escape the mischief of the section and the addition of a new clause in sub-section (7)

clarifies the position of Companies incorporated outside but resident in British India

References to 'domicile' were eventually amended as a consequence of the changes in section 4 giving up the criterion of domicile

This section relates to transfers to non residents and not—ordinarily—residents transfers to ordinary residents will in certain circumstances be caught by section 16 (1) (c) and (3), *q v* Though there is nothing to prevent the application of section 16 to cases of transfers to non residents etc., not covered by section 44-D the terms of the latter section are so wide that there is little chance of a case being not covered by section 44-D, but by section 16

Any person—Not necessarily individuals *see* section 2 (g) The corresponding provisions in the United Kingdom apply only to individuals specially defined to include a 'spouse'

"Which if it were the income of such person, would be chargeable"—The corresponding words in the United Kingdom Act of 1936 are "which, if it were the income of that individual received by him in the United Kingdom, would be chargeable" It will be noted that the provisions in the Indian Act are wider

Questions of fact—The provisions of the section are so wide that in practice the only question of law that can arise is that of there being evidence for the findings of fact There is no onus on the Income tax authorities to prove any motive for the transfer of assets Sub-sections (1) and (2) apply automatically if the conditions laid down therein are satisfied, and it is for the assessee to show to the satisfaction of the Income-tax authorities that the transactions were not made for the purpose of avoiding taxation or that they were *bona fide* commercial transactions, *Corbett's executors v Inland Revenue*, 25 Tax Cases 305 (CA), cf also *Cottingham Executors v Inland Revenue*, 22 Tax Cases 344 (CA) (1939) 1 K B 250

Power to enjoy—Redeemable debentures will be caught by these words *Latilla v Inland Revenue*, (H L) 1943 I T R (Sup) 78

Payable to a person—These words will include the share of profits of a partner A partner can call on his other partner to draw a cheque and make over his share of profits, and undrawn profits would figure as a liability in the partnership accounts That is enough to make it 'payable' *Latilla v Inland Revenue*, (*ibid*)

The technical view of the nature of partnership under the English Law does not however apply to taxation matters In the above case residents transferred their interests to a non resident company which did partnership business with other non residents, and received from the Company, *inter alia*, redeemable debentures which were redeemed from time to time It was argued that nothing was 'payable' because a partnership was not a separate legal entity but only a group of persons and no one could pay oneself

Whether it would or would not have been chargeable—It was unsuccessfully contended in *Macdonald v Inland Revenue*, (K B D), that the section would not apply to cases of partial avoidance of taxation *eg.* falling under one case of a schedule instead of under another Sub-section 3 (a) of section 44-D makes no distinction between partial and complete avoidance

'Taxation'—[*See* sub-section 3 (a)] has been held in the United Kingdom to include all kinds of taxes including death duties *Inland Re-*

venue v. Sasson, (1943) 25 Tax Cases 154 (C.A.) overruling *Macdonald v. Inland Revenue*, which had held on the strength of the preamble to the amending law that death duties were excluded.

Control—With reference to sub-section 5 (e) a dominant shareholder who is in a position to make and unmake the directors in a non resident company is in a position to control the application of the income of that company. See *Lee v. Inland Revenue*, 1941 K. B. D.

Income to be deemed to belong to the resident—If the definition in sub-section (5) is written into sub-section (1), it is clear that the income of the non resident to be deemed to belong to the resident is not limited to what the resident in fact receives or enjoys. There is equally little doubt that the whole of the income that can be connected with the assets transferred by the resident should be deemed to belong to the resident, but it is doubtful—and has yet to be decided—whether, by virtue of clauses (b) and (c) of sub-section (5), the whole of the income of the non resident can, in certain circumstances be deemed to be that of the resident, for example, the accrual of other income of the non resident may increase the value of the assets of the resident held by the non resident. *Lord Howard de Walden v. Inland Revenue*, 1942 I T R (Sup.) 90 (C.A.)

Retrospective effect—Sub-section (8) is explicit that this section will apply to all transfers of assets whenever made including those made before 1939 though the section will apply only to assessments made thereafter.

United Kingdom law—An important difference between the United Kingdom law of 1936 and that of 1938 is that while the former let-off cases in which the transfer and associated operations were *mainly* for a purpose other than that of avoiding tax, the latter excuses only those cases in which the avoidance of tax is not one of the objects of the transfer and associated operations or if the operations were *bona fide* commercial operations with no purpose of avoiding tax. Since 1938 however, certain Defence of the Realm Regulations, which confer wide powers on the Treasury to acquire control over securities possessed abroad by residents in the United Kingdom make it different for such residents to transfer assets abroad with a view to avoiding tax.

Appeal—There is a right of appeal to the Appellate Assistant Commissioner under section 30 against orders under this section.

Double taxation—Sub-section (4) has been put in out of abundant caution, though similar provisions have not been made in respect of cases under section 16.

44-E (1) Where the owner of any securities (in this sub-section and in sub-section (2) referred to as "the owner") agrees to sell or transfer those securities and by the same or any collateral agreement—

Avoidance of tax by certain transactions in securities.

(a) agrees to buy back or re-acquire the securities, or

(b) acquires an option, which he subsequently exercises to buy back or re-acquire the securities,

then, if the result of the transaction is that any interest becoming payable in respect of the securities is receivable otherwise than by the owner, the interest payable as aforesaid shall, whether it would or would not have been chargeable to tax apart from the provisions of this section, be deemed for all the purposes of this Act to be the income of the owner and not to be the income of any other person.

(2) The references in sub-section (1) to buying back or re-acquiring the securities shall be deemed to include references to buying or acquiring similar securities, so, however, that where similar securities are bought or acquired, the owner shall be under no greater liability to tax than he would have been under if the original securities had been bought back or re-acquired.

(3) Where any person carrying on a business which consists wholly or partly in dealing in securities agrees to buy or acquire any securities, and by the same or any collateral agreement—

(a) agrees to sell back or re-transfer the securities, or

(b) acquires an option, which he subsequently exercises to sell back or re-transfer the securities,

then, if the result of the transaction is that any interest becoming payable in respect of the securities is receivable by him no account shall be taken of the transaction in computing for any of the purposes of this Act the profits arising from or loss sustained in the business.

(4) Sub-section (3) shall have effect, subject to any necessary modifications, as if references to selling back or re-transferring the securities included references to selling or transferring similar securities.

(5) For the purpose of this section—

(a) the expression "interest" includes a dividend;

(b) the expression "securities" includes stocks and shares;

(c) securities shall be deemed to be similar if they entitle their holders to the same rights against the same persons as to capital and interest and the same remedies for the enforcement of those rights, notwithstanding any difference in the total nominal amounts of the respective securities or in the form in which they are held or the manner in which they can be transferred.

(6) The Income-tax Officer may by notice in writing require any person to furnish him within such time as he may direct (not being less than twenty-eight days), in respect of all securities of which such person was the owner at any time during the period specified in the notice, such particulars as he considers necessary for the purposes of this section and for the purpose

of discovering whether her tax has been borne in respect of the interest on all those securities, and, if that person without reasonable excuse fails to comply with the notice, he shall be liable to a penalty not exceeding five hundred rupees and to a further penalty of the like amount for every day after the infliction of such penalty during which the failure continues

History—This section and the next both of which are modelled on similar provisions in the United Kingdom of recent origin were both added in 1939 at the instance of the Select Committee who wrote as follows—

The new sections 44-E and 44-F are designed to prevent avoidance of tax by what are known as bond washing transactions involving the manipulation of securities so that the securities will pass temporarily into the legal ownership of some second person who is either not liable at all or liable in a lesser degree to tax under such conditions that the interest on the securities is the income of this second person. A common form of the process is the sale of securities *cum* interest with a simultaneous contract to repurchase them *ex* interest. Where foreign securities are concerned this second person may be a foreigner resident abroad entitled to *claim* exemption from the tax on the interest. More often a financial concern in India is utilised whose computation of profits includes the results of realising securities so that the concern can profitably offer bond washing facilities to the owner of securities bearing fixed interest where the owner himself is not liable to taxation on the realisation of the securities.

Previous Rulings—This section and the next nullify to a certain extent rulings referred to under sections 38 and 13 as to the normal effect of such transactions.

Owner—Not necessarily individual.

Whether it would or would not have been chargeable—As regards the meaning of these words occurring in sub-section (1) *see* notes on the corresponding words in section 44-D.

By the same or any collateral arrangement—*See* not if the second arrangement is entirely unconnected with the first whether it is so or not will be a question of fact.

Option—The option must be subsequently exercised in order to bring the case within the section.

Interest—Note that by special definition this includes a dividend which in turn has also been specially defined in section 2 (6 A).

Securities—Note the special definition in clause (b) of sub-section (5) which differs from that in section 8.

Similar securities—*See* clause (a) of sub-section (5). What matters is the right to capital and interest and the persons against whom recoveries lie and not the nominal accounts of the securities and the like. If the owner buys or takes over similar securities his liability would not be greater than if he had taken back the original securities. This is made clear by sub-section (2).

Limitation—The notice under sub-section (6) must obviously not relate to a period anterior to what would be covered by section 34.

"No account should be taken"—Sub-section (3).—Transactions dealt with under this section will be entirely excluded from those of the person's regular business. This exclusion is obviously independent of whether action is taken against his customers under sub-section (1). Taking sub-section (1) and (3) together, the intention is that in such cases, the result of the transactions should be fathered on the customer and not on the broker or jobber. So, the net profits or loss as the case may be will be taken as that of the 'owner' under sub-section (1) and added to his other income if any. The object of sub-section (3) is to prevent double taxation of the same income—once as that of the broker or jobber and again as that of the customer. There is no similar provision as regards transactions between two persons neither of whom is a broker or jobber, but even so, on the analogy of section 16, it would not be open to the Crown to treat the same item of interest (or dividend) as the income of two persons at one and the same time.

Appeal.—An appeal lies against a penalty under sub-section (6) to the Appellate Assistant Commissioner under section 30. As regards bringing the case within section 44-E, an appeal would automatically be a part of the appeal against the assessment under section 23.

Continuing offence.—*See* notes under section 51

44-F. (1) Any person upon whom notice is served by the Income-tax Officer requiring him to furnish a statement of particulars relating to any securities, in which, at any time during the period specified in the

*Avoidance of tax by sales
sum dividend.*

notice he has had any beneficial interest, and in respect of which, within such period, either no income was received by him, or the income received by him was less than the sum to which the income would have amounted if the income from such securities had accrued from day to day and been apportioned accordingly, shall, whether an assessment to income-tax or super-tax in respect of his total income has or has not been made for the relevant year or years of assessment, furnish such a statement and such particulars in the form and within the time (not being less than twenty-eight days) required by the notice.

(2) If it appears to the Income-tax Officer by reference to all the circumstances in relation to the securities of any such person (including circumstances with respect to sales, purchases, dealings, contracts, arrangements, transfers, or any other transactions relating to such securities) that such person has thereby avoided or would avoid more than ten per cent. of the amount of the income-tax or super-tax for any year which would have been payable in his case in respect of the income from those securities if the income had been deemed to accrue from day to day and had been apportioned accordingly and the income so deemed to have been apportioned to him had been treated as part of his total income from all sources for the purposes of income

tax or super-tax then those securities shall be deemed to be securities to which sub section (3) applies

(3) For the purposes of assessment to income-tax or super-tax in the case of any such person, the income from any securities to which this sub section applies shall be deemed to accrue from day to day, and in the case of the sale or transfer of any such securities by or to him shall be deemed to have been received as and when it is deemed to have accrued.

Provided that this section shall not apply if such person proves to the satisfaction of the Income-tax Officer that the avoidance of income-tax or super tax was exceptional and not systematic and that there was not in his case in any of the three preceding years any such avoidance of income-tax or super-tax or that the provisions of section 44-E have been applied in his case in respect of such income

(4) If any person fails to furnish any statement or particulars required under this section, or if the Income-tax Officer is not satisfied with any statement or particulars furnished under this section the Income-tax Officer may make an estimate of the amount of the income which, under the foregoing provisions of this section, is to be deemed to form part of the person's total income for the purposes of income-tax or super-tax

(5) If any person without reasonable excuse fails to furnish any statement or particulars required under this section, he shall be liable to a penalty not exceeding five hundred rupees, and to a further penalty of the like amount for every day after the infliction of such penalty during which the failure continues

(6) For the purpose of this section the expression "securities" includes stocks and shares

History—See notes under section 44 E

Scope of Section.—This section relates to a different set of circumstances from those contemplated by section 44-E, and is intended to apply to cases where a person systematically sells securities just on the eve of a dividend or interest payment and (without any simultaneous arrangement) buys them back soon after so as to convert the dividends, etc., into Capital receipts. The section can be applied only if tax has been avoided at least to the extent of ten per cent. The section does not however require any buying back as a necessary condition

Proviso—Two cases are excepted (1) if the avoidance was not systematic, as evidenced by the tax payer's records for the three years preceding the year under consideration and (2) if section 44-F has been applied. The latter condition is intended to avoid double taxation in respect of the same income, but there is no provision against the double taxation of the same interest or dividend at the same moment, viz., once in the hands of the evader under this section and again in the hands of the persons with

whom he had dealings but such double taxation will presumably not be made

Estimate—If the person fails to furnish information the Income tax Officer has power to make an estimate

Exceptional and not systematic—With reference to these words occurring also in the corresponding United Kingdom Statute (section 33 of the Finance Act of 1927) it was held that the words primarily have relation to number 'Systematic did not mean planned or devised (as the Crown argued) because the more planned or devised the more exceptional the avoidance would be. In the context the 'exception' is to the system therefore a single avoidance is not systematic but exceptional. Similarly avoidance will not be systematic merely because there are a number of sales at one time. On the other hand in order to escape this section, the assessee has to show that the admitted avoidance is exceptional and not systematic, i.e. not a part of a system of avoidances and that there has been no such avoidance in the last three years. *Island & Inland Revenue* 20 Tax Cas 446 (1936) 2 K B 542

Deemed to accrue—The words show that in fact the income does not so accrue and merely lay down a formula to estimate the tax avoided

Penalty—Compare sub section (6) of section 44 E

Limitation—The limitation in section 34 will obviously apply to this section also

Appeal—An appeal against penalty under sub section (5) lies under section 30. An appeal against the apportionment would obviously lie as part of the appeal against the assessment

Continuing offence—See notes under section 51

CHAPTER VI

RECOVERY OF TAX AND PENALTIES

45 Any amount specified as payable in a notice of demand

Tax when payable under sub section (3) of section 23-A or under section 29 or an order under section 31 or section 33, shall be paid within the time, at the place and to the person mentioned in the notice or order, or if a time is not so mentioned, then on or before the first day of the second month following the date of the service of the notice or order, and any assessee failing so to pay shall be deemed to be in default, provided that, when an assessee has presented an appeal under section 30, the Income-tax Officer may in his discretion treat the assessee as not being in default as long as such appeal is undisposed of

Provided further that where an assessee has been assessed in respect of income arising outside British India in a country the laws of which prohibit or restrict the remittance of money to British India, the Income tax Officer shall not treat the assessee as in default in respect of that part of the tax which is due in respect of that amount of his income which by reason of such prohibition or restriction cannot be brought into British India,

and shall continue to treat the assessee as not in default in respect of such part of the tax until the prohibition or restriction is removed

Explanation—For the purposes of this section income shall be deemed to have been brought into British India if it has been utilised or could have been utilised for the purposes of any expenditure actually incurred by the assessee without British India or if the income whether capitalized or not has been brought into British India in any form

History—This section corresponds to section 29 of the 1886 Act and section 35 of the 1918 Act but is more detailed and elaborate. This section was amended in 1930 and again in 1939 when the proviso and the explanation were added

Notice of Demand—In respect of an initial demand by the Income-tax Officer including penalties or interest under any of the appropriate sections there can be no default unless a notice has been served by the Income tax Officer as required by section 29 stating the demand payable by the assessee. As regards the form of notice see rules under section 29

The references to sections other than section 29 are unnecessary in view of the change made in section 29 in 1939 so as to extend the latter section to cover demands under all orders passed under the Act including demands for penalties and interest

Appellate and Revisional Orders—Where the amount assessed by the Income-tax Officer has not been paid pending the appeal and the appellate authority under section 31 enhances the demand the authority is expected to fix the time within which the demand or the additional demand as the case may be should be paid. If no such time is fixed the demand or the additional demand is payable on the first day of the second month following the date of service of the notice or order, see *Mahomed Farid Mahomed Shaffee v Commissioner of Income tax*, 3 I T C 67 regarding the issue of a demand notice under section 29 instead of under section 45

Stay of enforcement of demand—When an appeal has been presented the Income tax Officer is empowered to stay the collection of tax till the appeal has been decided. But no assessee can claim such postponement as a matter of right. Ordinarily where such stay is granted it is restricted to the amount in dispute. It should be noted that the proviso applies only to appeals under section 30—and not to those under section 33

Default—As to the meaning of this word see notes under section 46 *infra*. The time mentioned in the notice or order need not be later than the first day of the second month following the date of service of the notice or order

Frozen assets abroad.—It is clear that the onus lies on the assessee to show that his case is covered by the second proviso. The laws of the foreign country (which are questions of fact to the Courts of British India) will presumably include executive acts of Foreign Governments having the same effect *viz.*, that of prohibiting or restricting the remittance of money to British India

Reading the proviso as a whole it is clear, from the words 'cannot be brought into British India', that the real test for the applicability of the proviso is whether the foreign money can be brought into British India either directly or through other countries whether in cash or in kind. Obviously, it is not merely sufficient that the money could be taken out of the foreign country for example it may be possible under the laws of the foreign country to take the money to some other foreign country with similar restrictions about export of money but not to a country from where the money can be brought into British India.

That part of the tax—The calculation of the tax is apparently to be made on the basis of section 17 that is on a *pro rata* basis. This seems also to be the official view.

Default—Default in respect of frozen assets will according to the strict letter of the proviso commence *immediately* after the frozen assets become liquid and not necessarily after the normal interval laid down in the main part of the section.

Explanation—It will be noted that the explanation is qualified by the words 'for the purposes of this section', it cannot therefore be extended as an explanation to section 4 as a matter of course. The words could have been utilised and in any form have been put in to make the provisions as wide as possible. The questions likely to arise out of the explanation will ordinarily be questions of fact any differences between the assessee and the Revenue Authorities being composed by the usual appellate machinery.

46 (1) When an assessee is in default in making a payment of Income-tax, the Income tax

Mode and time of recovery Officer may in his discretion direct that, in addition to the amount of the arrears, a sum not exceeding that amount shall be recovered from the assessee by way of penalty.

(1 A) For the purposes of sub section (1), the Income-tax Officer may direct the recovery of any sum less than the amount of the arrears and may enhance the sum so directed to be recovered from time to time in the case of a continuing default, so however that the total sum so directed to be recovered shall not exceed the amount of the arrears payable.

(2) The Income tax Officer may forward to the Collector a certificate under his signature specifying the amount of arrears due from an assessee, and the Collector, on receipt of such certificate, shall proceed to recover from such assessee the amount specified therein as if it were an arrear of land revenue.

Provided that without prejudice to any other powers of the Collector in this behalf he shall for the purpose of recovering the said amount have the powers which under the

Code of Civil Procedure, 1908, a Civil Court has for the purpose of the recovery of an amount due under a decree

(3) In any area with respect to which the Commissioner has directed that any arrears may be recovered by any process enforceable for the recovery of an arrear of any municipal tax or local rate imposed under any enactment for the time being in force in any part of the province, the Income-tax Officer may proceed to recover the amount due by such process

(4) The Commissioner may direct by what authority any powers or duties incident under any such enactment as aforesaid to the enforcement of any process for the recovery of a municipal tax or local rate shall be exercised or performed when that process is employed under sub section (3)

(5) If any assessee is in receipt of any income chargeable under the head "Salaries", the Income tax Officer may require any person paying the same to deduct from any payment subsequent to the date of such requisition any arrears due from such assessee, and such person shall comply with any such requisition, and shall pay the sum so deducted to the credit of the Central Government, or as the Central Board of Revenue directs

(6) If the recovery of income-tax in any area has been entrusted to a Provincial Government under section 124 (1) of the Government of India Act, 1935, the Provincial Government may direct with respect to that area or any part thereof that income-tax shall be recovered therein with, and as an addition to, any municipal tax or local rate by the same person and in the same manner as the municipal tax or local rate is recovered

(7) Save in accordance with the provisions of sub section (1) of section 42 or of the proviso to section 45, no proceedings for the recovery of any sum payable under this Act shall be commenced after the expiration of one year from the last day of the financial year in which any demand is made under this Act

Provided that where the sum payable is allowed to be paid by instalments the period of one year herein referred to shall be reckoned from the date on which the last of such instalments was due

History—This section corresponds to section 30 of the 1886 Act and section 36 of the 1918 Act. Sub-section (1 A) was inserted in 1928 and the proviso to sub section (2) in 1933. Sub-section (6) was altered by the Government of India (Adaptation of Indian Laws) Order 1937. The reference to section 45 in sub-section (7) was consequential on the amendment of section 45 in 1939. The word financial was also added in 1939.

In 1941, the words in respect of the attachment and sale of debts due to the assessee and in respect of the attachment and sale of debts due to a judgment debtor were omitted thus making the powers wider

Mode of recovery—Section 46 (3) and (4) provide for cases where a special whole time income tax staff for the actual collection of the tax is employed in any area. Where such a staff is employed the Commissioner of Income tax may confer upon that staff any of the powers for the enforcement of any process for the recovery of a municipal tax or local rate imposed under any enactment which is in force in any part of the province, *e.g.* the powers of distraint if the Income-tax Officer is satisfied that the failure to deduct tax was wilful. In other areas and in the areas in which a special staff is employed where the powers for the recovery of municipal taxes or local rates have proved insufficient the Income-tax Officer may, under section 46 (2) forward under his signature a certificate specifying the amount of arrears due from an assessee to the Collector of the district and the Collector of the district on receipt of such a certificate must proceed to recover the amount specified in the certificate as if it were an arrear of land revenue. The Collector has without prejudice to any other power he may have the power to attach and sell a debt due to a defaulter to recover the arrears.

Salaries—Where the defaulter is a salaried person the Income tax Officer may under the provisions of section 46 (5), require the person paying salary to such assessee to deduct from any subsequent payments of salary any arrears of tax due from such assessee whether those arrears are due on account of tax on salary or on income from any other sources or on account of any penalty.

Limitation—No proceedings for recovery can be commenced after the expiration of one year from the last day of the year in which the demand is made with the exception of the special cases referred to in sub-section (1) of section 42 and in the proviso to section 45. The former refers specially to arrears of tax due from a non resident. For the collection of such arrears no time-limit is prescribed as such arrears may be recovered from any assets of the non resident which may at any time come within British India.

The limitation applies only to the commencement of proceedings for recovery and has nothing to do with the time within which such proceedings should be completed. Where pending a decision of a High Court or for some other reason an assessee is allowed to defer payment recovery proceedings will be commenced within the time limit in order to safeguard the revenue. In such cases if a recovery certificate is issued to the Collector for example he will be informed at the same time to defer taking action on it.

Proceedings—The phrase proceedings for the recovery of any sum payable under this Act should be interpreted as relating to proceedings taken under section 46. The issue of a notice of demand under section 29 is not a proceeding for the purpose of this section.

Proceedings for recovery begin only when the Income-tax Officer forwards a recovery certificate to the Collector under sub-section (2) of section 46 or takes other action under sub-section (3) (5) or (6). The imposition of a penalty is not a commencement of recovery proceedings.

(vi) The above remarks regarding recovery of tax apply also, under the provisions of section 47 to the recovery of any penalty imposed under section 25 (2), section 28 or sub-section (1) and (1 A) of section 46

Default—Sub-section (1)—‘Default is a French word

“I don’t know a larger or looser word In its largest and most general sense it seems to mean ‘failing,’” per *Eyre, C J*, in *Doe and Dacre v. Dacre*, 1 B & P 258

‘Default’ is a purely relative term like ‘negligence’ It means nothing more, nothing less, than not doing what is reasonable under the circumstances—not doing something which you ought to do having regard to the relations which you occupy towards the other persons interested in the transaction’—per *Brown, L J*, in *Re Young and Harston*, 31 Ch D 174, and *Collins, L J*, in *Re Woods and Lewis*, (1898) 2 Ch 211 (Stroud)

In this section ‘default’ simply means failure to pay It should be noted that under the proviso to section 18 (7) a penalty cannot be levied under section 46 on a person who is bound to deduct tax at source and pay the tax but has not done so unless there is wilful failure on his part to deduct and pay

Payment of income-tax—The words refer to the payment or the demand in a demand notice under section 29, and not only to tax proper as distinct from penalties or interest, and clearly include payment of sums arising out of appellate or revisional orders resulting in enhancement of demand See section 47

Attachment of debts—Under the 1886 Act, not only could the Collector recover arrears of income-tax with arrears of land revenue or municipal taxes but his orders had the force of a decree of a Civil Court, and he could enforce them like such decrees The power was taken away in 1918 but was indirectly available through some of the Provincial Acts governing the collection of arrears of land revenue or municipal taxes The power was restored in 1933 through the proviso to sub section (2) and was widened in 1941 by the omission of the words ‘in respect of attachment and sale of debts, etc.’

Appeal—Since 1st April, 1939 an appeal lies to the Assistant Commissioner (and higher authorities) against penalties levied under this section, but only if the tax is first paid, see section 30.

Police Officer—Executing warrants—In the absence of the Commissioner’s orders under sub-sections (3) and (4) of this section the Collector has no power to issue a distress warrant for the realisation of arrear of income-tax as though they were arrears of Municipal tax Nor has the Collector authority to issue such a warrant to an officer of the Police nor is such a Police Officer executing such a warrant acting in the execution of his duty as a Police Officer, consequently, resistance to such Police Officer is not an offence under section 353 Indian Penal Code, *Jairam Sahu v Emperor*, 1 I T C 201

Arrear of Income tax—Not same as arrear of Land Revenue—The effect of the Act is not to convert income-tax into an arrear of Land Revenue due in respect of the land which may be brought to sale for the realisation of income-tax, but merely to extend the procedure prescribed by the Revenue Recovery Act to the recovery of arrears of income tax.

A sale of land, therefore, for enforcement of payment of income tax even though made under the Rent Recovery Act does not give the purchaser a preferential title free of all encumbrances *Chinnammal Achi v Chena Muthu Sathikkathi Rowther*, 1935 I T R 364

In a case, again in which a mortgaged property was sold on account of the default of income tax of one of the sharers it was held that the sale affected only the defaulter's share in the mortgaged property and not the shares of the other sharers *Kadir Mohideen Maracayar v Muthukrishna Iyer* 1 I T C 6, 26 Mad 230 12 M L J 368

See also *Ibrahim Khan v Rangasami Naicken*, 28 Mad 420 a case of sale for al karri revenue and *Sankaran v Ramaswami*, 41 Mad 691 a case of sale of land on which there was a charge on account of a Land Improvement Loan from Government. As to whether the Collector can attach or sell property held by the Income-tax Officer to belong to the assessee but charged and admitted by the assessee to be the property of some one else see *Secretary of State v Radha Swami Sat Sang* 1945 I T R 520 (All)

'Certificate' procedure under the Public Demands Recovery Act — It is not necessary for the Certificate officer to offer evidence of any order having been made directing the certificate to be filed. When a statute directs a document to be filed in an office the direction involves no formal or technical procedure. All that is required is that the document should be preserved in the office in such condition that it can be produced when required *Doorga Prasad v Secretary of State* 1945 I T R 285 (P C)

The arrear of tax under section 46 (2) of the Indian Income tax Act specified in the certificate sent to the Collector is a public demand payable to the Collector within the meaning of the Bengal Public Demands Recovery Act 1913 (*ibid*)

The reference to the certificate holder as the Secretary of State for the Income tax Officer instead of 'the Secretary of State' does not vitiate the certificate (*ibid*)

Priority—Claim of Crown—Income tax — In *Collector of Moradabad v Muhammad Din* 2 All 196 it was held that the Common Law of England under which the Crown had a priority of claim in respect of debts was applicable to India also. This view was dissented from in *Ramachandra v Pitchaikanni* 7 Mad 434 in which it was held that except in the case of a claim for land revenue which is definitely charged on the land by statute, the Crown had no priority of claim. This decision was given having regard to historical considerations under which the present Government in India merely succeeded to the rights and liabilities of the East India Company. A doubt however was expressed as to the position in Presidency towns which were under the jurisdiction of the old Supreme Courts and in which the English Common Law had been applied. The position was again reviewed in *Bank of Upper India v Administrator General* 45 Cal 653 in which it was held following the cases below *Re Henley & Co* (1878) L R 9 Ch D 469 *New South Wales Taxation Commissioners v Palmer*, (1907) A C 179 and *Re v Wells* (1912) 16 East 278 282 that the Crown had priority over a second mortgagee but not over a first mortgagee both being English mortgages. The ratio decidendi was that the first mortgagee had a right of property whereas the second had only a right of redemption which the insolvent owner also had and that as between concurrent claims the Crown had precedence. It was also held that the rule was of universal application in the absence of statutory provision to the contrary. It should be noted

however, that the *Bank of Upper India* case was a case in the original jurisdiction of the Calcutta High Court

Attention is also invited to the dicta of the Privy Council in *Ragho Prasad v Mewlall*, 34 All 223 (P.C.)

It was held in *Soniram Rameshwar v Mary Pinto*, 1934 I T R 58, 11 Rang 467, A I R 1934 Rang 8 (followed in *Secretary of State for India v Ma Nyein Me and others* 1937 I T R 560 A I R 1937 Rang 380, which reviews the authorities) that in respect of income-tax already assessed the Crown had a right of preference over unsecured debts and if there are funds in the Court's custody of which payment can be made, the Court can order payment without prior attachment. The fact that a creditor has attached the assessee's property can give him no preference over the Crown. An attachment confers no title to property. The question of precedence over secured creditors has not been decided.

A decision to the same effect as in *Soniram Rameshwar v Mary Pinto*, 1934 I T R 58 was given by the Bombay High Court in *Governor General in Council v Chotalal Shirdas and another* 1939 I T R 411 (Bom.)

Though the Collector acting under section 46 (2) can exercise all the powers of a Civil Court for the purpose of recovering income tax, he is not really a Civil Court and there can be no question of rateable distribution between him and other creditors under section 73 C.P.C. *Secretary of State v Ma Nyein Me*, 1937 I T R 560 (Rang.)

Though income tax relates to the income of a particular period, it becomes a debt due to the Crown when demand is made under sections 29 and 45, and is not a debt due for any particular period. *Doorga Prasad v Secretary of State*, 1945 I T R 285 (P.C.)

Debts due to the Crown—Under section 49 of the Presidency Towns Insolvency Act, debts include not only debts already become due but also debts provable within section 46 (3) of the said Act viz 'all debts and liabilities present or future certain or contingent, to which the debtor is subject when he is adjudged an insolvent or to which he may become subject before discharge by reason of an obligation incurred before the date of such adjudication'. Accordingly, when a person who carried on business in 1934-35 was adjudged an insolvent in June, 1935, by which date no assessment had been made on him for 1935-36 on the income of 1934-35, it was held that tax for 1935-36 though assessed after June 1935, should be given priority and paid in full before a dividend could be declared to other creditors. *Secretary of State v Official Assignee* 1937 I T R 677 (Sind), see also *Manickam Chettiar v Income-tax Officer, Madras* 1938 I T R 180 (F.B.)

As regards the present position of the law in England regarding priority of Crown debts in the winding up of companies, see *Food Controller v Cork*, (1923) A.C. 647. Income-tax is a necessary expense of liquidation and ranks prior to the liquidator's claim for remuneration. In *re Beni Fe'fai Mining Co., Ltd.* 12 A.T.C. 624, 18 Tax Cases 632. In *Governor General in Council v Shiromani Sugar Mills, Ltd.*, 1946 I T R 248 the Federal Court decided that in respect of companies the Crown is not entitled to any prerogative priority or preferential rights of treatment save those expressly conferred and limited by the Companies Act itself, in particular by sections 230 and 232 (2). In this respect the position in the United Kingdom is the same, i.e. the Crown is bound in respect of liquidation of Com-

panies "to a statutory scheme of administration wherein the prerogative right of the Crown to priority no longer exists" (per *Lord Wrenbury* in *Food Controller v Clerk*)

Companies—Winding up—Priority of taxes—Section 230, Indian Companies Act—

"(1) In a winding up there shall be paid in priority to all other debts—

(a) all revenue, taxes, cesses, and rates, whether payable to the Crown or to a local authority, due from the company at the date hereinafter mentioned and having become due and payable within the twelve months next before that date,

* * * * *

(2) The foregoing debts shall—

(a) rank equally among themselves and be paid in full, unless the assets are insufficient to meet them, in which case they shall abate in equal proportion,

* * * * *

(3) Subject to the retention of such sums as may be necessary for the costs and expenses of the winding up the foregoing debts shall be discharged forthwith so far as the assets are sufficient to meet them

(4) In the event of a landlord or other person distraining or having distrained on any goods or effects of the company within three months next before the date of a winding up order, the debts to which priority is given by this section shall be a first charge on the goods or effects so distrained on or the proceeds of the sale thereof

Provided that in respect of any money paid under any such charge the landlord or other person shall have the same rights of priority as the person to whom the payment is made

(5) The date hereinbefore in this section referred to is—

(a) in the case of a company ordered to be wound up compulsorily, which had not previously commenced to be wound up voluntarily, the date of the winding up order and

(b) in any other case, the date of the commencement of the winding-up,

Priority under this section can apparently be claimed only if the assessment has been made and also fallen due before the date referred to above. It will be noted that there is a difference in this respect between the Companies Act and the Presidency Towns Insolvency Act. See *Governor General in Council v Sargodha Sugar Mills Ltd*, 1946 I T R 248 (T.C.). Where the case is one of discontinuance of business or of succession to it the provisions of sections 25 and 26 of the Income tax Act will come into operation.

Bankruptcy—Proof of—In *Cahert v Walker* 4 Tax Cases 79 it was held that a proof made in bankruptcy by a Collector of Taxes in respect of arrears of income tax due could not be expunged on the ground that the debtor had not in fact made the profit assessed. This decision was followed by the Oudh Chief Court in *Dinshaw & Co v Income-tax Officer Lucknow*, 1941 I T R 215 and definitely dissented from by the Lahore High Court in *Governor General in Council v Sargodha Trading Co*, 1943 I T R 368.

See notes under section 23 (4) as to the reopening of assessments in such cases.

The words 'other legal proceeding' in section 171 of the Indian Companies Act include proceedings by revenue authorities under section 46 (2) of the Income tax Act therefore before sending the requisite certificate under section 46 (2) to the Collector, the Revenue should apply for leave of the Court, regulating the liquidation, under section 171 of the Companies Act. *Governor General in Council v. Shriromani Sugar mills*, 1946 I T R 248 (F C)

In *In re the Watchmaker's Alliance and Ernest Goodes Store Limited*, 5 Tax Cases 117 the liquidators of a company paid away all the assets to contributories and others without making provisions for a Crown debt for income-tax. *Held*, that the liquidators misapplied the assets within the meaning of section 10 of the Companies (Winding up) Act 1890, and must pay the amount of the Crown debt, and that, in default of payment, a writ of attachment was issuable as a matter of right the Court having no discretion in the matter. See section 230 of the Indian Companies Act set out *supra*

Can Crown sue for recovering tax?—Section 46 is not exhaustive of the remedies of the Crown to recover arrears of income-tax and does not preclude an application to a Court for payment out of funds in the hands of the Court, and it is not necessary for the Crown before making such an application to obtain a decree against the assessee or to effect an attachment. *Manickam Chettyar v. Income tax Officer Madras*, 1938 I T R 180 (Mad)

Section 46 prescribes a summary remedy but it is not only remedy. The time limit laid down in section 46 (7) applies only to proceedings under that section.

When income tax is assessed it becomes a debt due to the Crown which as a creditor has the ordinary right of suit against the assessee there is nothing in the Income-tax Act taking away this right.

A suit for recovery of arrears of income-tax being a suit of a civil nature can be maintained under section 9 of the Civil Procedure Code, and would be governed by Article 120 if not, by Article 149 of the Indian Limitation Act.

It is open to the Income tax Officer under section 49-A to set off against refunds due to the assessee arrears of income-tax due from him even though the limitation laid down in section 46 (7) may have expired. *Indrachand v. Secretary of State* 1941 I T R 673 (Pat)

As to the right of the Crown to recover taxes generally by action

If the newly created duty is simply an obligation to pay money for a public purpose, the general rule would seem to be that the payment cannot be enforced in any other manner than that provided by the Act.

It is however a general rule that where an Act of Parliament creates an obligation to pay money, the money may be recovered by action, unless some other provision is contained in the Act that is unless an exclusive recovery is given, and the question may arise whether the particular remedy given by the Act is cumulative or substitutional for this right of action. *Marwell's Interpretation of Statutes* 6th edition, pp 710 and 711.

In the United Kingdom, section 169 of the Act of 1918 expressly allows the Revenue to recover tax by suit as well as by summary means specially provided in the Act.

In *In re Henley & Co.*, 1 Tax Cases 209 in which a Company was being wound up under the supervision of the Court, the Court of Appeal (*James, L.J.*) said: "There is nothing to prevent the Crown from suing the company or distraining their chattels, not only on the property, but anywhere else" for the purpose of recovering income-tax to which the Crown has under the English law a prior claim over other debts." But see *Food Controller v. Cork*, (1923) A.C. 647.

47. Any sum imposed by way of penalty under the provisions of sub-section (2) of section 25, Recovery of penalties, section 28, sub-section (6) of section 44-E, sub-section (5) of section 44-F or sub-section (1) of section 46 or any interest payable under the provisions of sub-sections (4), (6), (7) or (8) of section 18-A shall be recoverable in the manner provided in this Chapter for the recovery of arrear of tax.

History.—This section which appeared for the first time in 1922 was amended in 1939, and again in 1944. This section has been put in out of abundant caution; for it is clear from sections 29, 45 and 46 that 'income-tax' for the purpose of section 46 includes the various penalties under section 25 (2), section 28 and section 46 (1), and is the more so since the comprehensive amendment of section 29 in 1939.

CHAPTER VII.

REFUNDS.

48. (1) If any individual, Hindu undivided family, company, local authority, firm or other association of persons, or any partner of a firm or member of an association individually satisfies the Income-tax Officer or other authority appointed by the Central Government in this behalf that the amount of tax paid by him or on his behalf or treated as paid on his behalf for any year exceeds the amount with which he is properly chargeable under this Act for that year, he shall be entitled to a refund of any such excess.

(2) The Appellate Assistant Commissioner or the Appellate Tribunal in the exercise of their appellate powers if satisfied to the like effect shall cause a refund to be made by the Income-tax Officer of any amount found to have been wrongly paid or paid in excess.

(3) Where income of one person is included under any provision of this Act in the total income of any other person such other person only shall be entitled to a refund under this section in respect of such income.

(4) Nothing in this section shall operate to validate any objection or appeal which is otherwise invalid or to authorise the revision of any assessment or other matter which has become final and conclusive, or the review by any officer of a decision of his own which is subject to appeal or revision, or, where any relief is specifically provided elsewhere in this Act, to entitle any person to any relief other or greater than that relief or to entitle any person to claim a refund of tax payable before the commencement of the Indian Income tax (Amendment) Act, 1939, which he would not be entitled to claim but for the passing of that Act

Rules

The following are the rules relevant to this section

R 36 prescribing the form of application in the case of a person residing in British India

R 36-A in the case of a person not resident in British India latter being divided into two parts viz, (a) applications for the first time as non resident and (b) applications in later years as such

Rule 37 requiring returns of income to accompany applications under Rules 36 and 36-A

Rule 38 similarly requiring the production of certificates, granted under section 18 (9) (deduction of tax at source) and section 20 (dividends)

Rule 39 prescribing the Income tax Officer to whom the application has to be made

Rule 40 permits applications for refund to be presented in person or through an agent or by post

History—There were no statutory arrangements for refunds under the 1886 Act based on the total income and on difference of rates. The first provision for such refunds was made in 1916 when higher rates were introduced and the graduation made steep. In the first instance the procedure was regulated by rules made by the Local Governments. In 1918 the Act itself provided for refunds—see section 37 of that Act. The section was amplified in 1922 and again successively in 1928 1930 and 1933 and was completely recast once again in 1939.

Scope of Section—The section is now simple. All that one has to see is (1) the amount of tax properly chargeable on the claimant, i.e. with reference to his total income and the relevant provisions of exemption etc., and (2) the amount of tax already paid by him (i.e., whether at source under section 18 or otherwise) or on his behalf (i.e., dividends etc., after deducting relief received by the company if any). But when the income of one person is treated as that of another, e.g., sections 16, 44-D 44-E refund will be given only to the latter person.

Applies to super tax also—Section 48 as it stood before 1939,

provided only for refund of Income-tax, and even of that, only so far as it was collected or suffered at source, i.e., in respect of partners of registered firms, owners of securities and shareholders of companies

Also the section applied only when the claimant's own rate of tax was lower than the maximum. Other cases, i.e., not covered by the section were dealt with under section 48 A (introduced in 1933 but now deleted)

The section now applies both to super tax and to income tax

Dividends—Before 1939, dividends were not taxed in the hands of the shareholder who, however, could claim a refund (of income tax only as at present). Now dividends are not so exempt but credit is given to the shareholder for the income-tax appropriate to the dividend on the assumption that the dividends had been taxed at the maximum rate of income tax. See sections 16 (2) and 18 (5)

Who can claim refund—Under the section now, any category of assessee can claim a refund, if the amount of tax paid by him or on his behalf is in excess of what is properly chargeable

On his behalf—For examples of payment on behalf of another, see sections 18, 24 B, 40 to 42, 44-A to F, 49 B, and 49 C, also proviso to section 23 (5), sections 23 A (2) (ii) and 26

The general plan of the Act, and in particular the deliberate amendment of section 24 (1) (about set off of losses) so as to neutralise judicial rulings and change departmental practice founded on such rulings, would seem to show that tax is not in any sense paid by an unregistered firm on behalf of its partners, or by a non descript association of persons on behalf of its members, but the question has not been before the Courts

'Properly chargeable'—These words obviously mean chargeable with reference to his total income and total world income as computed in accordance with the Act. These words are reminiscent of the words "all relevant circumstances" in section 24 of the United Kingdom Finance Act, 1923

The main reason why claims for refund arise is the system of deduction at source or taxation at source, when the deduction is made at the maximum rate or some other rate higher than the payee's appropriate rate of which the payer has no knowledge, but that is not the only reason

Indian States—The section does not cover cases of refunds to Indian states (holding securities, for instance, as part of a business) taxed under the Government Trading Taxation Act, but a claim for refund cannot arise so long as a company is taxed at the maximum rate of income-tax

Change from accrued to cash basis—Any one fielded in section 11, i.e., of the same income in the hands of the same person can no doubt be dealt with under this section, but as to whether the taxation of the same item of income twice, once in each year on a different basis will amount to double taxation see notes under section 13 and also under section 14

Review or revision—Under the guise of a claim for refund an assessee cannot demand a review or revision of his assessment which is otherwise not open to him. See sub-section (4). It remains to be decided, however, whether a re-examination on fresh facts will be a revision or a review. A strict view of sub-section (4) would mean that sub-section (1) is operative only in cases where the applicant had not been assessed before, while on the other hand, a lenient view would put a premium on the negligence of an assessee in failing to place before the authorities in the first instance all the evidence on which he relies for his reliefs. There is really a lacuna in

this Act viz., to cover cases where owing to sufficient cause the assessee is unable to produce such evidence in the first instance and thus gap seems to be filled in practice by a liberal application of section 35 to cases to which that section does not literally apply.

With effect from 1st April 1940 refunds to non residents are allowed by the same officer as has jurisdiction to assess them. See notes under sections 42 and 43.

Anticipatory certificates of deduction of tax—The necessity for making a claim for refund of tax on interest on Government securities (and also in respect of the tax on salaries paid to non residents) can in many cases be avoided by obtaining a certificate from the Income-tax Officer under section 18 (3) to the effect that the total income or total world income of the recipient is not liable to tax or is liable only at a rate less than the maximum rate.

Cash refund procedure—In cases where a cash refund is necessary, the procedure laid down in rules 36 to 39 must be followed. The application must be made in the form prescribed in rule 36 by persons resident in British India and in that prescribed by rule 36-A by persons not resident in British India and verified in the manner laid down in those rules and must, under rule 37, be accompanied by a return of the total income or of the total world income as the case may be in the form prescribed in rule 19 (or in rule 19 A if the refund claim relates to an assessment year earlier than 1939-40) unless such a return has previously been made. A false statement in such a return or in such a verification is punishable under the provisions of section 182 of the Indian Penal Code. The application must also where necessary be accompanied by the certificates mentioned in section 18 (9) or section 20. Rule 39 prescribes the Income tax Officer to whom an application under section 48 should be made.

Where the applicants reside in India instead of issuing a refund order payable at a Treasury or a branch of the Imperial Bank of India, the amount of refund due may be remitted by money order if the Income-tax Officer concerned is satisfied that this course is more convenient. In that event the cost of the money order will be borne by Government and should not be deducted from the amount to be refunded. If the applicant resides out of India the amount of refund under section 48 or 49 of the Act will be remitted to them by a bank draft or money order at their cost unless they appoint agents to receive payment in India. (*Income tax Manual*)

Application by agents—If an agent wishes to make a refund claim on behalf of a non resident who is being assessed through him he will be required to show that he has been duly authorised in proper legal form to send the necessary forms so that his act will bind his principal. (*Income tax Manual*)

In other words the fact that the Income tax Officer appoints a person to be the agent of a non resident under section 43 will not enable that agent to claim refund of tax due to the non resident unless the latter authorises the agent to claim and receive the refund on the non resident's behalf.

Limitation period—See section 50.

Dividends and Interest on Bonds—The person eligible for refund of tax in respect of these items is the person to whom the income belongs.

and who is taxable on them. See notes under sections 3 and 8 as regards sales *cum* interest or dividend.

If however the case is dealt with under sections 44-E or 44-F then the person actually taxed on the interest or dividend would be eligible for the refund also.

Onus of proof—"The onus of proving the claim to refund (and therefore of adducing satisfactory evidence of his total income and of total world income) of course lies on the claimant, and if he fails to discharge it, his claim should be rejected. Certificates by income tax authorities in the United Kingdom or a Dominion, will normally be accepted as proof of the income assessing or assessable in that country. Certificates of responsible officials in Indian States will also normally be accepted in support of claims presented by subjects of Indian States" (*Income tax Manual*).

The Certificates granted under section 20 and rule 14 are however, not conclusive evidence by which the Income-tax Officer is bound. He may, if he likes, take further steps to check the correctness of those certificates before granting a refund.

Company wound up—What a shareholder receives in the winding up of a company is capital. If a preference shareholder should receive arrears of dividend at the time of winding up, such arrear dividends are nevertheless capital. That is, they are not dividends at all but represent a share of capital computed in a particular manner. In *re Dominion Tar and Chemical Co., Ltd.*, 8 A T C 587. No refund of tax will be allowed on such dividends.

See, however, the special definition of 'dividend' under section 2 (6 A), if, under that definition, a dividend is treated as income, it will clearly be eligible for such refund as may be due.

Deceased person's estate—Title to refund—See section 49 F, Dicta in various rulings like *Govind Saran v Commissioner of Income tax*, AIR 1927 Oudh 465, 105 I C 556, are now obsolete.

Appeals—There was a right of appeal under section 50-A (since deleted) till 1st April 1939, in respect of refunds but there was no further right of reference to the High Court since the appeal was not under section 30 or 32. As from 1st April 1939, an appeal lies in this respect also under section 30 together with further consequential rights arising out of appeals under that section.

False applications for refunds—As regards the penalty for false application, see notes under section 52.

Trustees—In the United Kingdom, where there are special provisions in this respect, if the trustee is resident and the beneficiary non resident, the right of the latter to refund depends on whether particular assets (securities) have been appropriated for the benefit of the particular beneficiary and such appropriation cannot be assumed. *Crawshaw v Commissioners of Inland Revenue*, 19 Tax Cases 715.

In India the law is laid down in sections 40, 41 and 48. If the shares of beneficiaries are ascertainable, they will be entitled to refund if any is admissible, if not, no refund will be given.

Cumulative refunds under sections 48 and 49—As to refunds not being granted cumulatively under both sections 48 and 49 or 49 A or the Burma Relief Order, see section 49 C.

Dividends free of tax in the United Kingdom and India—Before the advent of section 49 B in 1939, the position was that if a dividend was paid free both of the United Kingdom and the Indian Income-tax, the total income for the purpose of section 48 did not include United Kingdom income-tax because section 16 authorised the inclusion of Indian Income-tax only. The fact that for relief under section 49 the United Kingdom tax was not deducted in computing the income eligible for relief did not affect the issue. Section 49 B now makes a difference since according to it the tax paid by the company whether in British India or elsewhere is deemed to be paid on behalf of the shareholder, it can be assumed from this that the total income should include the income-tax in respect of the dividend payable to the United Kingdom or other Government.

United Kingdom Law—In the United Kingdom there is no provision corresponding to section 48 of the Indian Act. Relief is claimed by assesses, and granted either by adjustment during assessment or by refund or by both. The right of a shareholder to refund on account of the tax paid *by the company on his dividends rests on judicial pronouncements and not on any express provision as in India*.

See notes under sections 16 and 18

There is a limited provision in section 24 of the Finance Act of 1923 (subsequently amended) under which a person assessed under schedule E or schedule D may apply for relief if he has paid tax in excess because of a mistake in his return or statement, and according to *Taxation* "Typical cases in which repayment under this section has been made are the following

(a) omission to claim for certain admissible expenses *e.g.*, depreciation not claimed in accounts or net annual value of business premises owned by the trader not deducted,

(b)

(c) item returned as income which was clearly of a capital nature,

(d) A trader including extraneous receipts (*e.g.*, betting profits) in his takings,

(e) Purchases having been understated by reason of the omission of invoices,

(f) Errors in stock sheets,

(g) Duplication of amounts in lists of sundry debts or the inclusion therein of bad debts previously written off,

(h) The return of an item of income which was legally the income of an exempt person.

In a case however, in which an assessee had included certain rents in his trading receipts and been taxed thereon, and claimed later that the assessment should have been on the basis of schedule A (*i.e.*, notional rents), his claim was rejected. *Carrimore Six Wheelers Ltd v Inland Revenue*, (1944) 2 All E R 158 (C A) 172 L T 11, 26 Tax Cases 301

49 (1) If any person who has paid by deduction under section 18 or otherwise Indian income-tax for any year on any part of his income proves to the satisfaction of the Income-tax Officer that he has paid by deduction or otherwise United Kingdom

Relief in respect of United Kingdom Income-tax

Income-tax for the corresponding year in respect of the same part of his income, and that the rate at which he was entitled to, and has obtained, relief under the provisions of section 27 of the Finance Act, 1920, is less than the Indian rate of tax charged in respect of that part of his income, he shall be entitled to a refund of a sum calculated on that part of his income at a rate equal to the difference between the Indian rate of tax or the appropriate rate of United Kingdom income-tax, whichever is less, and the rate at which he was entitled to, and obtained, relief under that section :

Provided that in no case shall the rate at which such refund is calculated exceed half the Indian rate of tax appropriate to the income of the person entitled to relief.

(2) In sub-section (1)—

(a) the expression "Indian income-tax" means income-tax and super-tax charged in accordance with the provisions of this Act ;

(b) the expression "Indian rate of tax" means the amount of Indian income-tax exclusive of super-tax after deduction of any relief due to a claimant under the other provisions of this Act but before deduction of any relief due to him under this section, divided by his total income after deducting therefrom any income (including income from a share in an unregistered firm) exempted from tax by or under the provisions of this Act, added to the amount of Indian super-tax before deduction of any relief due to the claimant under this section divided by his total income ;

(c) the expression "United Kingdom income-tax" means income-tax and super-tax chargeable in accordance with the provisions of the Income-tax Acts ;

(d) the expression "appropriate rate of United Kingdom income-tax" has the meaning assigned to that expression in section 27 of the Finance Act, 1920, as amended by the Finance Act, 1927

Rules.

Rule 40 lays down the form in which an application for refund under section 49 should be made; and Rule 41 permits of the application being presented in person or through an agent or by post.

History—There was no arrangement for Double Income-tax Relief in India before 1922. The words 'or the appropriate rate of United Kingdom Income-tax, whichever is less' were added in 1934, in order to remove the anomaly of cases in which double-taxed income after getting relief from both countries ultimately bore a lighter tax than if it had been taxed only once in the country with the higher rate. In 1939 the proviso to sub-section (1) which had been dropped in 1934, was restored and 'Indian rate of tax' was redefined more on the basis of the United Kingdom Act. Also

in order to remove doubts 'by deduction or otherwise' was added after 'paid', and the 'corresponding year' substituted for 'that year'

Dominions and Indian States—As regards similar relief in respect of income taxed both in British India and in the Indian States (or British Dominions) *see* section 49 A which dates from April 1939. Formerly such relief was granted by notification under section 60.

United Kingdom Law— "27 (of Finance Act of 1920) (1) If any person who has paid by deduction or otherwise or is liable to pay United Kingdom income-tax for any year of assessment on any part of his income proves to the satisfaction of the Special Commissioners that he has paid Dominion income tax for that year in respect of the same part of his income, he shall be entitled to relief from United Kingdom income tax paid or payable by him on that part of his income at a rate thereon to be determined as follows—

(a) if the Dominion rate of tax does not exceed one half of the appropriate rate of United Kingdom tax the rate of which relief is to be given shall be the Dominion rate of tax

(b) in any other case the rate at which relief is to be given shall be one half of the appropriate rate of the United Kingdom tax

For the purpose of this section the expression 'the appropriate rate of United Kingdom tax' means the rate at which the claimant for the year to which the claim relates has borne or is liable to bear United Kingdom income-tax and where the claimant is liable to United Kingdom super tax the expression "the appropriate rate of United Kingdom tax" means a rate equal to the sum of the rates at which he has borne or is liable to bear United Kingdom income-tax and super tax respectively, for that year

(2) Where a person has not established his claim to relief under this section for any year of assessment before the first day of January in that year, the relief shall be granted by way of repayment of tax

(3) Where by reason of the allowance of relief under this section the rate of United Kingdom income-tax deducted from or paid in respect of any part of the income of any individual is less than the standard rate, and the rate of the relief so allowed is greater than the rate appropriate to the case of that individual such an adjustment shall be made in allowing to that individual any relief to which he may be entitled under the provisions of this part of this Act relating to the rate of tax on the first two hundred and twenty five pounds of taxable income as may be necessary to secure that the amount of United Kingdom income-tax finally paid or borne by him shall be equal to the amount which would have been paid or borne if the relief under this section had in the first instance been given at the rate appropriate to his case

(4) Notwithstanding anything in the Rules applicable to Case IV or Case V of Schedule D or in any other provision of the income-tax Acts no deduction shall be made on account of the payment of Dominion income tax in estimating income for the purposes of United Kingdom income-tax and where income-tax has been paid or is payable in any Dominion either on the income out of which income subject to United Kingdom income-tax arises or is received or as a direct charge in respect of that income the income so subject to United Kingdom income tax

shall be deemed to be income arising or received after deduction of Dominion income tax and an addition shall in estimating income for the purposes of the United Kingdom income tax be made to that income of the proportionate part of the income tax paid or payable in the Dominion in respect of the income out of which that income arises or is received together with the full amount of any Dominion income tax directly charged or chargeable in the Dominion in respect of that income

Provided that—

(a) where any income arising or received as aforesaid consists of dividends which are entrusted to any person in the United Kingdom for payment and the Special Commissioners are satisfied that the person so entrusted is not in a position to ascertain the amount of the addition to be made under this sub-section the assessment and charge may be made on the amount of the dividends as received by the person so entrusted but in any such case the amount of the addition shall be chargeable on the recipient of the dividends under Case VI of Schedule D, and

(b) where under the laws in force in any Dominion no provision is made for the allowance of relief from Dominion income tax in respect of the payment of United Kingdom income tax then in assessing or charging income-tax in the United Kingdom in respect of income assessed or charged to income-tax in that Dominion deduction shall be allowed in estimating income for the purpose of United Kingdom income tax of an amount equal to the difference between the amount of the Dominion income tax paid or payable in respect of the income and the total amount of the relief granted from the United Kingdom income tax in respect of the Dominion income tax for the period on the income of which the assessment or charge to United Kingdom income tax is computed

In this sub section the expression dividends' includes any interest annuities dividends shares of annuities pensions or other annual payments or sums in respect of which tax is charged under the Rules applicable to Schedule C or under Rule VII of the Miscellaneous Rules applicable to Schedule D

(5) Where under Rule 20 of the General Rules applicable to Schedules A B C D and F a body of persons is entitled to deduct income-tax from any dividends tax shall not in any case be deducted at a rate exceeding the rate of the United Kingdom income tax as reduced by any relief from that tax given under this section in respect of any payment of Dominion income-tax

(6) Where under the law in force in any Dominion provision is made for the allowance of relief from Dominion income tax in respect of the payment of United Kingdom income-tax the obligation as to secrecy imposed by the Income-tax Act upon persons employed in relation to Inland Revenue shall not prevent the disclosure to the authorized officer of the Government of the Dominion of such facts as may be necessary to enable the proper relief to be given in cases when relief is claimed both from United Kingdom income-tax and from Dominion income-tax

(7) The Commissioners of Inland Revenue may from time to time make regulations generally for carrying out the provisions of this section, and may, in particular by those regulations provide—

(a) For making such arrangements with the Government of any Dominion to which the last preceding sub-section applies as may be necessary to enable the appropriate relief to be granted

(b) For prescribing the year which in relation to any Dominion income-tax is, for the purposes of relief under this section, to be taken as corresponding to the year of assessment for the purposes of United Kingdom income-tax

(8) In this section —

(a) The expression 'Dominion' means any British possession or any territory which is under His Majesty's protection or in respect of which a mandate is being exercised by the Government of any part of His Majesty's dominions

(b) The expressions 'United Kingdom income-tax' and 'United Kingdom super tax' mean respectively income-tax and super tax chargeable in accordance with the provisions of the Income-tax Acts

(c) The expression 'Dominion income tax' means any income-tax or super tax charged under any law in force in any Dominion if that tax appears to the Special Commissioners to correspond with United Kingdom income-tax or super tax.

(d) The expression 'Dominion rate of tax' means the rate determined by dividing the amount of the Dominion income tax paid for the year by the amount of the income in respect of which the Dominion income tax is charged for that year, except that where the Dominion income-tax is charged on an amount other than the ascertained amount of the actual profits the Dominion rate of tax for the purposes of this section shall be determined by the Special Commissioners

For the purposes of this section, the rate of United Kingdom income tax shall be ascertained by dividing by the amount of the taxable income of the person concerned the amount of tax payable by that person on that income before deduction of any relief granted in respect of life assurance premiums or any relief granted under the provisions of this section, and the rate of United Kingdom super tax be ascertained by dividing the amount of the super tax payable by any person by the amount of that person's total income from all sources as estimated for super-tax purposes.

* * * * *

Scheme of relief—Taking the laws both in the United Kingdom and in British India together, the broad scheme of relief is that the United Kingdom gives relief at a rate up to the Indian rate or half the United Kingdom rate whichever is less and British India gives further relief so that the assessee finally bears tax at either the United Kingdom rate or the British Indian rate whichever may be higher but the relief in British India will not exceed half the Indian rate

Burma—Double taxation relief in respect of Burma is governed neither by section 49 nor by section 49 A but by a special Order in Council, 112, The India and Burma (Income-tax Relief) Order 1936 this order taking the place of section 49 of the Indian Income-tax Act. The scheme

provides both for double and for treble income tax relief. The Order has been set out under section 49 A.

The form of application for relief under this Order is given in Rule 40 A and the form of appeal against refusal of relief in Rule 40 B.

Preliminary conditions—An assessee must have obtained relief from the authorities in the United Kingdom and must prove that he has done so and at what rate the relief was granted before any relief can be given to him in India. He is required in practice to produce the official receipt for the United Kingdom tax paid, the notice of assessment showing the basis on which the liability has been computed and a certificate of the Income tax authority showing what relief has actually been given to him in that country.

Payment of tax in instalments—When during an assessment it taxation on any part of his income the amount of the relief will, if possible, be calculated by the Income-tax Officer in advance and the assessee will normally be allowed to pay the demand in two instalments the second of which will represent the amount of relief calculated to be due. The date of the first instalment will be that ordinarily fixed for the payment of a demand of income-tax while the second will be payable two or if possible, three or four months from the date of the notice of demand. If the assessee produces the necessary British certificates and establishes his claim to relief under section 49 of the Indian Income-tax Act, 1922 the demand for the second instalment will be modified by cancellation or reduction or if the relief is greater than the second instalment and the first instalment has been paid, a refund will be granted of the tax overpaid. (*Income tax Manual*)

The above procedure will also be followed in granting relief from double taxation to incomes taxed in British India and in a Dominion or Indian State included in reciprocal arrangements. See section 49 A.

Provisional claims—The time limit for making claim for refund under section 49 is mentioned in section 50. Since however there is often great delay in settling assessments and claims to relief in the United Kingdom provisional claims for double income tax relief unsupported by proof that relief has actually been obtained in the United Kingdom will be accepted if presented within the limitation period if the assessee definitely undertakes to produce such proof as soon as relief in the United Kingdom has actually been obtained. When this undertaking is punctually fulfilled the claim will be treated as one presented in due time. (*Income tax Manual*)

Proves to the satisfaction of the Income tax Officer—The nature of the evidence must depend on the circumstances of each case and the discretion of the Income-tax Officer but the certificates of the Revenue Officers in the United Kingdom would ordinarily be accepted as satisfactory evidence by the Income tax Officer. The onus of proof lies on the applicant.

Appeals—As regards right of appeal against orders under this section see section 30.

Limitation—See section 50.

Indian rate of tax—The definition as now revised closely follows the similar definition in the United Kingdom Act. Before 1st April 1939, the definition was as follows "means the amount of Indian income-tax divided by the income on which it was charged."

Any part of his income—In *Rolls Royce, Ltd v Short* 10 Tax Cases 59, the Company was taxed in India but not in England because at that time under the English law taxable income was computed on the average of the preceding three years. A claim for refund of tax from the British Exchequer failed because the company had in fact paid no tax to the United Kingdom. Incidentally *Roulatt, J.*, observed "We have not heard hitherto in the history of the Income-tax Acts of any such thing as part of an income, and it is painful to reflect that a new chapter of difficulties may be opened". See also *Assam Railways and Trading Co., Ltd v Commissioners of Inland Revenue*, 1934 A C 445, 12 A T C 123, 18 Tax Cases 509.

In the case of *Rolls Royce v Short*, *supra* certain observations were made by *Warrington, L.J.*, to the effect that having regard to the different modes of assessment in India and in England the profits chargeable in the two countries would seldom be identical and that as a consequence one should look rather to the source than to the exact amount. On the other hand it was stated in the *Assam Railway case*, (1935) A C 445, 1934 I T R 467 (affirming 1934 I T R. 9), that these observations were to be read with reference to the special facts of that case.

In the *Assam Railways case*, the company had income from tea gardens and also paid interest on debentures. In India a part of income from tea is not taxed and interest on debentures is deductible from taxable profits. In England on the other hand these two items are taxable, though the person paying interest can recoup himself by deducting tax when paying interest. The Company claimed relief from the United Kingdom tax in respect of income from tea and the interest on debentures on neither of which it had in fact paid tax in India, and the claim was rejected. The House of Lords declined to refer to the report of the Royal Commission on Income tax as an aid to the construction of the statute. The *ratio decidendi* was that 'part' is not the same as 'source', and that it refers to 'so many pounds, shillings and pence out of a larger amount' (per *Lord Warrington*, the observations of *Lord Wright* are very similar). At the same time, *Lord Wright* thought that there may be cases in which a reduction in the amount of the assessment in the Dominion may be consistent merely with a difference in computation, so that it may be said that the larger sum taxed in the United Kingdom ought to be regarded as taxed *in toto* in the Dominion by the smaller assessment, and that the taxpayer in that event has paid tax on the same part of his income taken at the larger figure both in the United Kingdom and the Dominion.

In *National Mortgage and Agency Co of New Zealand, Ltd v Commissioners of Inland Revenue*, 14 A T C 37, *Finlay, J.*, examined the various judgments in the *Assam Railways case* in the Court of Appeal and the House of Lords and opined that the House of Lords had approved not only the conclusion but the reasoning of the Special Commissioners. He held, therefore that no tax need be refunded by the United Kingdom in respect of debenture interest for which allowance is made in New Zealand but not in the United Kingdom. Under the New Zealand Income-tax Law, while debenture interest is allowed as a deduction from the taxable income the payer is taxed as agent of the payee from whom he can deduct tax. But in this particular case the interest on the debentures was payable in the United Kingdom under an English contract and the Company had no power to deduct the tax. The Company therefore bore the tax finally. It was

held that, notwithstanding the inability of the Company to recoup itself, it was not entitled to double income tax relief since it had paid New Zealand tax as agent and not for itself.

In the Court of Appeal in the same case 16 A T C 20, *L J Romer* interpreted the *Assam* case to mean that 'Nothing need be regarded except the two statutory incomes of the business, taking care, of course, to see that neither includes income from any other source. Relief will then be given to the extent of the smaller of the two sums without enquiry into the reasons for the difference between them'. That is to say, (a) the incomes must be from the same source, (b) the 'statutory' and not actual incomes are to be considered, (c) no enquiry is to be made into the causes of the difference of the figures in the two countries, i.e., into the varying allowances under the two laws, and (d) relief will be given on the smaller of the two statutory incomes. The Court of Appeal allowed the appeal of the Company, i.e., (a) the allowances or deductions under the laws of the two countries should be ignored in determining the comparable incomes so long as they are from the same source and (b) since there can be no agency without a principal, and since in the case the debenture holders were not liable to pay, the debentures being English (not New Zealand) contracts the Company did not pay tax to New Zealand on these debentures as agents. The House of Lords confirmed the decision of the Court of Appeal, 17 A T C 116, 1938 A C 524 22 Tax Cases 223.

Where under section 18 (3 A) and the other connected provisions of the Indian Act, tax is deducted at source in British India on interest paid to a non resident and at the same time the taxing authorities in the United Kingdom hold that the interest is not taxable in British India, Double Income-tax relief will not be given in the United Kingdom. This difference of opinion will perhaps remain till the outcome of the appeals to the Privy Council in the *Raleigh Investments and Wallace's* cases (see notes under sections 4 and 4-A) in which the extra territorial powers of the Indian legislature have been questioned.

The following executive instructions have been issued 'In order to determine the 'same part of income' which has suffered tax both in India and in the United Kingdom and on which relief is allowable, the sources of 'incoming profits' included in both the assessments will alone be compared. Income from any source included in the assessment by one country and not by the other will be excluded. No comparison however, will be necessary between allowances or deductions permissible in one country and those in the other.

The amount of income eligible for relief will then be the amount of the Indian assessment as reduced by such deductions or the amount of the comparable United Kingdom assessment whichever is less.

It is necessary to emphasise that relief is based upon a comparison (1) of the assessments in both the countries being based on the same period of accounts and (2) of the rates of tax employed in those assessments in the two countries and not upon a comparison of the amounts of tax paid in the two countries.

Carry forward of loss—If a carry forward of loss is allowed in one country but not in the other the income considered in the assessment of the country in which the loss is allowed (besides being reduced on account of other allowances if any) will be reduced by the loss allowed as a set-off.

The finally reduced income will be compared with the reduced income of the other country and relief will be allowed on the lower of the two incomes thus compared (*Income tax Manual*)

Remittances—If the difference between the incomes charged in the two countries is due to the fact that remittances only are taxed in British India and the whole income in the United Kingdom the remittances alone should be regarded as having suffered double taxation (*Income-tax Manual*)

Exempt blocks of income—Where a defined part of the income is exempted from tax or falls altogether outside the scope of the tax in either country for example interest on tax free Securities in either country or agricultural income in British India relief will not be allowed in respect of the tax on such part of the income. It may be, however, that the exempted or untaxed part of the income is not defined or separable but forms an element in the income doubly taxed. For example remittance may be made to the United Kingdom from British Indian income derived from both taxed and tax free sources in British India and it may not be possible to say how much is derived from each. In such circumstances relief will be allowed on that part of the remittances proportionate to the part of the income in British India that is derived from sources subject to tax. The statutory deduction from total income (e.g., Rs 25,000 in the case of an individual) allowed in super tax assessments in British India will not be treated as exempt from super tax for the purpose of computing the rate of tax suffered or for giving relief (*Income tax Manual*)

Joint assessments.—In the case of companies assessed separately in India but jointly in the United Kingdom and one of which makes a loss and the other a profit it will be necessary for the Income-tax Officer to scrutinise the United Kingdom assessment to see how much of the income of the same accounting period from each source has been taxed. Since one company has made a loss which has been allowed in the United Kingdom assessment it is clear that only part of the Indian profits of the other company which has made profit has paid tax in the United Kingdom. It is only on this part that relief is allowable since that part only has suffered double taxation (*Income tax Manual*)

Shareholder—Position of—See sections 49 B and 49 C

Unregistered firm—Partner in—A partner in an unregistered firm does not, it is submitted pay income-tax within the meaning of this section. It is the firm that pays the tax and not the partner see notes under section 48

Taxes corresponding to income tax.—Where a mining corporation paying a royalty was expressly excluded from the operation of an Income-tax Act in a Dominion, a claim that for the purposes of Double Income-tax relief from the United Kingdom the corporation must be deemed to pay income-tax in the Dominion was rejected even though the intention of the exclusion of the Corporation from the income-tax may have been the consideration that the royalty was equivalent to the tax *Ashanti Goldfields Ltd., v. Merrifield* 13 A.T.C. 641 19 Tax Cases 52

"Paid by deduction or otherwise"—The object of the addition of these words is to cover cases of dividends, see Enquiry Committee's Report, 1936, Chapter XI, Section 1. See also sections 18 (5) and 49 B. The question had been raised in an English case, *Commissioners of Inland Revenue v Dalgety & Co*, (1930) A C 527, in which the question arose whether 'paid' meant actually paid or effectively borne, and it was decided that it meant the former. The question in that particular case was whether relief should be given (1) on the whole of the profits earned in the Dominions or (2) on the balance of such profits after deducting the excess of the interest paid in the United Kingdom on its debentures over the income arising in the United Kingdom, and it was decided to allow relief on (1), notwithstanding that as a consequence the Company would receive back a sum which would cause the profits distributed as dividends to escape the full burden of United Kingdom tax. As Lord Macmillan said in this case (p. 542) "actual payment not ultimate incidence is the criterion both of the right to relief and of the right to deduct". The words 'or otherwise' obviously cover cases of payment after direct assessment. The words will also cover cases in which tax is paid by one person on behalf of another or the income of one person is taxed as that of another and cases in which as laid down in section 18 (5) and section 49-B tax paid by a Company is deemed to have been paid on behalf of the shareholder. There is little doubt, however, that the words cannot cover cases of tax being "suffered" *i.e.*, being borne indirectly in the sense that the ultimate incidence of the tax is on the person concerned.

Whether Company should pass on double income tax relief to shareholder—Ever since the Finance Act of 1916 there has been considerable litigation in the United Kingdom on the above subject namely, *Rover v South African Breweries*, (1918) 2 Ch 233, *The New Zealand and Australian Land Co v Scottish Union and National Insurance Co*, 57 Sc L R 15, (1931) A C 172, *Wakefield v Whiteaway Landlaw & Co*, 37 T L R 569, *Sheldrick v South African Breweries*, (1923) 1 K B 173 (C A), *Commissioners of Inland Revenue v Dalgety & Co*, (1930) A C 527, and there have been also several amendments in the Statutes from time to time. The principle against double taxation applies only to the payment of tax by the same person in respect of the same income, so, a preference shareholder who receives his full dividend in a foreign company cannot claim any relief on the ground that resident companies of which the foreign company was a shareholder had borne tax. *Barnes v Hutchinson*, (1939) 3 A L R 803, (H L) overruling (1938) 3 All E R 98.

The position in British India before 1st April, 1939, was obscure, but since that date the position has been made clearer by sections 49 B and 49 C. It should be noted however, that while section 49 C merely deems the shareholder for the particular purpose of regulating his own relief, to have obtained the relief obtained in fact by the Company the actual rights of the different classes of shareholders *inter se* would depend on their contractual rights. See *Purushothamdas Harkisandas v The Central Indian Spinning, etc., Co*, 1 I T C 11, 42 Bom 579 which however, was decided under the 1886 Income tax Act.

Corresponding year—It is observed from the Report of the Enquiry Committee, 1936 that the intention is that the Central Board of Revenue

should frame a rule. The suggested definition is the United Kingdom year of assessment corresponding to a British Indian tax year is the year for which an assessment is made by reference to the same basic period of accounts as that of the Indian assessment on which relief is claimed.

According to executive instructions an Indian assessment on which relief is claimed will be compared with the United Kingdom assessment based on the same period of accounts and where the accounts on which the Indian assessment is based enter into United Kingdom assessments for two different years the Indian assessment will for the purposes of relief be divided into two portions relief on each being allowed by reference to the taxation of that particular portion in the United Kingdom.

Examples—The following are some examples given in the Income tax Manual illustrating the method to be adopted in calculating relief due under section 49 of the Act. The calculation of the United Kingdom relief is subject to changes which may be made in the rates of tax personal allowances etc. granted in that country.

Example 1—A married man with one child is resident in the United Kingdom. He has a fixed income of Rs. 10,500 from property in India and has no other income. His liability to tax is—

	In the United Kingdom.			In India,
	Rs.	A.	P.	
Assessable income	10,500	0	0	Income tax on Rs. 10,500 at 11 29 p. in the rupee equals Rs. 67-3-0
Less personal allowance	Rs. 2,400			
Deduction for child	800			
Taxable income	7,300	0	0	
Tax on the 1st Rs. 1,800 at 16 p. in the rupee	150	0	0	
Tax on balance Rs. 5,500 at 4-4 annas in the rupee	1512	8	0	
*Total tax (before relief in respect of Indian Income-tax)	1662	8	0	

* For the purposes of calculating 'the appropriate rate of United Kingdom tax' this amount is not to be reduced by any relief granted in respect of any life assurance premiums.

The United Kingdom tax (Rs. 1662-8-0) divided by the taxable income (Rs. 7,300) gives an appropriate rate of United Kingdom tax of 3 annas 8 pies. A has paid Indian income tax in respect of the same income at a rate of 11 29 p. in the rupee, that is a rate which is less than half

the United Kingdom rate and the relief from United Kingdom tax will, therefore, be a sum equal to the Indian rate (11 29 pies) on Rs. 7,300. No further relief will be due in India.

Example 2 —B is a bachelor resident in the United Kingdom with no dependents and has an earned income of £1,000 assessable to United Kingdom income tax. He has no other income and pays income-tax in India in respect of the income in question. His liability to tax is as follows —

	United Kingdom
	£ s d,
Total income	1 000 0 0
Less earned income allowance one-fifth of £1 000	200 0 0
Assessable income	800 0 0
Less personal allowance	100 0 0
Taxable income	700 0 0
Tax on 1st £135 at 1s 8d	11 5 0
Tax on balance £565 @ 5 6d	155 7 6
Total tax (before relief in respect of Indian income tax)	166 12 6

The tax (£166-12 6) divided by the taxable income (£700) gives an "appropriate rate of the United Kingdom tax" of 4s 9d or 3 8 annas in the rupee, Indian income-tax is payable on his income (@ exchange 1s 6d = Rs 13 333) at a rate of 13 99 pies in the rupee, so that B is entitled to get relief from the United Kingdom at the rate of 13 99 pies in the rupee (that is, 1s, 5d. in the pound) on £700 and there is no balance of relief to be given in India.

Example 3 —C is a company the whole profits of which are taxed both in the United Kingdom and in India. The Indian rate of tax (including company super tax) paid by the company is 3 annas and 6 pies in the rupee while the "appropriate rate of United Kingdom tax" for the company is 5s 6d in the pound. The company can get relief at the rate of 2½ in the pound (or 2 annas 2 4 pies in the rupee) in the United Kingdom and on proof of payment of United Kingdom tax and of the grant of United Kingdom relief, can claim from the income-tax authorities in India the balance of relief namely, 1 anna 3 6 pies in the rupee. This makes the total rate of relief given in the two countries 3 annas 6 pies so that the aggregate rate of tax paid in the two countries is equal to the United Kingdom rate (5s 6d in the pound).

49-A. (1) The Central Government may, by notification in the Official Gazette, make provision, for the granting of relief in respect of income on which has been paid both income-tax (including super tax) under this Act and Dominion income-tax

Relief in respect of Indian State and Dominion Income-tax

(2) for the purposes of this section 'Dominion income-tax' means any income-tax or super-tax charged under any law in force in any Indian State or in any part of His Majesty's Dominions (other than the United Kingdom) where the laws of that State or part provide for relief in respect of tax charged on income both in that State or part and in British India which appears to the Central Board, of Revenue to correspond to the relief which may be granted by this section

History—This section which was added in 1939 provides for the grant of relief to income taxed in British India and in an Indian State or in a Dominion of His Majesty (other than the United Kingdom) Formerly, such relief was granted by Notification under section 60 and that section cannot be utilised for this purpose hereafter

Notifications—It should be noted that relief is granted by notification and not by rules i.e., the proposals do not need to be previously published for criticism Arrangements have been made under this section (or section 60 formerly) with the following States or Dominion

Aden—See Notification No 18 I T dated 21—2—1942

Ceylon—do No 17 I T dated 21—2—1942

Certain African Dominions do dated 4—1—1941

Various Indian States do No 69 dated 1—9—1939

While the procedure is similar in most of these cases the basis of relief and the rate of relief under the different notifications it will be seen differ The basis in the case of Indian states however which have come into the scheme of reciprocal relief is uniform barring Mysore in respect of which there are special arrangements dating from a long time

Reciprocity—This section applies only to cases where the State or Dominion agrees to give relief otherwise section 49 D will apply

Appeal—There is no provision in section 30 for appeals in respect of claims under this section The respective notifications and orders provide for an appeal

Relief in respect of Burma however, is regulated by a special Order in Council, and in view of the provisions in it which make that order take the place of section 49 it is considered that an appeal under that order is an appeal in respect of section 49 and therefore falls under section 30 with the consequential rights of further appeal to the Tribunal under section 33 and of a reference to the High Court under section 66

In the absence of an appeal however under section 30 the assessee or claimant has no right of reference to the High Court under section 66 or even of appeal to the Appellate Tribunal under section 33

Paid—The words *whether by deduction or otherwise occurring in* section 49 do not occur in this section but the absence is immaterial and the respective notifications incorporate these words

Which appears to the Central Board of Revenue—While the Government make the notification it is left to the Central Board of Revenue to decide which State or Dominion tax corresponds to income-tax and super tax. There is no provision for an appeal against the orders of the Board.

Officers to whom refund applications are to be made—In the case of residents it is the same officer as would assess them in the case of non residents the Central Board of Revenue appoints the officer. For these appointments see notes under section 48 and Appendix

THE INDIA AND BURMA (INCOME TAX RELIEF) ORDER 1936 PART I

INTRODUCTORY AND GENERAL

1 This Order may be cited as 'The India and Burma (Income tax Relief) Order, 1936.'

2 The Interpretation Act 1889 applies for the interpretation of this Order as it applies for the interpretation of an Act of Parliament.

3 Any reference in this Order to or to any provisions of the Indian Income tax Act, 1922 shall be construed as a reference to that Act or those provisions as for the time being in force in India, as for the time being in force in Burma or as for the time being in force both in India and in Burma as the context and the circumstances may require or, if that Act or those provisions have been repealed and re enacted either with or without modifications to the re enacting Act or provisions as in force as aforesaid.

4 In this Order Income-tax, or tax, in relation to India or Burma means income-tax payable in accordance with the Indian Income tax Act 1922 and includes super tax so payable and other expressions have, except where the context otherwise requires the same meanings as in the Indian Income tax Act 1922.

5 References in this Order to the rate of tax shall—

(a) in relation to India or Burma, be construed as references to a rate determined by dividing the amount of income-tax paid in India or Burma as the case may be for the year in question (before deduction of any relief granted under section forty nine of the Indian Income tax Act 1922, or under this Order) by the amount of the income on which tax was charged

(b) in relation to the United Kingdom mean the appropriate rate of United Kingdom income-tax for the year in question as defined for the purposes of section twenty seven of the Finance Act 1920

6 Any reference in this Order to the lower of two rates shall where the rates are equal be construed as a reference to either of those rates and any reference in this Order to the two lowest of three rates shall, where the three rates are equal be construed as a reference to any two of them and where two of the three rates are equal and the third is less be construed as a reference to the lowest rate and one of the equal rates

7 This Order shall have effect with respect to the financial year beginning on the date of the commencement of Part III of the India Act and every subsequent financial year

Provided that if at any time after the expiration of three years from the commencement of Part III of the India Act the Governor General of India gives to the Governor of Burma or the Governor of Burma gives to the Governor General of India notice of his desire that this Order shall cease to operate, the Order shall not have effect with respect to any financial year subsequent to the financial year next following that during which the notice is given

PART II

RELIEF IN INDIA

1 If any person who has paid Indian income-tax for any year on any part of his income proves to the satisfaction of the Income-tax Officer that he has paid for that year Burman income-tax, or Burman income-tax and United Kingdom income-tax, in respect of that part of his income he shall be entitled to a refund of Indian tax calculated on that part of his income at the appropriate rate of relief

In this paragraph appropriate rate of relief means—

- (a) in relation to income taxed in India and Burma and not in the United Kingdom a rate bearing to the Indian rate of tax or the Burman rate of tax whichever is the lower the same proportion as the Indian rate of tax bears to the sum of the Indian rate of tax and the Burman rate of tax,
- (b) in relation to income taxed in India Burma and the United Kingdom a rate bearing to the difference between the total rate at which he was entitled to and obtained relief in the United Kingdom under section twenty seven of the Finance Act, 1920, in respect of that income and the sum of the two lowest of the three rates of tax the same proportion as the Indian rate of tax bears to the sum of the Indian rate of tax and the Burman rate of tax

2 No refund of tax shall be payable in India under section forty nine of the Indian Income-tax Act 1922 in respect of any income which is taxed under that Act in Burma and if any such refund is made it shall be repaid

3 Any sums repayable under the last foregoing paragraph and any sums overpaid by way of refund under this Part of this Order shall be recoverable as if they were arrears of income tax

4 No income which an assessee proves to the satisfaction of the Income-tax Officer to have been charged in his hands to income-tax under the Indian Income-tax Act 1922 for any year preceding the commencement of Part III of the India Act shall be included in India in the assessment of his income for any subsequent year

5 In the provisions of the Indian Income-tax Act 1922 (other than the provisions of section forty nine thereof)—

- (a) any reference to that Act or to section forty nine thereof shall be construed as including a reference to this Part of this Order,

- (b) any reference to section twenty seven of the Finance Act, 1920, shall be construed as including a reference to Part III of this Order,
- (c) any reference to the United Kingdom in relation to relief under the said section twenty seven, or in relation to refunds under the said section forty nine shall be construed as including a reference to Burma in relation to refunds under Part III of this Order or this Part of this Order, as the case may require

PART III

RELIEF IN BURMA

1 If any person who has paid Burman income tax for any year on any part of his income proves to the satisfaction of the Income-tax Officer that he has paid for that year Indian income-tax or Indian income-tax and United Kingdom income tax, in respect of that part of his income, he shall be entitled to a refund of Burman tax calculated on that part of his income at the appropriate rate of relief

In this paragraph 'appropriate rate of relief' means—

- (a) in relation to income taxed in Burma and India and not in the United Kingdom a rate bearing to the Burman rate of tax or the Indian rate of tax whichever is the lower, the same proportion as the Burman rate of tax bears to the sum of the Burman rate of tax and the Indian rate of tax,
- (b) in relation to income taxed in Burma India and the United Kingdom a rate bearing to the difference between the total rate at which he was entitled to and obtained, relief in the United Kingdom under section twenty seven of the Finance Act, 1920, in respect of that income, and the sum of the two lowest of the three rates of tax the same proportion as the *Burman rate of tax* bears to the sum of the *Burman rate of tax* and the *Indian rate of tax*

2 No refund of tax shall be payable in Burma under section forty nine of the Indian Income-tax Act, 1922 in respect of any income which is taxed under that Act in India and if any such refund is made it shall be repaid

3 Any sums repayable under the last foregoing paragraph and any sums overpaid by way of refund under this Part of this Order shall be recoverable as if they were arrears of income tax

4 No income which an assessee proves to the satisfaction of the Income tax Officer to have been charged in his hands to income-tax under the Indian Income tax Act 1922 for any year preceding the commencement of the Burma Act shall be included in Burma in the assessment of his income for any subsequent year

5 In the provisions of the Indian Income-tax Act 1922, (other than the provisions of section forty nine thereof)—

- (a) any reference to that Act or to section forty nine thereof shall be construed as including a reference to this Part of this Order,

- (b) any reference to section twenty seven of the Finance Act, 1920, shall be construed as including a reference to Part II of this Order,
- (c) any reference to the United Kingdom, in relation to relief under the said section twenty seven or in relation to a refund under the said section forty nine shall be construed as including a reference to India in relation to refunds under Part II of this Order,

or this Part of this Order, as the case may require (Note.—The forms prescribed under this order are in Rules 40-A and 40-B)

ADEN

(Notification No 18, Income tax, dated the 21st February, 1942)

In exercise of the powers conferred by section 49 A of the Indian Income-tax Act 1922 (XI of 1922), the Central Government is pleased to make the following rules for the granting of relief in respect of income on which tax has been paid both in British India and in Aden namely —

1 These rules may be cited as the Income-tax (Double Taxation Relief) (Aden) Rules, 1942

2 In these rules —

- (a) The expression 'Aden Income-tax' means income tax and super tax charged for an year in accordance with the provisions of the Aden Income-tax Ordinance, 1937
- (b) The expression "Aden rate of tax" means the amount of Aden income-tax divided by the amount of the income on which it was charged
- (c) The expression 'Indian income-tax' means income-tax and super tax chargeable in accordance with provisions of any law in force in British India
- (d) The expression "Indian rate of tax" means the rate determined by dividing the amount of income-tax paid in British India for the year in question by the amount of income on which tax was charged
- (e) The reference to the lower of the two rates shall, where the rates are equal be construed as a reference to either of those two rates

3 If any person who has paid by deduction under section 18 or otherwise Indian Income-tax for any year on any part of his income proves to the satisfaction of the Income-tax Officer that he has paid for that year Aden income-tax in respect of that part of his income he shall be entitled to the refund of Indian Income tax calculated on that part of his income at a rate bearing to the Indian rate of tax or the Aden rate of tax whichever is the lower, the same proportion as the Indian rate of tax bears to the sum of the Indian rate of tax and the Aden rate of tax

4 (1) The application for refund of income-tax under these rules will be made as follows —

- (i) If the applicant is resident in British India to the Income-tax Officer of the district in which the applicant is chargeable directly to income-tax or if he is not chargeable directly, to the Income-tax Officer of the district in which the applicant ordinarily resides,

- (ii) if the applicant is resident outside British India to the Income-tax Officer appointed by the Central Board of Revenue.
- (2) Such application may be presented by the applicant in person or by a duly authorised agent or may be sent by post, and shall be in form I appended to these rules—

FORM I.

Application for relief from double income-tax under the Income-tax (Double Taxation Relief) (Aden) Rules, 1942.

I, _____ of _____ do hereby state that I have paid (or under the provisions of section 49-B of the Indian Income-tax Act, 1922 (XI of 1922) must be deemed to have paid) Aden income-tax|income-tax and super-tax amounting to Rs. _____ for the year ending 19 _____ on an income* of Rs. _____ and that Indian Income-tax|Income-tax and super-tax of Rs. _____ has also been paid (or under the provisions of section 49-B of the Indian Income-tax Act, 1922 (XI of 1922) must be deemed to have been paid) on the same income*|part of the same income amounting to Rs. _____ I now pray for relief at the rate of _____ amounting to Rs. _____ to which I am entitled under the Income-tax (Double Taxation Relief) (Aden) Rules, 1942. My income from all sources to which this Notification applies during the "previous year" ending on the 19 _____ amounted to Rs. _____ only—see return of income attached|already submitted.

Signature.

I hereby declare that what is stated herein is correct.

Signature.

Dated 19 _____

5. No claim to any refund of Indian income-tax or super-tax under these rules shall be allowed unless it is made within four years from the last day of the financial year commencing next after the expiry of the previous year in which the income arose, accrued or was received or was deemed to have arisen, accrued or been received or brought into British India. Provided that when the claim is to a refund of income-tax, or super-tax paid prior to the 1st April, 1939, the claim shall not be allowed unless it is made within one year from the last day of the year in which such tax or the Aden income-tax was received, whichever is later.

6. An applicant for refund under these rules may appeal to the appellate Assistant Commissioner of Income-tax from any order of the Income-tax Officer disallowing the claim for refund either wholly or in part.

7. The appeal shall be presented within thirty days of the date on which the order of the Income-tax Officer was communicated to the applicant and shall be in Form II appended to these rules.

FORM II.

Appeal from an order of the Income-tax Officer disallowing a claim for refund under the Income-tax (Double Taxation Relief) Aden, Rules 1942

To

The Appellate Assistant Commissioner of Income-tax

* Where the income on which income-tax has been charged differs from that on which super-tax has been charged both amounts must be specified.

half the Indian Income-tax on the same part of his income, whichever is less: Provided that where any person is entitled to further relief in British India on that part of his income on which relief is admissible under the Ceylon Income-tax Law on account of its having been also taxed in some other country besides Ceylon, the relief in respect of the Ceylon tax shall not exceed the difference between half the Indian Income-tax and such further relief as may have been granted in British India owing to that part of his income having been taxed in some other country besides Ceylon.

4. (1) The application for refund of income-tax under these rules shall be made as follows:—

(i) If the applicant is resident in British India, to the Income-tax Officer of the district in which the applicant is chargeable directly to income-tax or if he is not chargeable directly to income-tax to the Income-tax Officer of the district in which the applicant ordinarily resides, or

(ii) If the applicant is resident outside British India to the Income-tax Officer appointed by the Central Board of Revenue.

(2) Such application may be presented by the applicant in person or by a duly authorized agent or may be sent by post, and shall be in Form I appended to these rules.

FORM I.

Application for relief from double income-tax under the Income-tax (Double Taxation Relief), Ceylon, Rules, 1942.

I, _____ of _____ do hereby state that I have paid (or under the provisions of section 49-B of the Indian Income-tax Act, 1922 (XI of 1922) must be deemed to have paid), Ceylon tax amounting to Rs. _____ for the year ending 19____, on an income of Rs. _____ and that Indian Income-tax|income-tax and super-tax of Rs. _____ has also been paid or under the provisions of section 49-B of the Indian Income-tax Act, 1922 (XI of 1922) must be deemed to have been paid, on the same income*|part of the same income amounting to Rs. _____. I now pray for relief of a sum of Rs. _____ to which I am entitled under the Income-tax (Double Taxation Relief) (Ceylon), Rules, 1942. My income from all sources during the "previous year" ending on the _____ 19____, amounted to Rs. _____. only, —see Return of income attached|already submitted.

Signature.

I hereby declare that what is stated herein is correct.

Signature

Dated

19 ____

5. No claim to any refund of Indian income-tax or super-tax under these rules shall be allowed unless it is made within four years from the last day of the financial year commencing next after the expiry of the previous year in which the income arose, accrued or was received or was deemed to have arisen, accrued or been received or was brought into British India.

Provided that where the claim is to a refund of income-tax or super-tax paid prior to the 1st of April, 1939, the claim shall not be allowed unless

*Where the income on which income-tax has been charged differs from that on which super-tax has been charged both amounts must be specified.

it is made within one year from the last day of the year in which such tax or the Ceylon tax was recovered, whichever is later

6 An applicant for refund under these rules may appeal to the Appellate Assistant Commissioner of Income tax from any order of the Income-tax Officer disallowing the claim for refund either wholly or in part.

7 The appeal shall be presented within thirty days of the date on which the order of the Income-tax Officer was communicated to the applicant and shall be in form II appended to these rules

FORM II
(See Rule 7)

Appeal from an order of the Income tax Officer disallowing a claim for refund under the Income tax (Double Taxation Relief) (Ceylon) Rules, 1942

To

The Appellate Assistant Commissioner of Income-tax

The day of 19

The petition of of post-office

District

sheweth as follows —

Your petitioner applied to the Income tax Officer for a refund under the Income tax (Double Taxation Relief) (Ceylon) Rules 1942 of Rs

The Income-tax Officer has by his order dated the rejected the application

of which a copy is attached— Intimation

granted a refund of only Rs

of this order was received by your petitioner on

Your petitioner therefore requests that the order of the Income tax Officer may be set aside and the refund applied for may be granted

*Signed

GROUND OFS OF APPEAL

Form of Verification

I, the petitioner named in the above petition do declare that what is stated therein is true to the best of my knowledge and belief

*Signed

CEYLON
A—TAX

As regards Ceylon according to executive instructions the following points have to be borne in mind in regard to this grant of relief under this section

(1) Under section 45 (4) (b) (1) of the Ceylon Income-tax Ordinance "Ceylon Tax" does not include for purposes of relief either in India or Ceylon the additional percentage charged on non resident companies under section 20 (6) of the Ordinance

(2) "Ceylon Tax" does not include for purposes of relief either in British India or Ceylon tax on interest or other charges on income included in the Ceylon assessment [Ordinance section 45 (4) (b) (u)]

* The form of appeal and the form of verification appended thereto shall be signed—

(a) in the case of an individual by the individual himself

(b) in the case of a Hindu undivided family by the Manager or Karta,

(c) in the case of a company or local authority by the principal officer

(d) in the case of a firm by a partner and

(e) in the case of any other association by a member of the association.

(3) "Indian Tax" includes personal Super Tax, both in India and Ceylon

(4) "Indian Tax" in India includes Company Super Tax as regards companies themselves but not as regards shareholders

(5) Relief is given in both countries of half the smaller tax. The amounts of tax and not the rates of tax are considered

B—"PART OF HIS INCOME" (INDIA) "HIS INCOME FROM ANY SOURCE" (CEYLON)

(1) As the British Indian Notification No 14 (Finance Department—Central Revenues), dated the 2nd April 1932 is drafted relief will be allowed in British India "on that part of the income on which relief is admissible under the Ceylon Income tax law". The practical result of this is that the expressions "part of his income" in the Indian Notification and "his income from any source" in the Ceylon Ordinance, refer to the same thing and the British Indian relief is automatically regulated by the Ceylon relief

The British Indian and Ceylon authorities alike ignore in granting relief all differences between the computation of the income in the two countries due to—

- (a) Certain expenses being allowed in one country and not in the other
- (b) The allowances for depreciation being higher in one country than in the other
- (c) Depreciation being carried forward in one country and not in the other
- (d) Losses being carried forward in one country and not in the other
- (e) The fact that assessment is made on the "income arising in one country and on 'remittances' in the other
- (f) The fact that the assessments are based on different accounting periods in the two countries
- (g) Where a Tea Estate is taxed on 40 per cent of its profits in British India and on the whole profits in Ceylon, there will be only one source of income from the Ceylon point of view and the relief allowed in each country will be half the lower amount of tax, ignoring this difference in the basis of assessment

(2) No relief can be given unless tax is paid for the same year in each country on the source in question *e.g.*, in the first year of a business, tax will be levied on its profits in Ceylon but not in British India, in the year after a business ceases its profits will be liable to tax in British India but not in Ceylon. No relief can be given in these cases

C—"ANY PERSON"

(1) In Ceylon the income of married women is treated as that of their husbands. If the wife is separately assessed in British India on the same income she will be entitled to relief in British India

(2) *Partnership* —Ceylon charges tax on individual partners and not on partnerships at all. No difficulty will arise in British India in regard to registered firms. If partners of an unregistered firm are assessed in Ceylon and the firm is assessed in India no relief will be due either to the partners or to the firm except to the extent that the partners pay super-tax in British India on their shares from the firm

SHAREHOLDERS

(1) If a resident in India has dividends from a Company in Ceylon from which Ceylon tax is deducted at source and is assessed in India on those dividends he will be entitled to relief in India

(2) If a resident in Ceylon is a shareholder in an Indian Company and is taxed in Ceylon on dividends which he receives from the Company, Ceylon will regard him as having suffered Indian tax and he will be entitled to relief in India.

Relief in British India in respect of income taxed in British India and Aden—The following procedure has been agreed upon between the Government of India and the Government of Aden and should be followed for the grant of relief in respect of double taxation in India and in Aden—

- (i) Any assessee who is liable to tax in both countries and *whose head office is in British India* may submit in British India with his British Indian return of income a copy of his Aden return of income subject to his clearly distinguishing in the former any income which he claims to be taxable in British India only and in the latter any which he claims to be taxable in Aden only. The Income-tax authorities in Aden will then be informed that this has been done and will ordinarily postpone further assessment enquiry until a further reference is made by the Income-tax authorities in British India. The British Indian Income-tax Officer will examine the accounts relating to all the income and in his assessment order will distinguish between (i) what he holds to be income taxable only in British India and (ii) income taxable in both countries. He will then issue his British Indian demand and forward to the Government of Aden a copy of his assessment order, accompanied by a note regarding his examination of the accounts relating to (iii) income taxable in Aden only if any. The Aden Income-tax Officer then will if satisfied issue his assessment order and demand on the basis of (ii) and (iii) as reported, if not satisfied he will make further enquiries. In each country the original demand will for form's sake be for the total tax payable in that country but with a note to the effect that the amount in excess of _____ being the sum of the estimated share of that country in the tax at the higher rate on (ii) and of the tax on (i) or (iii) as the case may be need not be paid pending the completion of discussions between the Income tax departments of the two countries as to the final amount each is to receive after setting off double income tax relief.

- (ii) The above procedure will if it is understood be adopted *mutatis mutandis* by the Aden Income-tax authorities in respect of assessee who are liable to tax in both countries and *whose head office is in Aden*.

OTHER DOMINIONS

Notification No 1, Dated the 4th January, 1941 of the Finance Department (Central Revenues)

- 1 (1) These rules may be cited as the Income tax (Double Taxation Relief) (Dominions) Rules, 1939

(2) They extend to the whole of British India including Berar, and every reference therein to British India shall be construed as including a reference to Berar

2 In these rules —

- (a) Dominion means any of the territories specified in the first column of the Schedule annexed to these rules
- (b) the expression Dominion Income tax means tax charged for any year in accordance with the provisions of the dominion enactment specified in the second column of the said Schedule
- (c) the expression 'Dominion rate of tax' has the meaning assigned to it in the section of the retrospective dominion enactment specified in the third column of the said Schedule
- (d) the expressions 'Indian Income-tax' and 'Indian rate of tax' have the same meaning as in clauses (a) and (b) respectively of sub-section (2) of section 49 of the Indian Income-tax Act 1922

3 If any person who has paid by deduction under section 18 of the Indian Income tax Act 1922 or otherwise Indian income-tax for any year on any part of his income proves to the satisfaction of the Income-tax Officer that he has paid by deduction or otherwise Dominion Income-tax for that year in respect of the same part of his income he shall be entitled to a refund of a sum calculated on that part of his income at a rate to be determined as follows —

(i) If he is resident in British India the rate at which refund is to be given shall be—

- (a) the dominion rate of tax when the rate does not exceed half of the Indian rate of tax and
- (b) half the Indian rate of tax in any other case

(ii) If he is not resident in British India the rate at which refund is to be given shall be—

- (a) half of the dominion rate of tax when the rate does not exceed the Indian rate of tax and
- (b) in any other case the amount by which the Indian rate of tax exceeds half of the Dominion rate of tax

Provided that in no case shall the rate at which such refund is calculated exceed half the Indian rate of tax appropriate to the income of the person entitled to relief or be greater than the excess of the lower of the Indian and the dominion rate of tax over the rate at which relief is given in the dominion

4 The application for refund of income tax under these rules shall be made as follows —

(1) If the applicant is resident in British India to the Income-tax Officer of the district in which the applicant is chargeable directly to income-tax or if he is not chargeable directly to the Income-tax Officer of the district in which the applicant ordinarily resides

(2) If the applicant is resident outside British India to the Income tax Officer appointed by the Central Board of Revenue

(3) Such application may be presented by the applicant in person or by a duly authorised agent or may be sent by post and shall as far as circumstances permit be in Form I appended to these rules

5 No claim to any refund of Indian Income-tax or super tax under these rules shall be allowed unless it is made within four years from the last day of the financial year commencing next after the expiry of the previous year in which the income arose, accrued or was received or was deemed to have arisen, accrued or been received or was brought into British India.

Provided that where the claim is to a refund of Income tax or super tax paid prior to the 1st April, 1939, the claim shall not be allowed unless it is made within one year from the last day of the year in which such tax or the Dominion Income-tax was recovered whichever is later

6 An applicant for refund under these rules may appeal to the Appellate Assistant Commissioner of Income-tax from any order of the Income-tax Officer disallowing the claim for refund either wholly or in part

7 The appeal shall be presented within thirty days of the date on which the order of the Income-tax Officer was communicated to the applicant, and shall as far as circumstances permit, be in Form II appended to these rules

FORM I (See Rule 4)

Application for relief from double income tax under the Income tax (Double Taxation Relief) (Dominions) Rules, 1940

I, _____ of _____, do hereby state that I have paid (or under the provisions of section 49 B of the Indian Income tax Act 1922 (XI of 1922) must be deemed to have paid) (name of dominion) Income-tax amounting to £ _____ for the year ending 19 _____ on an income of £ _____ and that Indian Income tax (income-tax and super tax of Rs _____ has also been paid (or under the provisions of section 49 B of the Indian Income-tax Act, 1922 (XI of 1922) must be deemed to have been paid) on the same income*) part of the same income amounting to Rs _____. I now pray for relief at the rate of _____ amounting to Rs _____ to which I am entitled under the Income-tax (Double Taxation Relief) (Dominions) Rules, 1939 My income from all sources during the 'Previous year' ending on the _____ 19 _____, amounting to Rs _____ only—see Return of income attached [already submitted ✓

I hereby declare that what is stated herein is correct.

Signature _____
Signature _____

Dated _____ 19 _____

FORM II (See Rule 7)

Appeal from an order of the Income tax Officer disallowing a claim for refund under the Income tax (Double Taxation Relief) (Dominions) Rules, 1940

To
The Appellate Assistant Commissioner of Income-tax
The _____ day of _____ 19 _____
The petition of _____ of _____ post office _____ District
sheweth as follows —
Your petitioner applied to the Income-tax Officer for a refund

*Where the income in which income tax has been charged differs from that on which super tax has been charged both amounts must be specified

under the Income-tax (Double Taxation Relief) (Dominions) Rules, 1939, of Rs. . . . The Income-tax Officer has by his order, dated . . . rejected the application

the . . . , of which a copy is attached, . . . granted a refund of only Rs. . . . Intimation of this order was received by your petitioner on . . .

Your petitioner therefore requests that the order of the Income-tax Officer may be set aside and the refund asked for may be granted.

*Signed . . .

GROUND OFS OF APPEAL

Form of verification

I, . . . , the petitioner named in the above petition do declare that what is stated therein is true to the best of my information and belief.

*Signed . . .

SCHEDULE.

1	2	3
Kenya	{ Income-tax Ordinance, 1937 (XII of 1937), of the Colony & Protectorate of Kenya }	Section 44
Tanganyika	{ War Revenue (Income-tax) (Replacement) Ordinance, 1940, of Tanganyika territory. }	Section 32 (3)
Uganda	Income-tax Ordinance 1940, of Uganda Protectorate	Section 32 (3)
Zanzibar	Income-tax Decree, 1940, of Zanzibar	Section 32 (3)

INDIAN STATES.

Notification No. 69, 16th September, 1939.

1. These rules may be cited as the Income-tax (Double Taxation Relief) (Indian States) Rules, 1939.

2. In these rules,—

(a) the expressions "Indian income-tax" and "Indian rate of tax" have the same meanings as in clauses (a) and (b) respectively of sub-section (2) of section 49 of the Indian Income-tax Act, 1922;

(b) "State" means any of the Indian States specified in the Schedule to these Rules;

(c) the expression "State income-tax" means income-tax and super-tax charged in accordance with the provisions of the law relating to income-tax for the time being in force in the State; and

(d) the expression "State rate of tax" means the amount of State income-tax divided by the amount of the larger of the two

* The form of appeal and the form of verification appended thereto shall be signed—

(a) in the case of an individual by the individual himself;

(b) in the case of a Hindu undivided family by the Manager or Karta;

(c) in the case of a company or local authority by the principal officer;

(d) in the case of a firm by a partner and

(e) in the case of any other association, by a member of the association.

incomes on which income-tax and super tax respectively have been charged by the State

- (e) the expression 'corresponding year' in relation to a year of assessment in British India means the year for the purposes of State income-tax which by order of the Central Board of Revenue shall be demand to correspond with such year of assessment in British India
- (f) the reference to the lower of the two rates shall where the rates are equal be construed as a reference to either of those two rates

3 If any person who has paid by deduction under section 18 of the Indian Income-tax Act, 1922 or otherwise Indian income-tax for any year on any part of his income proves to the satisfaction of the Income-tax Officer that he has paid for the corresponding year by deduction or otherwise State income-tax in respect of that part of his income, he shall be entitled to the refund of Indian income-tax calculated on that part of his income at a rate bearing to the Indian rate of tax or the State rate of tax whichever is the lower, the same proportion as the Indian rate of tax bears to the sum of the Indian rate of tax and the State rate of tax.

Provided that where in respect of that part of the income relief has already been obtained under this rule on account of taxation in another State or further relief is admissible in British India on account of taxation in the United Kingdom or Ceylon the refund should be so regulated that together with such other relief, the aggregate relief shall not exceed half the Indian rate of tax.

4 (1) The application for refund of income-tax under these rules shall be made as follows —

- (i) if the applicant is resident in British India to the Income-tax Officer of the district in which the applicant is chargeable directly to income-tax, or if he is not chargeable directly to the Income-tax Officer of the district in which he ordinarily resides
- (ii) if the applicant is resident outside British India to the Income-tax Officer appointed by the Central Board of Revenue

(2) Such application may be presented by the applicant in person or by a duly authorized agent or may be sent by post and shall be in Form I appended to these Rules

5 No claim to any refund of Indian income-tax or super tax under these rules shall be allowed unless it is made within four years from the last day of the financial year commencing next after the expiry of the previous year in which the income arose *accrued or was received or was deemed to have arisen* accrued or been received or was brought into British India

Provided that where the claim is to a refund of income-tax or super tax paid prior to the 1st April 1939 the claim shall not be allowed unless it is made within one year from the last day of the year in which such tax or the State income-tax was recovered whichever is later

6 An applicant for refund under these rules may appeal to the Appellate Assistant Commissioner of Income-tax from any order of the Income-tax Officer disallowing the claim for refund either wholly or in part

7. The appeal shall be presented within thirty days of the date on which the order of the Income-tax Officer was communicated to the applicant, and shall be in Form II appended to these Rules.

SCHEDULE.

Gujarat States Agency.

1. Baroda.
2. Chhota Udepur.
3. Sachin.

Kashmir Agency.

1. Jammu and Kashmir.

Central India Agency.

1. Dhar.
2. Makrai.
3. Bhopal.

Punjab States Agency.

1. Patiala.
2. Bahawalpur.
3. Jind.
4. Kapurthala.
5. Tehri Garhwal.
6. Maler Kotla.
7. Mandi.
8. Faridkot.

Punjab Hill States Agency.

1. Baghat.

Deccan States Agency.

1. Akalkot.
2. Phaltan.
3. Ramdurg.
4. Kolhapur.
5. Sangli.
6. Jamkhandi.
7. Mudhol.
8. Kurandvad (senior)
9. Miraj (senior).

Rajputana States Agency

1. Bundi

Madras States Agency.

1. Travancore.
2. Cochin.

Mysore Agency.

1. Sandur.

Gwalior Agency.

1. Benares.
2. Rampur.

Eastern States Agency.

1. Bastar.
2. Kanker.
3. Raigarh.
4. Jashpur.
5. Sarangarh.
6. Kawardha.
7. Khairagarh.
8. Korea.
9. Nandgaon.
10. Chhuikhadan.
11. Mayurbhanj.
12. Patna.
13. Sonapur.
14. Kalahandi.
15. Rairakhol.
16. Baudh.
17. Seraikela.
18. Talcher.
19. Gangpur.
20. Kharsawan.
21. Keonjhar.
22. Cooch Behar.
23. Shaguja.
24. Bonai.
25. Narsinghpur.
26. Athmallik.

FORM I.

(See Rule 4.)

Application for relief from double income-tax under the Income-tax (Double Taxation Relief) (Indian States) Rules, 1939.

I, _____ of _____ do hereby state that I have paid [or under the provisions of section 49-B of the Indian Income-tax Act, 1922 (XI of 1922) must be deemed to have paid] (name of State) state

income-tax|income-tax and super tax amounting to Rs for the year
 ending 19 on an income of Rs and that Indian income-
 tax|income tax and super tax of Rs has also been paid [or
 under the provisions of section 49 B of the Indian Income-tax Act, 1922
 (XI of 1922) must be deemed to have been paid] on the same income*|part
 of the same income amounting to Rs I now pray for relief
 at the rate of amounting to Rs to which I am
 entitled under the Income-tax (Double Taxation Relief) (Indian States)
 Rules, 1939 My income from all sources during the "previous year"
 ending on the 19 , amounted to Rs only—
 see Return of income attached|already submitted

Signature

I hereby declare that what is stated herein is correct

Signature

Dated

19

FORM II

(See Rule 7)

*Appeal from an order of the Income tax Officer disallowing a claim for
 refund under the Income tax (Double Taxation Relief)
 (Indian States) Rules, 1939*

To

The Appellate Assistant Commissioner of Income-tax

The day of 19

The petition of post-office District

sheweth as follows —

Your petitioner applied to the Income-tax Officer for a refund under
 the Income-tax (Double Taxation Relief) (Indian States) Rules, 1939, of
 Rs. The Income-tax Officer has by his order, dated the

rejected the application

of which a copy is attached ————— Inti-

mation of this order was received by your petitioner on

Your petitioner therefore requests that the order of the Income-tax
 Officer may be set aside and the refund asked for may be granted

Signed*

GROUNDS OF APPEAL

Form of Verification

I, , the petitioner named in the above petition do
 declare that what is stated therein is true to the best of my information
 and belief

Signed†

*Where the income on which income tax has been charged differs from that on
 which super tax has been charged both amounts must be specified

† The form of appeal and the form of verification appended thereto should be signed—

(a) in the case of an individual by the individual himself,

(b) in the case of a Hindu undivided family by the manager or Karta,

(c) in the case of a company or local authority by the principal officer,

(d) in the case of a firm by a partner and

(e) in the case of any other association by a member of the association.

MYSORE

As regards Mysore, there are special arrangements dating from a long-time as given below

(1) *Salaries and pensions*—Servants of the Government of India living in Mysore are allowed on their salaries or pensions rebate from the Indian income-tax of an amount equal to the Mysore tax, while Mysore darbar servants living in British India pay the Indian income-tax only and are not liable to pay any tax to the Mysore darbar on their salaries or pensions.

(2) *Interest on securities*—Interest on the Mysore darbar securities received or paid in British India is exempt from the payment of Indian income tax, and similarly interest on securities of the Government of India received or paid in Mysore is exempt from the Mysore tax.

(3) *Businesses*—In the case of businesses whose headquarters are in British India but which have branches in Mysore or carry on business in Mysore, a deduction is allowed from the Indian income-tax payable on the profits of such businesses of the amounts of Mysore income-tax that would be payable on such portion of the same profits as appears to the Income-tax Officer in British India to be due to transactions in Mysore. Businesses with headquarters in Mysore which have branches or dealings in British India are assessed by the Income-tax authorities in British India to the full amount of Indian income-tax due on the profits realised in British India only, while the Mysore Income tax authorities in computing the profits or gains of all such businesses for purposes of Mysore tax allow a deduction of the amount of profits or gains appearing to the assessing officer to be due to transactions in British India.

(4) *Dividends*—The Government within whose jurisdiction tax is charged on the profits out of which a dividend is paid retains the tax on the part of those profits represented by the dividends and allows such refund on the dividends as may be due under the provisions of its Income-tax law, corresponding to section 48 of the Indian Income-tax Act, while the Government in whose jurisdiction the dividend is received includes it in the 'total income' of the assessee concerned for purposes of fixing the rate of, and the liability to tax but waives its claim to levy tax in respect of the dividend.

(5) *Income from profession or vocation*—As regards income derived from the practice of a profession or vocation, the Government within whose jurisdiction it arises or accrues taxes it, while the Government in whose jurisdiction it is received includes it in the 'total income' of the assessee for purposes of determining liability to and the rate of, tax provided that (i) the income earned in Mysore by a resident in British India or in British India by a resident in Mysore is charged to tax in British India or Mysore as the case may be, if it has not already been or will not be, charged to tax in Mysore or British India on the ground for example that in either area the income is below the taxable limit, (ii) in cases where such professional earnings have been or will be, taxed in Mysore or British India they shall be taken into account for the calculation of 'total income' in British India or Mysore whether received in British India or Mysore.

49-B Where any dividend has been paid, credited or distributed or is deemed to have been paid, credited or distributed to any of the persons specified in section 3, who is a shareholder of a Company which is assessed to income-tax in British India or elsewhere, such person shall be deemed in respect of such dividend himself to have

Payment of income-tax by company to be deemed payment by shareholder

paid income-tax (exclusive of super-tax) at the rate applicable to the total income of a Company for the financial year in which the dividend has been paid, credited or distributed or is deemed to have been paid, credited or distributed, on so much of the dividend as bears to the whole of the same proportion as the amount of income on which Company is liable to pay income-tax bears to the whole income of the company

History—This section, introduced in 1939, was redrafted in 1941 in order to make its intention clear Cf Explanation (3) to sub-section (1) of section 4 and sub-section (2) of section 16 To a certain extent this section overlaps and repeats sub-section (5) of section 18

Deemed—See definition of 'dividend' in section 2 (6 A) and also section 23 A.

Grossing up—If r is the full rate of company income tax in pias per rupee and x the percentage of the Company's profits liable to tax, the gross dividend for every unit of dividend will be $\frac{1}{1 - (\frac{x}{100} \times \frac{r}{1-r})}$

Exclusive of super tax—These words should be noted

Object—Sections 49-B and 49 C together are intended to provide against the grant of excessive relief and for the recovery of such relief when given

Amount of income on which the Company is liable to pay Income-tax.—The words used are 'amount' not 'part' of income as in section 49 See in particular, *Assam Railways case*, (1934) A C 445, 1934 I T.R. 467 (affirming 1934 I T.R. 9) referred to under that section.

Applies to all cases—The section applies to all cases whether falling under section 48, 49 or 49 A; and any notification issued under section 49-A must be in consonance with section 49-B.

49-C. (1) Where any dividend is paid, credited or distributed or is deemed to have been paid, credited or distributed to a shareholder of a company which has obtained the relief referred to in section 49 or granted under section 49-A or under the India and Burma (Income-tax Relief) Order, 1936, the shareholder shall be deemed in respect

Relief granted to a company to be deemed relief granted to shareholder.

of such dividend himself to have obtained such relief at the rate at which such relief has been granted, in respect of income-tax only, to the company for the financial year preceding the year

in which the dividend was paid, credited or distributed or is deemed to have been paid, credited or distributed.

(2) If the rate at which a shareholder is deemed under sub-section (1) to have obtained relief exceeds the rate at which he would have been entitled to relief had such relief been given direct to him by or under the said sections or order, any excess shall be recovered from him either as an addition to the tax payable by him on any assessment made on him under section 23 or section 34 or by setting it off against any relief due to him under section 48.

History.—This section was added in 1939 and altered in 1941, along with section 49-B

Sub-section (1).—This removes a defect in the Act under which it was possible for a shareholder to get excessive relief. The Burma (Income-tax Relief) Order has been set out in the notes under section 49-A.

Income-tax only—i.e., not in respect of super-tax. The separation of the relief obtained by a company into parts representing income-tax and company super-tax respectively been made by executive orders. The Income-tax Enquiry Committee, 1936, suggested that 'as a practical measure the total rate of relief allowed to a company shall be divided between income-tax and company super-tax in the proportions that the rates of these taxes paid by the company bear one to the other before any relief is granted'. See Chapter XI, section 5 of the Committee's report and the illustrative examples given therein.

Illustration.—The combined effect of this section and of sections 16 (2) and 49-B is illustrated as below—

Suppose 30 per cent. of the income of a company has been charged to *income-tax* (Company super-tax has to be ignored for this purpose) at 30 pies per rupee and 70 per cent. of its income is derived from tax-free securities, and suppose a shareholder of the company gets a dividend of Rs. 12,000 (net) from the company. If the company has not received, and is not entitled to receive, any double taxation relief, the amount of the dividend when grossed up according to the formula referred to in the notes

on section 49-B will be $\text{Rs } 12,000 \times \frac{32}{32 - (5 \times \frac{30}{100})} = \text{Rs. } 12,590$

of which Rs. 3,777 (representing 30 per cent.) has *suffered income-tax on behalf of the shareholder* at 30 pies per rupee, while the balance of Rs. 8,813 has not suffered any income-tax.

Supposing next that the company has obtained double taxation relief at 15 pies per rupee on the portion of the income charged to income-tax, the position of the shareholder (assuming he has no other income) will be as shown below:—

Total income	Rs	12,590	
Income-tax suffered by the company in respect of the profits represented by this dividend	..	590	(excluding fractions).
Double Income-tax Relief in respect of Income-tax (not Super-tax) obtained by the company..		295	" "
Net Income-tax suffered by the company	..	295	" "

Income-tax payable by the shareholder at the rate of 13 39 pies per rupee on 30 per cent. of Rs 12,590, i.e., on Rs 3,777	Rs	
		263
Double income tax relief obtainable at half the effective rate of the shareholder		131
Net tax payable by the shareholder		132
Refund due to the shareholder 295-132		163
		(in round figure)

Recovery of excessive relief—Sub section (2) gives powers to the Revenue to recover excessive relief. The limitation of time is obviously the same as in respect of assessments under section 34 or of refunds under section 48. If, for any reason, no assessment is being made under section 23 or section 34, it would not be open to the Income-tax Officer to recover the excess relief. Section 34 clearly authorises the Income-tax Officer to make an additional assessment in cases of excessive relief, but sub-section (2) of section 49 C with its reference to "addition to tax payable" under 'any' assessment made under section 34 reads as though the Income-tax Officer cannot make an *ad hoc* assessment under section 34 solely to recover the excessive relief. The clear terms of section 34 cannot, however, be reduced to a nullity by the bad drafting of section 49 C.

49-D. If any person who has paid by deduction or otherwise Indian Income-tax for any year in

Relief in respect of tax charged in country not providing for relief in respect of British Indian Income-tax

respect of any income arising without British India in a country the laws of which do not provide for any relief in respect of income-tax charged in British India proves that he has paid income-tax

by deduction or otherwise under the laws of the said country in respect of the same income, he shall be entitled to the deduction from the Indian Income-tax payable of a sum equal to one-half of such Indian income-tax or to one-half of such tax payable in the said country, whichever is the less.

Explanation—The expression 'Indian income-tax' in this Section means income-tax and super-tax charged in accordance with the provisions of this Act.

History—This section was added in 1939, and the explanation in 1941.

'Country'—The word would seem to cover any State, whether British or Foreign including such Indian States, Colonies and Dominions as are not covered by section 49 A.

By deduction or otherwise.—See notes under section 49.

Laws—Will presumably include executive orders.

The same income—not the same *part* of income as in section 49 but the general trend of the principles in the *Assam Railways case*, (1934) A.C. 445, 1934 I T R. 467 and other cases will probably apply.

49-E Where under any of the provisions of this Act, a refund is found to be due to any person, the Income-tax Officer, Appellate Assistant Commissioner or Commissioner, as the case may be, may, in lieu of payment of the refund, set off the amount to be

Power to set off amount of refunds against tax remaining payable

refunded, or any part of that amount against the tax, if any, remaining payable by the person to whom the refund is due

History—This section was inserted in 1933. It merely regularised departmental practice. There has been an omission to provide for a similar power for the Appellate Tribunal. If the omission is deliberate on the ground that the Tribunal is not concerned with the collection of tax, so is the Appellate Assistant Commissioner.

Limitation—The words 'remaining payable by' do not mean 'legally recoverable from' and where proceedings under section 46 are barred by limitation under section 46 (7) it is open to the Income tax Officer under section 49 E to set off arrears of income tax against refunds due. *Indar Chand v Secretary of State* 1941 I T R 613 (Patna)

49-F Where through death, incapacity, bankruptcy, liquidation or other cause, a person who would but for such cause have been entitled to a refund under any of the provisions of this Act, or to make a claim under section 48 or 49, is unable to receive such refund or to make such claim his executor, administrator or other legal representative, or the trustee or receiver, as the case may be; shall be entitled to receive such refund or to make such claim for the benefit of such person or his estate

Power of representative of deceased person or person disabled to make claim on his behalf

Refund in special cases—Prior to 1933 the Act did not provide for a refund where through death, incapacity, bankruptcy, liquidation or other cause a person could not receive it or claim it. There is an obvious omission to provide for cases under section 49 A and 49 D.

As regards the right of appeal against an order of an Income-tax Officer refusing to grant the refund, see section 30.

Sections 49 E and 49 F render obsolete almost all the previous decisions, one of the latest of which was *Zenab Kaderbhoi v Secretary of State*, 1936 I T R 389 (Sind) about the rights and liabilities of the representatives of deceased and disabled persons in regard to refund of income-tax.

Death etc—See notes under section 24-B. Section 49 F it should be noted deals with claims which the deceased etc could have made and not to claims in respect of income which accrued or arose after death in capacity, etc. In respect of such claims the executor or trustee himself is eligible under sections 3, 40 and 41 read with section 48 *et seq*.

50 No claim to any refund of income tax or super tax under this Chapter shall be allowed, unless it is made within four years from the last day of the financial year commencing next after the expiry of the previous year in which the income arose, accrued or was received or was deemed to have arisen, accrued or been received or was brought into British India.

Provided that where the claim is to a refund of income-tax or super-tax paid prior to the commencement of the Indian

Limitation of claims for refund

Income-tax (Amendment) Act, 1939, the claim shall not be allowed unless it is made within one year from the last day of the year in which the tax was recovered or before the last day of the financial year commencing after the expiry of the previous year as defined in clause (11) of section 2 in which the income arose on which the tax was recovered, whichever period may expire later

Provided further that a claim to refund under section 49 of tax paid prior to the commencement of the Indian Income-tax (Amendment) Act, 1939, may be admitted after the period of limitation herein prescribed, when the applicant satisfies the Commissioner, or an Assistant Commissioner of Income-tax specially empowered in this behalf by the Central Board of Revenue, that he had sufficient cause for not making the claim within such period

History—The provision dates from 1916 and has been amended successively in 1918 1930 and 1939. In 1939 the time limit was extended to four years along with transitional provisions in regard to anterior claims

Limitation—How applied—The limitation in this section applies only to the date of the claim by the assessee. Once the claim has been admitted it is not necessary that the refund should actually be paid within the period fixed under this section. A claim would be in order if presented on the very last day on which the year prescribed in this section expired

It should be noted that whereas in respect of tax paid before 1st April 1939 limitation is to be reckoned from the date of recovery of tax it is reckoned for tax paid after that date with reference to the date of origin of the income

Recovered—Meaning of—It was argued in *Commissioner of Income tax v Binny & Co*, 2 I T C 466 that 'recovered' meant a taking back of what had been given and that consequently the word referred in a claim under section 49 to the repayment of the tax in the United Kingdom. This interpretation was not accepted since a similar meaning would make no sense in reference to a claim under section 48 to which section 50 equally applied. 'Recovered' is used in this section merely as meaning 'received by Government'. In other sections also it is used in senses not implying any taking back of what has been given. See for example sections 18 41 and 44-A

Dividends of companies—The question when tax is recovered in respect of dividends from companies was raised in *Amratlal Gandhi v Commissioner of Income tax*, 2 I T C 48 in which the Bombay High Court ruled that tax is 'recovered' when the dividend is declared

In *Dhanbai Dadabai Kanga v Commissioner of Income-tax* 3 I T C 76 the same High Court held that 'the year in which tax was recovered' means the financial year in respect of assessee's not maintaining accounts or those maintaining them by the financial year. As regards others the Court left

the question open The principle of this decision partly appears in the first proviso

Alternative periods of limitation—In the first proviso the words 'the year' which are used along with the words 'financial year' in the same section evidently refer to the calendar year. Cf. section 3 (59) of the General Clauses Act X of 1897. The alternative periods of limitation therefore are (a) one year from the end of the calendar year in which the tax was recovered and (b) the last day of the financial year commencing after the expiry of the previous year, *i.e.*, the accounting year in which the income arose on which the tax was recovered.

If the person claiming relief has been assessed in British India the period of limitation for the purpose of section 50 in respect of tax paid before 1st April 1939 will run from the date of recovery of tax after the assessment notwithstanding the fact that a part of the income had been taxed at source on an earlier date. But if the person has not been assessed and his entire income had been taxed at source the period would run from the date of taxation at source or of payment of dividend. In respect of tax paid after 1st April, 1939, limitation is reckoned with reference to the date of origin of the income and not with reference to the date of recovery of tax. The above remarks apply to relief under all the sections in this chapter.

Provisional claims—See notes under section 49. Under departmental instructions in view of the delay in obtaining the necessary documents, provisional claims are allowed to be made within the due date, the evidence being produced afterwards.

Second Proviso—The proviso was inserted in order to meet cases of hardship which were formerly dealt with under executive orders. The Madras High Court drew attention to the need for this amendment when dealing with *Commissioner of Income-tax v. Binny & Co.*, 47 Mad 837; 3 I T C 466. The Select Committee which considered Amending Act XXII of 1930 recommended that the Assistant Commissioner in outlying areas like Sind should be specially empowered to act under this proviso so as to reduce delay in the disposal of claims.

Though it may be impossible for an assessee to ascertain whether or not he is entitled to a refund (under section 48) until an assessment has been made upon him (but he is supposed to know his own income?), the Court has no power to extend the period of limitation laid down in this section. *Adam Haji Dawood & Co. v. Commissioner of Income tax, Burma*, 1936 I T R 100.

Double Income tax relief—Supplementary assessments—Section 49 does not distinguish between original assessments and supplementary assessments under section 34. In the absence of such a distinction an assessee is it would appear not deprived of relief under section 49 if otherwise, supplementary assessment gives him a title to relief. The period of limitation would be that laid down in the main part of the section or that in the provisos according as the claim relates to tax paid before or after 1st April 1939.

CHAPTER VIII

OFFENCES AND PENALTIES

Failure to make payments
or deliver returns or state-
ments or allow inspection

51 If a person fails without reason-
able cause or excuse—

(a) to deduct and pay any tax as required by section 18 or under sub section (5) of section 46

(b) to furnish a certificate required by sub section (9) of section 18 or by section 20 to be furnished,

(c) to furnish in due time any of the returns mentioned in section 19 A, section 20-A, section 21, sub-section (2) of section 22, or section 38,

(d) to produce, or cause to be produced, on or before the date mentioned in any notice under sub section (4) of section 22, such accounts and documents as are referred to in the notice;

(e) to grant inspection or allow copies to be taken in accordance with the provisions of section 39,

he shall, on conviction before a Magistrate, be punishable with fine which may extend to ten rupees for every day during which the default continues

History—In the 1886 Act there was a provision enabling the Commissioner of the Division to remit wholly or in part any fine imposed under the corresponding section. Clause (b) was introduced in 1922. The reference to section 19 A was inserted in 1928 and that to section 20 A in 1933, when those sections were inserted in the Act.

As a consequence of the amendment of section 22 in 1939 making it obligatory for assessees to submit returns *suo motu* section 51 was amended so as to attract it only to failure to submit a return when called for by the Income-tax Officer and not to failure to submit a return *suo motu*.

Reasonable cause—As to the meaning of 'reasonable cause or excuse', compare the notes under section 27. It is for the Magistrate to decide whether there has been 'reasonable cause or excuse' or not.

If a company is not liable to pay tax a certificate under section 20 would be untrue and that would be a reasonable cause for not issuing it. *Baru Lalita v Tata Iron and Steel Co* 1940 I T R 337 (Bom.)

Magistrate—As to the meaning of magistrate see section 2 (8) and notes on it. Only certain magistrates can try cases under sections 51 and 52 of the Income-tax Act.

Previous sanction—See section 53 under which no prosecution can be launched under section 51 except at the instance of the Inspecting Assistant Commissioner.

Compounding of offences—See the same section.

Fines—How levied—A fine for a continuing offence cannot be levied prospectively.

'The proper course seems to me to be to institute further prosecution if there is occasion for it and allow the accused an opportunity of defending before the further fine is imposed per *Best J* in *R v Veeramma* 16 Mad 230 (a case under the Municipalities Act) He could of course be convicted with having persisted in the failure only as regards the past he could not be convicted of a failure in regard to the future —per *Heaton J* in *R v Byramjee* 43 Bom 836 (a case under the Cantonment Act)

The order for payment of so much fine per day so long as the building continues to stand is illegal. The addition of such an order is premature. There must be proof of a continuing offence before the jurisdiction of a Magistrate to make such an order arises —per *Blair J* in *R v Wasir Ahmad* 24 All 309 following *Ramakrishna Biswas v Masundar* 27 Cal 565 (which cites earlier cases) (a case under the Municipalities Act). Clearly this necessitates a separate prosecution for a distinct offence—a prosecution in which a charge must be laid for a specific contravention for a specific number of days for which charge if proved the Magistrate is to impose a daily fine of an amount which is left to him in his discretion to determine. The orders in the present case are bad as being conviction and punishments for offences which the accused persons had not committed with which they were not and could not have been charged at the time the sentences were passed. The effect of such orders would be to deprive the accused persons of the opportunity to deny the commission of the offence or plead extenuating circumstances and to take away from the Magistrate who might have afterwards to levy the fine the discretion vested in him by law to determine the amount that should be inflicted after investigation of the case —per *Parsons and Ranade JJ* in *In re Limbaji Tulsiram* 22 Bom 766 (a case under the Municipalities Act)

The liability to daily fine in the event of a continuing breach has been imposed by the legislature in order that a person contumaciously disobeying an order lawfully issued may not claim to have purged his offence once and for all by payment of the fine imposed upon him for neglect or refusal to comply with the said order. The liability will require to be enforced as often as the Revenue authority may consider necessary by the institution of a second prosecution in which the question for consideration will be how many days have elapsed from the date of the first conviction under this section during which the offender is proved to have persisted in the offence and secondly the appropriate amount of daily fine to be imposed under the circumstances of the case subject to the maximum of Rs 10 per day. Per *Piggott J* in *Emperor v Amir Hasan Khan* (1918) 40 All 569. A person cannot again be prosecuted for the continuance of the same offence before conviction nor can he be separately prosecuted for the continuance of the same offence for each day the offence is continued as a separate and distinct offence under that section before conviction. *Calcutta Corporation v Mattoo Bepah* 13 Cal 108.

Effect of penal assessment—A penal assessment under section 28 for false statement is no bar to prosecution for failing to produce accounts

The two are different offences *R v Hoosanelly & Co*, 1 I T C 48, 43 Mad 498. It is evidently for the department to decide whether to act under section 28 or under section 51 or 52. When the above case was decided, a penal assessment could not be made because of non production of accounts. Since 1st April 1939 such an assessment can be made but, even so all that section 28 (4) bars is a prosecution in respect of the same facts on which a penalty has been imposed.

Service of notice—A conviction under section 34 (b) of the Income-tax Act, 1886 [partly corresponding to section 51 (c) of the present] was not maintained because there had been no formal service of notice as required by section 46 of the 1886 Act [corresponding to section 63 (1) of the present Act read with section 27 of the General Clauses Act X of 1897], the letter having been sent by ordinary post unregistered, *Emperor v Ramacharan* 1 I T C 21.

Imprisonment in default of fine—The question whether a Magistrate can sentence a person to imprisonment in default of payment of fine imposed under this section has not been decided. In *In re Lakma* 18 Bom 400 it was held that a penalty levied under a Municipalities Act is a 'fine', and that imprisonment in default of payment of fine was legal. In *R v Rappel*, 18 Mad 490 a case under a Town Nuisances Act, it was held that a Magistrate could sentence a defaulter to imprisonment. On the other hand in *R v Kutrapa*, 18 Bom 440 and *R v Subramania Iyer*, 20 Mad 385 both cases under the Railways Act it was held that the fact that excess charges were recovered like a fine by the Magistrate did not justify the imprisonment of a defaulter. In *Basantakumari v Calcutta Corporation*, 15 C W N 906 a case under a Municipal Act it was held that in that particular case in which the penalty consisted of a lump fine in the first instance and a continuing fine for the period of continuance of the offence the Magistrate could not impose a sentence of imprisonment in default of payment of fine. But the Court avoided giving a general interpretation of section 25 of the General Clauses Act and the connected sections in the Indian Penal and Criminal Procedure Codes (sections 63-70 Indian Penal Code and 386, *et seq*, Criminal Procedure Code), which govern the subject.

United Kingdom Law—Section 55 of the United Kingdom Act 1842 [sub-sections (1) and (3) of section 107 of the 1918 Act] enacted that 'if any person who ought, by this Act, to deliver any list declaration or statement as aforesaid shall refuse or neglect so to do within the time limited in such notice he shall be liable to a penalty etc. Section 52 [sub-sections (1) and (3) of section 100 of the 1918 Act] requires the assessee to deliver a 'true and correct statement in writing of his income etc.

Inaccurate return—Liable to penalty—A solicitor who had bought the business of another deceased solicitor for a consideration which included an annuity to the widow of the deceased married the widow and discontinued the annuity. Nevertheless, he continued to show the annuity as a deduction from his income as solicitor, in his income-tax returns. No fraud was alleged but it was considered that an inaccurate return furnished through negligence was liable to a penalty.

Per *Lord Loreburn, L C* — 'The revenue is protected against procrastination and carelessness which if practised on any large scale would make this collection of the tax an intolerable business. But I do not think it is true that an innocent mistake exposes a man to these penalties. On the other hand, the making of the return or statement is not always easy, and mistakes may occur notwithstanding that care may have been used to avoid them, still more when proper care has not been used. Accordingly, provision is made for penalties which are to fall in the event either of unpunctuality or of inaccuracy in the return or statement required. But alongside of that are found to be provisions to relieve a man from the penalty if he mends his mistake.'

Per *Lord Atkinson* — '(The law) provides that the person shall declare the truth of the statement, and that the profits are fully stated upon every description of property appertaining to the declarant estimated to the best of his judgment and belief according to the directions and rules of the Act. If, in making this estimate, he applies these rules and directions according to the best of his judgment or belief he is not liable to those penalties though he may have perchance fallen into error. I do not think there is anything in section 129 (section 140 of the 1918 Act) inconsistent with this construction of section 160 (Section 207 and Fifth Schedule of 1918 Act).'

Accordingly, section 129 provides that when he discovers any defect or wrong statement in the statement he has delivered he may correct it. No doubt the words 'and such person shall not afterwards be subject to any proceedings by reason of such omission or wrong statement' would seem to suggest that the person would be liable if he had made a statement not true in fact, though true and accurate according to his belief, but I do not think this is enough to override the plain words of section 190 and the rules. In this case, the question left to the jury was not framed precisely as it should have been. They should, in my opinion, have been asked whether, in their opinion the respondent in making the return applied the Rules in the Schedule according to the best of his judgment and belief. They have found that he was guilty of negligence which I think must be taken to be finding that he did not estimate his gains and profits 'to the best of his judgment and belief according to those rules'.

Per *Lord Gorrell* — 'It would seem therefore that section 55 was intended to impose penalties for breach of the duties imposed and not merely for non delivery. It may be that if a statement is made to the best of the declarant's judgment and belief according to the directions and rules of the Act he is not liable to a penalty merely because there is an innocent error or omission but that is not the case before your Lordships where a return has been negligently made. It is not necessary in my opinion to decide any such point in this case. Moreover it is difficult to suppose that the Crown in such a case would seek to impose a penalty, and even if the attempt were made, the relieving section 129 would come into play'. *Attorney-General v. Till*, 5 Tax Cases 440

In the above case both *Lord Gorrell* and *Lord Shaw* quoted with approval the following remarks of *Lord Stormouth Darling* in *Lord Advocate v Sawers*, 3 Tax Cases 617 —

"If a man were to put in piece of blank paper and call it a statement, or if he were to lodge a statement flagrantly and extravagantly different or incorrect, then according to the argument of the Defender he would be exempt from prosecution, at all events under section 55. The reasonable reading of section 55 is that if there is a failure to deliver the kind of statement required by section 52 either by failure to deliver any statement at all or by delivery of a statement which is untrue or incorrect, then the penalty is incurred."

Inaccurate return—Whether punishable in India—Section 22 (2) prescribes the obligation to furnish a return, in compliance with a notice to be issued by the Income-tax Officer. Rules 19 and 19 A prescribe the forms of returns and the manner in which they shall be verified. As in the United Kingdom, the person filing the returns here should certify that the return is correct according to the best of his knowledge and belief. Under section 22 (3) mistakes can be rectified, and under section 51 (c) an inaccurate return not prepared to the best of the declarant's judgment and belief can apparently be penalised. The fact that under section 52 a deliberately false return can be proceeded against under the Indian Penal Code does not affect this point. In the United Kingdom also, a person can be indicted under the criminal law of the country for furnishing a deliberately false statement or return. The failure under section 51 (c) is not only to furnish the return within the time but to furnish the kind of return contemplated by sections 19 A, 21, 22 and 38. A person could not put in a mere blank piece of paper as his return and seek to escape the penalty under section 51 (c). Similarly, he cannot put in a return which obviously is not prepared according to the best of his knowledge and belief and try to escape section 51 (c). In all such cases, of course, the *onus* would be on the Crown to prove that the offence had been committed.

Prosecution—Neglect to deliver correct returns—Stigma of crime—"If I thought that a judgment against the defender would affix upon him a stigma of crime, then I should certainly be in favour of sending the case to a jury, even though the amount involved is small, but I do not take the view that the result of an adverse judgment would be of that nature. I think, practically speaking, it may leave the defendant's character uninjured." , per the *Lord Ordinary* in *Lord Advocate v A B*, 3 Tax Cases 617.

52 If a person makes a statement in a verification mentioned in section 19-A or section 20-A or section 21 or section 22 or sub-section (2) of section 26-A or sub-section (3) of section 30 or sub-section (3) of section 33 which is false, and which he either knows or believes to be false, or does not believe to be true, he shall be punishable, on conviction before a Magistrate, with simple imprisonment which may extend to six months or with fine which may extend to one thousand rupees or with both.

False statement in declaration.

History—Corresponds to section 35 of the 1886 Act and section 40 of the 1918 Act. This section has undergone several amendments, consequential on changes in other parts of the Act.

The words 'be punishable' onwards were substituted in 1939 for 'be deemed to have committed the offence described in section 177 of the Indian Penal Code'.

References—Section 19 A refers to statements of dividends paid. Section 20-A to those of interest paid. Section 22 to the return of income and sections 30 and 33 to appeals. There is an omission to refer to section 33 A (application to the Commissioner for revision) and also to section 12 A (sharing of managing agency commission).

Scope of this section—Section 51 is designed merely to secure the proper performance of certain duties imposed by the Act on various persons, so the section creates offences out of the non performance of such duties without reasonable excuse. Section 52 on the other hand, deals with offences *per se*.

This section applies only to the items specified. In respect of other false statements *e.g.*, in respect of returns under section 38 (names of partners, beneficiaries, etc.), all that the Income tax Officer can do is to proceed under section 476 Criminal Procedure Code, or under some other provision.

This section has nothing to do with offences under the Indian Penal Code *e.g.* under sections 177, 196, 465 etc., thereof. It was held in *Halkhoriram v Rex*, 1941 I T R 209 (Pat.) that having been acquitted under section 465 the accused could not be placed on trial again under section 196 for an offence based on the identical facts.

Two conditions are precedent to the application of this section *viz.*, (a) the statement should be false and (b) the person making it should have known or believed it to be false or not believed it to be true. The section applies only to wilful falsification of statements and not to cases of inadvertence, mistake or misunderstanding to cover which the Act contains provisions in sections 22 (3) and 34, *Patel v Emperor* 1933 I T R 363.

As to *bona fide* mistakes, see section 22 (3) and notes thereunder.

Person—The word person is used in its ordinary meaning and includes an agent of an assessee making a return on the latter's behalf. *Inspecting Assistant Commissioner of Income tax v Chotabhai Jhaveribhai* 1941 I T R 604 (Mad.).

Section 476 Criminal Procedure Code—The provision in this section is without prejudice to that in section 476 Criminal Procedure Code under which a Court can direct a prosecution in respect of the offences mentioned in that section and committed before the Court. All Income-tax Officers, Assistant Commissioners and Commissioners are evidently Courts for this purpose. *see In re Nataraja Aiyar*, 36 Mad 72 and *In re Punamchand Manehlal* 38 Bom 642.

'It is not necessary that there should be two parties arrayed as opponents in the matter to be decided by the officer. The petitioner had a right that he should not be made to pay a heavier tax than was properly assessable on his income. The officer had to decide as between the petitioner and Government what the petitioner's income was. It

is immaterial that in the appeal the Government would not be named as a respondent. Suppose a trustee or a guardian of an infant makes an application to a Court for leave to sell certain properties of the beneficiary or the ward. There might not be any respondent in the application, yet it cannot be doubted that the order passed would be that of a Court, per *Sundara Aiyar, J.*, in *In re Nataraja Aiyar*, 36 Mad 72.

'The Divisional Officer has been empowered by Government to do justice between itself and the payer of an income-tax on the question as to the extent of his liability to pay such tax and I am therefore clear that he is a Revenue Court. The question who or what is a Court within the meaning of particular enactments is frequently a very difficult question and even the highest tribunals seem to be loth to give any definition which would be comprehensive and exhaustive', per *Sadaswa Aiyar, J.*, *ibid*.

Therefore an Income tax Officer can direct a prosecution, without the sanction of the Assistant Commissioner, in respect of offences committed before him under sections 182, 193 and 196 of the Indian Penal Code, *Hazarilal v Emperor*, 1937 I T R 610 (Nag).

The legal obligation to submit a return will not save a person from prosecution under section 182, Indian Penal Code, if the return of income submitted by him is false *Hazarilal v Emperor, supra*.

Jurisdiction—Magistrate—Who should try—A person making a verification in a statement under section 22 or 30 (3) can legally be tried under section 52 only by a Court having jurisdiction over the place where the verification was made and not by a court having jurisdiction over the place where the Income tax appeal was presented, *In re Mohidin Pakkiri Marakkayar*, 1 I T C 193, 45 Mad 893, A I R 1923 Mad 50.

Offence—When committed—The offence under this section in respect of a return made under section 22 (2) is committed on the day on which the return is verified by the assessee. A revised return filed under section 22 (3) cannot condone the offence under section 52 though it might mitigate it *Ganga Sagar v Emperor*, A I R 1929 All 919 4 I T C 97.

It has been held however that where an incomplete return is made openly with qualifications and under protest a prosecution cannot be made for false verification since, there is no valid return out of which the offence can arise *Champalal Girdharilal v Emperor*, 1933 I, T R 384.

Special Act—Construction in favour of subject—'The person who is supposed to have made a false statement is certainly entitled to have set out the particular statement which is supposed to be false and before an action can be taken under section 193, Indian Penal Code, it is necessary that that statement should be a statement made by a person who was legally bound on oath or by some express provision of law, to state the truth, or being bound by law to make a declaration upon any subject makes any statement which is false and which he either knows or believes to be false or does not believe to be true. The law as ascertained in section 25 of Act II of 1886 lays down how these statements are to be verified and the Act being a Special Act it is to be construed in favour of the subject', per *Knox J.*, in *Jagdeo Sahu v Rex*, 38 I C 993.

Proceedings before an Income-tax Officer do not start till he enquires into the assessee's income and a statement in a return of income is not,

therefore evidence given in a proceeding before the Income tax Officer. A false statement in the verification clause in a return of income is therefore not governed by section 193 of the Indian Penal Code but by section 52 of the Income tax Act which brings it within section 177 of the Indian Penal Code. False evidence produced before the Income-tax Officer under sections 22 (4), 23 (2) and (3) and 37 to support the return of income can be dealt with under section 196 Indian Penal Code irrespective of whether the evidence is produced voluntarily or at the instance of the Income tax Officer, *Hazarilal v Emperor* 1937 I T R 610 (Nag). This case was before 1939 when section 52 merely deemed an offence to be committed under section 177 of the Indian Penal Code.

Returns by persons under no obligation to do so—If a person has not received a notice under section 22 (2) he is under no obligation to furnish a return of income and is not legally bound to furnish any information within the meaning of section 177 of the Indian Penal Code. It has been held accordingly that if such a person submits a false return of income he does not fall within the provisions of section 52 of the Income-tax Act and section 177 of the Indian Penal Code. *Harichand v Emperor* 1934 I T R 336. This case also was before 1939 when the amended section 22 (1) laid down the obligation on assessee to submit returns *suo motu*.

53 (1) A person shall not be proceeded against for an offence under section 51 or section 52 except at the instance of the Inspecting Assistant Commissioner.

(2) The Inspecting Assistant Commissioner may either before or after the institution of proceedings compound any such offence.

Previous law—This section corresponds to section 36 of the 1886 Act and section 41 of the 1918 Act. This section was amended in 1939 so as to place this power in the hands of the Inspecting Assistant Commissioner and to let him compound the offence at any stage. The Select Committee desired that leave of the Court should be necessary to compounding in cases already before the Court but this was not accepted.

When assessee does not gain—In *Attorney General v Lillicrap's Executors* 26 Tax Cases 100 it was held that so long as the conditions laid down in the law (corresponding to sections 51 and 52 of the Indian Act) were fulfilled penalty could be levied irrespective of whether or not the assessee intended in any way to benefit by the false return or statement.

Sub section (2)—The power in sub section (2) is intended to save the harassment of persons but no one can claim that the Assistant Commissioner should use this power in his favour. It is a matter entirely within his discretion. The power can be exercised both before and after proceedings under sections 51 and 52 have commenced and this has been made clear in terms by the amendment in 1939. It would be an abuse of this power to attempt to squeeze the maximum money possible out of the assessee by holding out a threat of prosecution. *Ganga Sagar v Commissioner of Income tax* 4 I T C 97.

Scope of section—The Assistant Commissioner's sanction is required only for the prosecutions referred to in sections 51 and 52. Other prosecutions started under section 476, Criminal Procedure Code, by the Income-tax Officer, as a Court do not require the Assistant Commissioner's intervention. See *Hazarilal v Emperor*, 1937 I T R 610 (Nag.)

The nature of offences under section 51 is quite different from that of offences under section 52, and if a prosecution under both the sections is contemplated, the Assistant Commissioner should expressly sanction prosecution under both the sections. If the Assistant Commissioner has sanctioned prosecution only under one section, it is not open to the Court to convict the accused for an offence under the other section, *Champalal Girdharilal v Emperor*, 1933 I T R 384 (Nag.)

Who should lodge complaint—There is nothing to prevent the Income-tax Officer having jurisdiction over the assessment from lodging a complaint (with the sanction of the Assistant Commissioner) in respect of offences committed in the time of the officer's predecessor in office. It is not necessary that the complaint should be made by the same officer as made the assessment on or otherwise dealt with the false statement in question, *Patel v Emperor*, 1933 I T R 363 (Rang.)

United Kingdom Law—Prosecutions are instituted at the instance of the assessing Commissioners, the administrative machinery for assessment in that country is so radically different from that here as already pointed out in the notes under section 5.

Informers—Though under section 32 of the Inland Revenue Regulation Act, 1890 (provisions like which do not exist in India) the Revenue authorities have power to sanction rewards to informers, there can be no contracts with informers as to the terms on which information would be given or received, for such a contract would be against public policy and could not be permitted except by express enactment, *Edward Riach v Lord Advocate*, 10 A T C 321.

Withholding of prosecution—A compromise entered into between the Revenue and an assessee is binding on the latter the withholding of prosecution being adequate consideration for the compromise. *Attorney-General v Midland Bank*, 13 A T C 602 (K B D). On the other hand if a subject voluntarily pays tax without an assessment on him and such payment is accepted by the Revenue, there is nothing to prevent a formal assessment being made on him and the subject being charged again, *Cokerline & Co v Commissioners of Inland Revenue*, 9 A T C 244 and 396. See also *Shyam Sundar Beharilal's case*, 6 I T C 290 referred to under section 31.

54 (1) All particulars contained in any statement made,

Disclosure of information
by a public servant.

return furnished or accounts or documents produced under the provisions of this Act, or in any evidence given, or affidavit or deposition made, in the course of any proceedings under this Act other than proceedings under this Chapter, or in any record of any assessment proceeding, or any proceeding relating to the recovery of a demand, prepared for the purposes of this Act, shall be treated as confidential, and, notwithstanding anything

contained in the Indian Evidence Act 1872, no Court shall, save as provided in this Act, be entitled to require any public servant to produce before it any such return, accounts, documents or record or any part of any such record, or to give evidence before it in respect thereof.

(2) If a public servant discloses any particulars contained in any such statement, return, accounts, documents, evidence, affidavit, deposition or record, he shall be punishable with imprisonment which may extend to six months, and shall also be liable to fine.

(3) Nothing in this section shall apply to the disclosure—

(a) of any such particulars for the purposes of a prosecution under the Indian Penal Code in respect of any such statement, return, accounts, documents, evidence, affidavit or deposition, or for the purposes of a prosecution under this Act, or

(b) of any such particulars to any person acting in the execution of this Act where it is necessary to disclose the same to him for the purposes of this Act, or

(c) of any such particulars occasioned by the lawful employment under this Act of any process for the service of any notice or the recovery of any demand, or

(d) of any such particulars to a Civil Court in any suit to which Government is a party, which relates to any matter arising out of any proceeding under this Act, or

(e) of any such particulars to the Auditor-General of India for the purpose of enabling him to discharge his functions under section 144 of the Government of India Act, 1935, or

(f) of any such particulars to any officer appointed by the Auditor-General of India or the Central Board of Revenue to audit income-tax receipts or refunds, or

(g) of any such particulars, relevant to any inquiry into the conduct of an official of the Income-tax Department, to any persons appointed Commissioners under the Public Servants (Inquiries) Act, 1850, or to an officer otherwise appointed to hold such enquiry, or to a Public Service Commission established under the Government of India Act, 1935, when exercising its functions in relation to any matter arising out of any such inquiry, or

(gg) of any such particulars, relevant to any enquiry into a charge of misconduct in connection with income-tax proceedings against a lawyer or registered accountant to the authority referred to in sub-section (3) of section 61, when exercising the functions referred to in that sub-section, or

(h) of any such particulars occasioned by the lawful exercise by a public servant of his powers under the Indian Stamp Act, 1899, to impound an insufficiently stamped document, or

(i) of such facts, to an authorised officer of the United Kingdom, or of any Indian State or of any part of His Majesty's Dominions which has entered into an agreement with British India for the granting of double taxation relief, as may be necessary for the purpose of enabling such relief or a refund under section 49 of this Act to be given, or

(j) of such facts, to an officer of a Provincial Government, as may be necessary for the purpose of enabling that Government to levy or realise any tax imposed by it on agricultural income, or

(k) of such facts, to any authority exercising powers under the Sea Customs Act, 1878, or any Act of the Central Legislature imposing a duty of excise as may be necessary for enabling it duly to exercise such powers, or

(l) of such facts, to any person charged by law with the duty of enquiring into the qualifications of electors, as may be necessary to establish whether a person is or is not entitled to be entered on an electoral roll, or

(m) of so much of such particulars, to the appropriate authority, as may be necessary to establish whether a person has or has not been assessed to income tax in any particular year or years, where under the provisions of any law for the time being in force such fact is required to be established

(4) Nothing in this section shall apply to the production by a public servant before a Court of any document, declaration or affidavit filed, or the record of any statement or deposition made in a proceeding under section 25 A or section 26-A, or to the giving of evidence by a public servant in respect thereof

(5) No prosecution shall be instituted under this section except with the previous sanction of the Commissioner

History—Corresponds to section 42 of the 1918 Act and section 38 (2) and (3) of the 1886 Act. The section was expanded in 1922 again twice successively in 1933 and again in 1939-1940 and 1941

Applies to all records—While the Act of 1918 merely penalised the disclosure by a public servant of the particulars contained in any statement or return furnished under the Act section 54 further penalises the disclosure of any particulars contained in any accounts or documents produced under the Act or in any evidence given or deposition made in the course of proceedings under the Act or in any record of an assessment proceeding or proceedings for recovery of a demand and debars the Court except in the

specified cases from requiring public servants to produce income tax records or to give evidence respecting the same

Apart from the particular cases referred to in sub section (3) all records are strictly confidential. This prohibition applies to furnishing information to other Government departments and local authorities except to the extent specifically authorised in sub section (3). The following persons are in practice, allowed to inspect income tax returns, *viz*, (a) the person who made the return (b) a partner (known to be such) in a firm—whether registered or not—to which the return relates and (c) the manager of a Hindu undivided family to whose income the return relates or an adult member of the family on whom a notice or requisition has been served under section 63 (*See* Income tax Manual)

Supply of copies to agents—*See* notes under section 61

"Public Servant"—*See* S 2 (13)

United Kingdom Law—There is no similar provision in the English Acts, but every officer charged with duties under the Income tax Act has to make a declaration as to secrecy, and the Courts have almost invariably upheld the privilege of the Crown not to produce such evidence. There are numerous cases on the subject of which a few may be cited *Christie v Crank*, 37 Sc.L.R. 503, *Keir v Outram*, 51 Sc.L.R. 8, *In re Joseph Hargreaves*, 4 Tax Cases 173

Prosecution of assessee—In *R v Barker* (1941) 2 K.B. 381, (1941) 3 All E.R. 33, it was held that disclosures made by an assessee to the Revenue authorities in response to the promise of the latter not to prosecute the assessee must not be used in criminal proceedings against the assessee but this decision has been modified by section 34 of the United Kingdom Finance Act of 1942

Returns—When admissible in evidence—A certified copy of an Income tax Return obtained by a person other than the assessee is not admissible as evidence under the Indian Evidence Act, because the disclosure of the return is prohibited by section 54 of the Income tax Act *Anwar Ali v Tafazzal Ahmad* 1 I.T.C. 377 (Rang). A Court is precluded not only from calling for documents etc. produced before Income tax authorities but even from asking public servants to depose that particular accounts or documents have been produced before such authorities, *Sayad Ashgar Ali Shah v Achrumal and another*, 1934 I.T.R. 384 (Lah.)

The object of this section being to make the income-tax returns confidential as between the assessee and the Income tax Department and against the whole world except for certain limited purposes provided by the section itself it would clearly be an evasion of this prohibition if a party in a Court of law were to force the other party to obtain and furnish information from the Income tax Officer against the interest of the (second) party which the first party could not obtain for himself. If somehow, such information has been obtained by the first party, it is inadmissible in evidence unless the second party desires its retention, *Ma Hla Mra Khine v Ma Hla Kra Pru* 1938 I.T.R. 663

According to the Calcutta High Court, *Pramathanatha Pramanick v Nirode Chandra Ghose*, 1939 I.T.R. 570 while an assessment order is a public document within the meaning of section 74 of the Evidence Act, it is not covered by section 76 since no one has a right to inspect it or to demand a certified copy of it. Therefore even if the Income tax Officer gives a certified copy such copy is not covered by section 77. An assessee can

no doubt waive the privilege of secrecy provided by section 54 of the Income-tax Act, but it would be a startling thing if a joint assessee were to be permitted to use a copy of an Income tax document to the detriment of his co-assessee and in contentious proceedings between them. The judgment made no reference to the exception in sub section (4) of section 54 of the Income-tax Act, in respect of proceedings under section 25 A and section 26-A of the same Act.

According to the Bombay High Court also *Devdutt Ramniranjandas v Shriram Narayandas*, 56 Bom 324, certified copies of Income tax returns are not admissible as evidence, since no one has a right to inspect such documents and the Income-tax Officer is under no obligation to give certified copies. The Court considered, however, that it was open to the assessee or other person concerned to produce secondary evidence on such matters to the extent permitted by the Evidence Act.

There have been several cases before the Madras High Court. In *Noone Varadarajan Chetti v Vutukuri Kanakiah*, 1939 I T R 331, it was held that inasmuch as section 54 while laying a prohibition on the Court confers no exemption on the Income tax Officer who is amenable to the processes of the Court, secondary evidence of the contents of Income-tax documents was admissible as evidence. The judgment did not consider the rulings of other Courts. In *Pentapathi Venkatramana v Pentapathi Varahulu*, 1939 I T R 560, it was held that the record of a statement on oath before an Income-tax Officer by an assessee is a public document and that a certified copy thereof, if granted by the Income tax Officer is admissible in evidence. Section 76 of the Evidence Act, according to this ruling was merely permissive, and not exhaustive and there was nothing illegal in granting certified copies of such statements to assesseees including partners in a firm under assessment. In *Mythili Ammal v Janaki Ammal*, 1939 I T R 657, it was held that a return of income is not a public document within the meaning of section 74 of the Evidence Act since it is neither part of the act, nor part of the record of the act, of the Income tax Officer, which is performed only when he assesses the income of the assessee and determines the sum payable by him. The record of this act is the notice of demand under section 29 of the Income tax Act. Therefore, though an Income-tax Officer could give certified copies of returns for the private use of the assessee a third person who has somehow come into possession of these certified copies cannot use them to his own advantage by tendering them as evidence.

The position was reviewed by a Full Bench of the same Court in *Ramareo v Venkataramayya*, 1940 I T, R 450. According to this ruling not only records of statements on oath before the Income-tax Officer but returns, accounts and other documents forming part of the record of assessment in the office of the Income tax Officer are public documents since they form a part of the records of his acts, just as plaints written statements and the like are the records of a case in a Court. In this respect, there is no difference between the parts of the record prepared by the Income-tax Officer himself and the parts which contain the information called for by him or admitted by him into the record for the purpose of assessment. It is also not correct to say that no one has a right to inspect such documents, for the Income-tax Officer would not be doing his duty if he refused to an assessee this right and thus made it difficult for him to object to a wrong assessment. Moreover, there is nothing unlawful in giving a certified copy to the assessee himself. It was accordingly held that certified copies of such

documents, when presented by the assessee, can be admitted as evidence under section 65 (c) of the Evidence Act. While an assessee may produce such certified copies as evidence, others cannot compel him to produce them. *Velayudam Pillai v Subramania Pillai*, 1941 I T R 275. Even in a dispute between partners, the Income-tax Officer is precluded from disclosing particulars of Income-tax records except to the extent expressly permitted by section 54 of the Income-tax Act (*e.g.*, sub-section (4)), *Rangasami Naicker v Raju Naicker, etc.*, 1941 I T.R. 693.

According to the Bombay High Court in *R v Osman Chotani*, 1942 I T R 429, section 54 enjoins secrecy on the part of Income tax authorities and prohibits Courts from calling for Income-tax records, the section does not say that such records must not be admitted as evidence, if otherwise admissible. It only prohibits those public servants to whom disclosure has been made under the Income-tax Act, from disclosing information and not all public servants. And, therefore, where a police officer searched certain premises of an Income-tax Office, seized certain documents and produced them before the Court, the documents were admitted as evidence.

According to the Allahabad High Court also, *Suraj Narain v Seth Jhabulal, etc.*, 1945 I T.R. 13, section 54 is intended only to prevent Income-tax Officers from betraying the confidence vouchsafed to them, and not to prevent the assessee from himself disclosing the contents of the documents relating to his assessment. An assessment order is a public document under section 74 of the Evidence Act and a certified copy of it is admissible in evidence under section 65 *ibid*. A certified copy of the assessment order is therefore admissible to prove that the assessee is a partner in a firm.

CHAPTER IX

SUPER-TAX.

55. In addition to the income-tax charged for any year, there shall be charged, levied and paid for that year in respect of the total income of the previous year of any individual, Hindu undivided family, company, local authority, unregistered firm or other association of persons, not being a registered firm, or the partners of the firm or members of the association individually, an additional duty of income-tax (in this Act referred to as super-tax) at the rate or rates laid down for that year by Act of the Central Legislature :

Provided that where under the provisions of clause (b) of sub-section (5) of section 23 an unregistered firm has been assessed in the manner applicable to a registered firm, super-tax shall be payable by each partner of the firm individually on his share in the income, profits and gains of the firm and not by the firm itself :

Provided further that, where the profits and gains of an unregistered firm or other association of persons not being a company have been assessed to super-tax, super-tax shall not be payable by a partner of the firm or a member of the association as the case may be, in respect of the amount of such profits and gains which is proportionate to his share.

History—Super tax was first imposed in India in 1917. The tax was then levied on much the same lines as now, except that companies were taxed on a graduated scale exactly like individuals, but only on the undistributed profits and gains (there was also no distinction between registered and unregistered firms) or the profits not paid or allotted to partners. The law was altered in 1920, and companies were taxed on the whole of their profits (with a free allowance till 1939) but at a flat and comparatively low rate. The rates are, since 1922, regulated by the Finance Act and not by the Income-tax Act itself. The reference to 'other association of individuals' was inserted by Act XI of 1924. The word 'Central' was substituted for 'Indian' by the Government of India (Adaptation of Indian Laws) Order, 1937. Further changes were made in 1939 making the second proviso cover cases of non-descript associations also and also altering the main part of the section and inserting the first proviso so as to be in consonance with sections 3, 23 (5) and other sections which were also amended.

Super tax—The provisions of the Act regarding income tax other than those specially excepted in section 58 apply also to super tax which is merely, as stated in section 55, 'an additional duty of income-tax.' Super tax is levied at the rates specified in the Finance Act.

How levied—The super tax on companies and on local authorities is levied at a flat rate on the whole of the profits. No refund on account of super tax on companies is allowed to shareholders.

Super tax on assesseees other than companies and local authorities is levied on a scale of graduated rates.

Hindu undivided families are treated, for purposes of super tax, as for income-tax purposes as separate assesseees.

Unregistered firms and non-descript associations are also treated as separate assesseees. Where however, such a firm or association is not assessed to super tax, i.e., if the total income of the firm or association is below the taxable limit or if an unregistered firm is treated as registered under section 23 (5) the income or share which any individual member of the unregistered firm or association is entitled to or receives from the firm or association is included in his total income.

Registered firms are not assessed to super tax but the shares of partners in registered firms are included in the total income of the individual partners on which super tax is levied and similarly, the dividends of shareholders received from companies are included in the individual income of those shareholders.

Total income—The tax is levied on 'total income', and 'total income' in all cases means exactly the same thing as total income calculated for income-tax purposes with the exception that where an unregistered firm or non-descript association is itself assessed to super tax the share of the profits of a member of the firm or association is excluded from his total income for super tax purposes. See however sections 56 and 58.

No separate assessment for super tax—An assessment made under section 23 or 34 can include both the assessment for super tax and for income tax, and it is not necessary for the Income-tax Officer to pass two separate assessment orders. English decisions as to the effect of an income-tax assessment on the super tax assessment are not relevant the machinery and procedure in England for the two taxes being different from each other.

References—See also notes under section 2 (6)—Company, 2 (9)—Hindu Undivided Family, 2 (14)—Registered firm 2 (16)—Unregistered

firm, section 3—Association of persons, Also, under section 16—Definition of 'total income' and 'previous year', section 2 (11) and section 4 (3) (iii)—local authorities

Registered firms—The registration of a firm in the manner prescribed under the Act is a condition precedent to the right of the Revenue to proceed under this section, *see*, to tax the partner instead of the firm, *C T A C T Nachiappa Chettiar v Commissioner of Income tax, Burma*, 1933 I T R 330 Since 1939, if an unregistered firm is treated as registered under section 23 (5), it shall be so treated for super-tax also

Individual—This word was used in the proviso before 1939 in referring to a partner in an unregistered firm and it was held that it was used in a wide sense, and under the proviso, a Hindu undivided family having a share in an unregistered firm was not liable to pay super-tax in respect of its share of profits if the firm had been taxed In *re Ramratardas v Madangopal*, 1935 I T R 183 (All) Though the same word had been used both in the main section and in the proviso it was considered permissible to interpret it in two different senses in order to obviate the anomaly that would otherwise arise This question of the meaning of the word 'individual' does not arise now The adverb 'individually' now occurring can only mean separately as distinguished from the group *See also* notes under section 2 (6-B) and in particular *Chandrika Prasad Ram Sarup v Commissioner of Income tax U P*, 1939 I T R 269 (All) as to firms being partners

Free of super-tax—As regards payments free of super tax' *see* notes under section 3 Also the cases referred to *infra*

Deduction of super-tax at source—*See* section 18 sub sections (2), (2 B) (3 B), (3 C), (3 D) and (3 E), and also section 58-H *See also* section 58 (2)

United Kingdom Law—In the United Kingdom no super tax is paid by companies or firms, the tax is levied on individuals only A tax corresponding to the company super-tax in British India called the Corporation Profits Tax was levied on companies between 1920 and 1924 and this was permitted to be deducted from the profits as a business expense for the purpose of computing income tax It was treated for the purpose like the Excess Profits Duty and the present Excess Profits Tax

Super tax was replaced by a sur tax in the United Kingdom with effect from 1929-30 In essential features the old super tax and the new sur tax are the same despite differences in mode of incidence and of collection *see per Bennett J*, in *Hulton*, In *re Hulton v Midland Bank Executor & Trustee, Ltd*, (1930) 99 L J Ch 316, (1931) 1 Ch 77, and *per Lord Hanworth, M R*, in *Reckitt* In *re Reckitt v Reckitt*, (1932) 2 Ch 144

In the United Kingdom, when income due over a long period is accumulated and received at one time the Acts and certain rulings, *c g*, *Harvey v Commissioner of Inland Revenue*, 9 Tax Cases 331 and *Commissioners of Inland Revenue v Earl Haddington* 8 Tax Cases 711, permitted the spreading of the income over the years to which is related The law was amended in 1927 Such spreading had at no time been authorised in India, where the liability is governed by sections 7, 8 and 13

Super-tax—Reimbursement of—Whether included in income—Under the will of her late husband an assessee received a certain income, and in addition an annuity just enough to reimburse all super tax payable

by her. She was assessed to super tax for the year 1913-14, and the Trustees under the will paid the tax charged under the assessment out of the Trust moneys held by them from which income-tax had been deducted at the source. An additional assessment to super tax for the year 1914-15 in respect of the super-tax thus paid by the Trustees on the assessee's behalf and of the income-tax applicable thereto was made upon the assessee. *Held*, that the additional assessment had been correctly made, and that the amount of the super tax paid for the assessee *plus* the income-tax applicable to that amount formed part of her total income for the purpose of super tax, *Mrs M M A S Meeking* (In the names of J. C M A. Wilson and H Johnson) v *The Commissioners of Inland Revenue*, 7 Tax Cases 603

Dividends—Free of income-tax—Gross dividend chargeable to super-tax—An assessee owned certain ordinary shares in a company, and, under the authority of a resolution of the Directors duly confirmed by the company at its annual general meeting, the dividends upon these shares had been paid 'free of income-tax'. In making the super tax assessments, the Special Commissioners computed the income derived from these dividends as follows—Assuming the amount of the "tax free" dividend to be £100 and income tax at a uniform rate of 1s 2d to apply the whole period in respect of which such dividend was paid

Actual amount of dividend received "free of tax"	£100 0 0
Add Income-tax at 1s 2d, i e, 1s 2d for every 18s 10d	£ 6 3 10
Gross amount of dividend receivable	£106 3 10

Held, that the amount to be included in the assessee's return of total income for purposes of super tax was not the amount of dividend actually received by him, but that amount, with the addition thereto of the amount of income-tax in respect of it as above set out, *Ashton Gas Company v Attorney General*, (1906) A C 10, followed in *Samuel v Commissioners of Inland Revenue*, 7 Tax Cases 277, (1918) 2 K B 553

(Section 16 of the Indian Act directly provides for this, and under section 56 the total income for income-tax is also the total income for super-tax.)

56. Except in cases to which section 15-A applies or to which by-clause (a) of the proviso to sub-sections (3) and (4) of section 25, those sub-sections do not apply, and subject to the provisions of this Chapter, the total income of *any individual, Hindu undivided family, company, local authority, unregistered firm or other association of persons* shall, for the purposes of super-tax, be the total income as assessed for the purposes of income-tax, and where an assessment of total income has become final and conclusive for the purposes of income-tax for any year, the assessment shall also be final and conclusive for the purposes of super-tax for the same year.

History—See section 2 of the Super-tax Act of 1917 and section 3 of the Super tax Act of 1920. The section was amended in 1924, 1925, 1928,

1939 and 1944 The beginning words referring to section 25 were added in 1944 in order to remove an anomaly dating from a long time See notes under section 25 The reference to section 15 A was made by the Amending Ordinance of 1945 relating to earned income relief

United Kingdom Law—See section 5 of the Income-tax Act of 1918 and *National Provident Institution v Brown* 8 Tax Cases 57 and *Fitzgerald v Inland Revenue*, 7 Tax Cases 284

Section 57 which provided for the recovery of super tax from the share of profits of a non resident partner in a registered firm from the resident partners who are held jointly and severally liable for the same was deleted in 1939 as these provisions have been incorporated in other parts of the Act

58 (1) All the provisions of this Act, relating to the charge, assessment, collection and recovery of income-tax except those contained in section 3, the second proviso to sub-section (1) of section 7, the second and third provisos to section 8, clauses (a) and (b) of sub-section (2) of section 14, and sections 15, 15-A, 19 and 20 and the first proviso to sub-section (1) of section 41 and section 58-F and sub section (2) of section 58-G shall apply, so far as may be, to the charge assessment, collection and recovery of super-tax

(2) Save as provided in sub sections (2), (2-A), (2-B), (3-B), (3-G), (3-D) and (3-E) of section 18, and section 58-H super-tax shall be payable by the assessee direct

History—See sections 3 and 6 of the 1920 Act and section 8 of the 1917 Act Subsequent changes were made in 1926 1929 1933 and 1939 and in 1941 all of them consequential on changes in other parts of the Act The last change made in 1941 was consequent on the amendment of sections 14 and 17 seeking to tax income in Indian states of residents in British India on a remittance basis clause (c) of sub-section (2) of section 14 relates to such income The reference to section 15 A was added by the Ordinance of 1945 relating to earned income relief

Sub section (1)—Section 3 is the charging section for Income tax The second proviso to sub-section (1) of section 7 relates to the exemption of deductions under the authority of Government from the salary of a person for the purpose of securing to him a deferred annuity or of making provision for his wife or children

The provisos to section 8 referred to relate to tax free securities

Clause, (a) and (b) of sub section (2) of section 14 relate to the exemption from tax of the share of a person's income from an unregistered firm or non descript association which has paid tax Section 15 relates to the exemption of provision for life insurance and section 15 A to earned income relief

Section 19 relates to the payment direct of Income tax in cases other than those falling under section 18 section 20 to the issue of certificates on account of Income tax to shareholders by companies the first proviso to section 41 (1) refers to taxation at the maximum rate of income-tax of trustees in cases where the shares of beneficiaries are indeterminate sec-

tion 58-F to the exemption of annual accretion in certain provident funds from income-tax, and sub-section (2) of section 58-G to the exemption from income-tax of accumulated balances in the above funds

All the other provisions of the Act apply in respect of super tax. The case of *Batuk Prasad Ahari*, 5 I T C 138 (All) referred to under section 28 is obsolete in view of the amendment of that section in 1939

Sub section (2)—With the exceptions in the specified sub section of section 18 and section 58-H super tax cannot be deducted at source but should be collected only from the assessee including an agent who is assessed after an assessment under section 23 or other appropriate section and the issue of a notice of demand under section 29

United Kingdom Law—In the United Kingdom also no abatement is made for super tax on account of premia paid for Life Insurance or subscriptions to Provident Funds or interest from Tax free Securities. But the administrative machinery for assessing Super tax is different from that for assessing Income-tax see notes under section 5

CHAPTER IX A

SPECIAL PROVISIONS RELATING TO CERTAIN CLASSES OF PROVIDENT FUNDS.

General—This Chapter along with consequential amendments in sections 4 (3) 15 and 58 was introduced by Act XII of 1929 and has been since amended in detail in a few places. The concessions were extended in 1939 to employees of a person exercising a profession or vocation

The main features of the concessions are (a) The contributions of the employer and the employee together will be exempt from income tax up to a limit of one-sixth of the employee's salary or Rs 6 000 whichever is less (b) In addition to the above the employee can get abatement of income tax on account of insurance premia on the difference between one-sixth of his total income (Rs 6 000 if less) and one-sixth of salary or such lower amount on which he may receive exemption under section 58 F (c) Interest on contributions including accumulations is exempt from income tax up to a rate laid down by the Central Government now 6 per cent per annum (d) The interest on the investments of the funds is exempt from income-tax (e) The annual accretion to an account that is the increase in the balance both on account of contributions and on account of interest is deemed to be received by the employee every year and taxed accordingly subject to the above exemptions (f) The accumulated contributions including interest are exempt from both income tax and super tax when paid except in the case of employees with less service than five years who however can be exempted in certain circumstances by the Commissioner

The conditions of recognition of funds are set out in sections 58 C and D. The most important conditions are the vesting of the fund in trustees under irrevocable trusts the regularity of saving i.e. of contributions and the non recoverability by the employer except in specified circumstances and within strict limits of sums from the fund

58 A In this Chapter, unless there is anything repugnant in the subject or context,—

Definitions.

(a) a "recognised provident fund" means a provident fund which has been and continues to be recognised by the Commissioner in accordance with the provisions of this Chapter,

(b) an "employer" means—

(i) a Hindu undivided family, company, firm or other association of persons, or

(ii) an individual engaged in a business, profession or vocation whereof the profits and gains are assessable to income-tax under section 10, maintaining a provident fund for the benefit of his or its employees,

(c) an "employee" means an employee participating in a provident fund, but does not include a personal or domestic servant,

(d) a "contribution" means any sum credited by or on behalf of any employee out of his salary, or by an employer out of his own monies, to the individual account of an employee, but does not include any sum credited as interest,

(e) the "balance to the credit" of an employee means the total amount to the credit of his individual account in a provident fund at any time,

(f) the "annual accretion" to the balance to the credit of an employee means the increase to such balance in any year, arising from contributions and interest,

(g) the "accumulated balance due" to an employee means the balance to his credit, or such portion thereof as may be claimable by him under the regulations of the fund, on the day he ceases to be an employee of the employer maintaining the fund, and

(h) the "regulations of a fund" means the special body of regulations governing the constitution and administration of a particular provident fund

Notes—These definitions are special ones intended for this Chapter only

(a) Has been and continues to be recognised. As regards the according and withdrawal of recognition—see section 58 B

(b) Association of persons—this is intended to cover cases like Chambers of Commerce which are associations of associations. See notes under section 3

In (i) it is not necessary that the employer should engage in a business or a profession. For example a University School Hospital or Public Library can obtain the benefits of this Chapter. It is only in (ii) i.e. when the employer is an individual that he should be engaged in business or in a profession

(c) All employees whether paid salaries or wages are eligible excepting domestic and personal servants. see notes under section 58 C (b)

(d) Popularly and also in the Provident Funds Act 1925 the employee's contributions are usually called Subscriptions and the employers' Contributions. The Act uses Contributions to cover both

(e) The balance obviously includes interest

(f) The need for and the importance of this definition will be seen from section 58-E.

(g) This definition has been framed so as to be applicable to all funds and has no reference to the regulations embodied in this Act and the rules thereunder

58 B (1) The Commissioner of Income tax may accord recognition to any provident fund which,

The according and with
drawal of recognition

in his opinion, satisfies the conditions prescribed in section 58 C, and the rules made thereunder, and may, at any time,

withdraw such recognition if, in his opinion, the provident fund contravenes any of those conditions

(2) An order according recognition shall take effect on such date as the Commissioner may fix in accordance with any rules the Central Board of Revenue may make in this behalf, such date not being later than the last day of the financial year in which the order is made

(3) An order withdrawing recognition shall take effect from the day on which it is made

(3 A) An order according recognition to a provident fund shall not, unless the Commissioner otherwise directs, be affected by the fact that the fund is subsequently amalgamated with another provident fund on the occurrence of an amalgamation of the undertakings in connection with which the two funds are maintained, or that it subsequently absorbs the whole or a part of another provident fund belonging to an undertaking which is wholly or in part transferred to or merged in the undertaking of the employer maintaining the first mentioned fund

(4) An employer objecting to an order of the Commissioner refusing to recognise or an order withdrawing recognition from a provident fund may appeal, within sixty days of such order, to the Central Board of Revenue

The appeal shall be in the form and shall be verified in the manner prescribed by the Central Board of Revenue

RULES

Rule 10 of the rules made by the Central Government lays down that the application for recognition shall be made by the employer and prescribes the procedure for obtaining recognition and Rule 14 of the same rules lays down that before withdrawing recognition the Commissioner shall give an opportunity to show cause to the contrary to the employer and to the trustees of the fund

Rule 3 of the rules made by the Central Board of Revenue gives the date from which an order of recognition shall take effect.

Changes in the section—Sub-section (2) was deleted and sub-section (4) as renumbered was amended in 1939 so as to provide in terms for an appeal against an order withdrawing recognition. Sub-section (3-A) was added in 1940.

Limitation—See section 67-A as regards the computation of limitation for the purposes of appeal.

Appeal to Appellate Tribunal and reference to High Court—No appeal lies under this section 30; hence no appeal lies to the Tribunal or a reference on questions of law to the High Court.

Withdrawal of recognition by the Central Government—The special, overriding power (in old sub-section (2)) which Government kept in reserve against possible abuse of the spirit of the concessions while satisfying the letter of the various conditions laid down was removed in 1939.

Amalgamations—It will be seen that sub-section (3-A) does not require the second fund to be a recognised one

Conditions to be satisfied
by a recognised provident
fund.

58-C. (1) In order that a provident fund may receive and retain recognition, it shall satisfy the conditions set out below and any other conditions which the Central Government may, by rule, prescribe,—

(a) All employees shall be employed in India, or shall be employed by an employer whose principal place of business is in British India.

Provided that the Commissioner may, if he thinks fit, and subject to such conditions, if any, as he thinks proper to attach to the recognition, accord recognition to a fund maintained by an employer whose principal place of business is not in British India notwithstanding that a proportion not exceeding ten per cent. of the employees is employed outside India.

(b) The contributions of an employee in any year shall be a definite proportion of his salary for that year, and shall be deducted by the employer from the employee's salary in that proportion, at each periodical payment of such salary in that year, and credited to the employee's individual account in the fund.

Provided that an employee who retains his employment while serving in His Majesty's Forces or when taken into or employed in the national service under the National Service (European British Subjects) Act, 1940, or the National Service (Technical Personnel) Ordinance, 1940, may, notwithstanding that he receives from the employer no salary or a salary less than he would have received had he not entered His Majesty's Forces,

or been so taken into or employed in the national service, contribute to the fund during his service in His Majesty's Forces or while so taken into or employed in the national service a sum not exceeding the amount he would have contributed had he continued to receive from the employer the same salary (including increments, if any) as he would have received had he not entered His Majesty's Forces or been taken into or employed in the national service.

(c) Subject to the provisions of section 58-D the contributions of an employer to the individual account of an employee in any year shall not exceed the amount of the contributions of the employee in that year, and shall be credited to the employee's individual account at intervals not exceeding one year.

(d) The fund shall consist of contributions as above specified and of donations, if any received by the trustees, of accumulations thereof, and of interest (simple and compound), credited in respect of such contributions, donations and accumulations, and of securities purchased therewith and of no other sums.

(e) The fund shall be vested in two or more trustees or in the Official Trustee, under a trust which shall not be revocable save with the consent of all the beneficiaries.

(f) The employer shall not be entitled to recover any sum whatsoever from the fund, save in cases where the employee is dismissed for misconduct or voluntarily leaves his employment otherwise than on account of ill-health or other unavoidable cause before the expiration of the term of service specified in this behalf in the regulations of the fund.

In such cases the recoveries made by the employer shall be limited to the contributions made by him to the individual account of the employee, and to interest (simple and compound) credited in respect of such contributions and accumulations thereof, in accordance with the regulations of the fund.

(g) The accumulated balance due to an employee shall be payable on the day he ceases to be an employee of the employer maintaining the fund.

(h) Save as provided in clause (g), or in accordance with such conditions and restrictions as the Central Government may, by rules, prescribe, no portion of the balance to the credit of an employee shall be payable to him.

(2) Where there is a repugnance between any regulation of a recognised provident fund and any provision of this Chapter or of the rules made thereunder, the regulation shall, to the extent of the repugnance, be of no effect.

The Commissioner may, at any time, require that such repugnance shall be removed from the regulations of the fund.

Changes—The provisos to clauses (a) and (b) of sub-section (1) and the reference to 'donations' in clause (d) were all added in 1940.

"Any other conditions"—The following rule has been made by the Governor General in Council—

R 3—Where the employer is not a company as defined in Clause (2) of section 2 of the Indian Companies Act, 1913, the contributions made by employees after the date of recognition of a provident fund and the interest on the accumulated balances of such contributions shall be wholly invested in securities of the nature specified in clauses (a), (b), (c), (d) or (e) of section 20 of the Indian Trusts Act, 1882, and payable both in respect of capital and of interest in British India or in a Post Office Savings Bank Account in British India

Section 20 of the Indian Trusts Act, 1882—Where the trust property consists of money and cannot be applied immediately or at any early date to the purposes of the trust, the trustee is bound (subject to any direction contained in the instrument of trust) to invest the money on the following securities, and on no others—

(a) in promissory notes, debentures, stock or other securities of the Government of India, or of the United Kingdom of Great Britain and Ireland,

(b) in bonds, debentures and annuities charged by the Imperial Parliament on the revenues of India,

(c) in stock or debentures of, or shares in, Railway or other Companies the interest whereon shall have been guaranteed by the Secretary of State for India in Council,

(d) in debentures or other securities for money issued by, or on behalf of, any municipal body under the authority of any Act of a legislature established in British India,

(e) on a first mortgage of immovable property situate in British India, Provided that the property is not a leasehold for a term of years and that the value of the property exceeds by one-third, or, if consisting of buildings, exceeds by one half, the mortgage money, or

(f) on any other security expressly authorised by the instrument of trust, or by any rule which the High Court may from time to time prescribe in this behalf

Provided that, where there is a person competent to contract and entitled in possession to receive the income of the trust property for his life, or for any greater estate, no investment on any security mentioned or referred to in clauses (d), (e) and (f) shall be made without his consent in writing "

Notes—The securities referred to above exhaust the investments that can be made. Other securities, however sound, e.g., securities on which the Imperial Bank of India is authorised to lend are excluded. It should be particularly noted that the restriction applies only to employee's contributions and interest thereon after the date of recognition. There is no restriction on the investment of other sums, i.e., "transferred balances" see section 58 (J) (2) and employers' contributions

The condition that the securities should be payable in British India both in respect of capital and of interest is also important

A reasonable time will be allowed within which to invest the amounts

Clause (a)—“All employees” evidently refers to all employees subscribing to the fund (*see* definition in section 58-A) and not all employees whether subscribing to the fund or not of the particular employer. If the foreign staff of an employer whose principal place of business is in British India subscribe to the fund, they will, as the law stands, get the benefit of exemption from tax of income from investments of the fund though not any rebate of tax on salary except in the rare cases in which under section 18 (2 B) tax is deducted at source. It is doubtful however whether the employer can deduct from his British Indian profits the contribution made by him to his non British Indian staff unless the foreign profits also are taxed in British India, for obviously no allowance can be claimed in respect of non taxable income. *See* notes under section 10 (2).

Note the use of the word ‘India’ in the first part of the clause and of ‘British India’ in the second part. Under the first part, it is immaterial where the principal place of business of the employer is located so long as all the employees are employed in India, *i.e.*, British India or Indian States. Under the latter part it is immaterial where the employees are employed so long as the principal place of business is in British India.

The proviso to the clause, added in 1940, is intended to deal with cases in which only a small minority of employees of an employer whose principal place of business is outside British India are employed outside British India. Where such employees outside British India exceed ten per cent, the Commissioner will not recognise the fund unless the employees serving outside are excluded from the fund.

Clause (b)—*Definite proportion* should not fluctuate at anybody’s discretion but should be laid down—even though within varying limits—by the regulations of the fund. *See* section 58-D as regards contributions of a contingent nature.

A fund will not be ineligible for recognition merely because its securities are revalued periodically and the changes in the value of the securities taken into account before allocating to each member his share of profit.

Deducted at each periodical payment, etc.—The employee’s contributions must be deducted when salary is paid and at once credited to his account in the fund. It cannot be collected at longer intervals.

“Salary” as used in this Chapter is not used in the same sense as in section 7, but is confined to regular, periodical payments of salary, wages, etc. The definition of ‘employee’ in sub-section (c) of section 58-A which excludes only one class of wage-earners, *viz.*, personal and domestic servants makes it clear that ‘salary’ as used in this Chapter includes “wages” also. As regards the distinction between “salary” and “wages”, *see* notes under section 7.

Clause (c)—The object of this sub-section is to prevent abuse which is otherwise possible by private companies and firms who might give nominal salaries and disproportionately high contributions to their employees. The scope of the abuse is however, limited by section 58-F which restricts the exemption to one-sixth of salary.

The employer should part with his money every year and make it over to the trustees.

Clause (d)—The changes made in 1940 make it clear that the receipt of donations by a fund will not render it ineligible for recognition.

Forfeitures to the fund do not put anything into the fund taken as a whole, for they merely reduce the amounts due to particular members. The Commissioner will not withdraw or refuse recognition merely because he is doubtful of the validity as between the fund and its members of regulations as to forfeitures, *e.g.*, forfeiting to the fund balances at the credit of intestate members.

Clause (e)—This contains two important conditions. The words "or the official Trustee" were inserted by Act IV of 1931. If he is the trustee, a second trustee is not required. So long as the trust is not revocable except with the consent of all the beneficiaries, the fund can be recognised even if it can be closed at will by the employer or by the Trustees.

Clause (f)—Compare section 6 of the Provident Funds Act (XIX of 1925) on which it is modelled.

While forfeitures to the fund *are*, for the benefit of other members will not render a fund ineligible for recognition, forfeitures to the employer of any monies other than his own contributions and interest thereon, and even of them in circumstances other than those allowed in this Act will render the fund ineligible. This clause deals with forfeitures to the employer, it is left to the regulations of each fund to govern forfeitures to the fund.

Clause (g)—No exemption from tax is admissible after the date on which the accumulated balance is due to be paid. If membership is optional, the rules should provide for the payment of accumulated balances immediately to members discontinuing, otherwise recognition will not be given. By definition, section 58-A, an employee is one, who participates in the fund, and an optional subscriber who ceases to subscribe ceases to be an 'employee'. This clause will not prevent the recognition of a fund the rules of which provide for the transfer—not to the employer but to the fund—of sums at credit of subscribers who transgress certain rules and then leave service or forfeit the benefits of the fund.

Also according to the definition of 'accumulated balance' in section 58-A, the amount payable to an employee is not necessarily identical with the contributions of both employer and employee and interest on both contributions, therefore so long as clause (f) of section 58 C (1) is not broken the regulations of the fund may provide for forfeitures to the fund to be disposed of in any manner other than for the benefit of the employer, *e.g.*, to be given to the family of the member.

Clause (h)—The rules made by the Governor General in Council under this sub-section restrict withdrawals by employees while still in service. See Rules 4 and 9.

These rules are modelled on the rules of the Government General Provident Fund regulating temporary withdrawals therefrom. But they differ in some details, *e.g.*, in allowing permanent withdrawal for house building.

Repayments of advances are not income and cannot therefore be taxed as addition to income or exempted from tax.

Rule 9 A deals with accounts of funds kept outside British India.

Sub section (2)—If the repugnance were not removed it would be open to the Commissioner—in fact it is his duty—to withdraw recognition—see section 58 B (1).

58-D. Subject to any rules which the Central Government may make in this behalf, the Commissioner may, in respect of any particular fund, relax the provisions of condition (c) of sub-section (1) of section 58-G—

Power to relax, restrictions of employer's contribution in certain cases

(a) so as to permit the payment of larger contributions by an employer to the individual accounts of employees whose salary does not exceed five hundred rupees per mensem; and

(b) so as to permit the crediting by employers to the individual accounts of employees of periodical bonuses or other contributions of a contingent nature, where the calculation and payment of such bonuses or other contributions is provided for on definite principles by the regulations of the fund

Notes.—Rules which provide for forfeiture in favour of the employer in a manner repugnant to the provisions of section 58-C (1) (f) will render the fund ineligible for recognition, but rules which provide for forfeiture to the fund will not, nor will rules providing for payment of forfeited amounts to families of employees

No rules have been framed under this section

Sub-section (b)—The bonuses and contributions referred to are those granted yearly or half yearly by the employer at the time of closing accounts and ascertaining his profits but, unless these are provided for in the regulations of the fund and given to the employees irrespective of the employer's volition, the contributions will not be eligible for the concession. A contribution, say, at the same percentage of salary as the dividend of the employer company on its capital would be eligible for the concession if provided for by the regulations but a contribution which the employer can withhold at his option will not be eligible. The law has not expressly provided for contributions of the following nature, *e.g.*, lapsing of forfeitures of contributions of dismissed employees in favour of other employees and increases due to appreciation of the fund's securities. The former is really an employer's contribution of a contingent nature even if it is not considered to be already a part of the fund into which nothing new is put by the forfeiture while the latter is a mere accretion to capital (often compensated automatically by shrinkage in other years).

58-E. The annual accretion in any year to the balance at

Annual accretion deemed to be income received.

the credit of an employee participating in a recognised provident fund shall be deemed to have been received by him in that year and shall be included in his total income for that year, and, subject to the exemptions specified in section 58-F, shall be liable to income-tax and super-tax.

Provided that, for the purpose of sub-section (3) of section 15, out of such annual accretion only the employee's own contributions shall be included in his total income.

Notes—It will be seen that the total income is deemed to include certain items—employer's contribution and interest—which might never be received by the employee at all. This plan was deliberately adopted by the

Select Committee in order to allow the whole of the employee's accumulation to be paid to him intact at the end of his service without any delay

As a consequence of this provision, employees whose salaries are just below the taxable minimum might become liable to tax, and similarly persons just below the lines at which rates of tax change might be liable to pay higher rates

The Bill as originally introduced by Government was drafted on the principle that all excess contributions and interest above the limit which is to be exempt from the payment of tax should be accumulated year by year and taxed as a lump sum at the end of the employee's service. The Select Committee considered that, even to the limited extent of the excess contributions this principle would be inconvenient in practice and would be inequitable in those cases where the receipt of large lump sums might render an employee, otherwise exempt, liable to pay income tax, or raise his rate of income-tax or even render him liable to super tax

They therefore preferred the plan provided by this section

Proviso—While for all other purposes the total income of the employee will include the whole of the annual accretion only his own contributions will be included for ascertaining his total income for the purpose of section 15 (3) If this were not done a subscriber to a recognised provident fund would be in a more favourable position than other persons

It will be seen that section 58-R relating to superannuation funds is somewhat differently framed though the effect is similar

Exemption of balances not paid—By notifications under section 60 the Governor General in Council has directed that when in any year an employee participating in a recognised provident fund has ceased to be an employee of the employer maintaining the fund and has been declared by such employer not to be eligible to receive the whole of the accumulated balance due to him so much of his income as is assessable for that year shall be exempted from income-tax and shall be excluded from the computation of his total income for the purposes of the said Act as is equivalent to so much of the accumulated balance due to him as has not been paid or is not payable to him and if such amount exceeds the amount of his income in that year, so much of his income in the following year or years as is equal to the amount of such excess shall be so exempted and excluded from income-tax in such year or years

A credit or debit in a subscriber's account consequent on the appreciation or depreciation of securities of the fund is *prima facie* of a capital nature though from section 58-A (f) and section 58 C (1) (d) it might seem to be of the nature of interest and contributions It is clear, however that the debit or credit is not income of the employee though it may be part of the fund

58-F (1) An employee shall not be liable to pay income-tax on contributions to his individual

Exemption of annual accretion from income tax

account in a recognised provident fund, in so far as the aggregate of such contributions in any year does not exceed one-

sixth of his salary in that year or six thousand rupees, whichever is less

(2) Interest credited on the accumulated balance of any employee in a recognised provident fund shall be exempt from

payment of income-tax, if and in so far as it does not exceed one-third of the salary of the employee for the year concerned and in so far as it is allowed at a rate not exceeding such rate as the Central Government may, by notification in the Official Gazette, fix in this behalf.

History.—Sub-section (1) was amended in 1939 consequentially on the amendment of section 15 imposing an absolute money limit of rupees six thousand. Sub-section (2) was amended at the same time, a limit of one-third of salary being imposed.

Income-tax.—Under section 58, 'income-tax' in section 58-F does not include super-tax, the concession, therefore, relates to income-tax only.

Sub-section (1).—The employee can obtain further abatement of tax on account of insurance premia. *See* sections 15 (3) and 58-E (proviso).

Sub-section (2).—Under Notification No. 10, dated 15th March, 1930, the maximum rate of interest now in force is 6 per cent. per annum. It is of course open to an employer to allow a higher rate of interest but the concessions of this Chapter will be allowed only in respect of the first 6 per cent. of the interest so allowed.

It should be noted that the two limits laid down are cumulative, *i.e.*, whichever is less.

Salary 'in that year' means salary as computed under section 7 *i.e.*, under the 'due' or 'paid' basis as may be, but can only include specific, monetary amounts paid or falling due periodically and not include everything taxable under section 7, *e.g.*, fluctuating bonuses and commissions.

As regards the form of accounts, *see* section 58-I and rules made thereunder.

Where interest allowed to individual employees varies, for example with reference to length of service, exemption is allowed in respect of interest so long as the average interest earned by the fund as a whole does not exceed the prescribed rate.

Interest on amounts credited to individual accounts as the result of appreciation of investments is not taxable income but appreciation of capital, even though it may form part of the fund [*see* section 58-A (f) and section 58-C (1) (d)].

Accounts.—Where only part of the contributions and interest are allowed under the Act, it is not necessary to keep separate accounts; and the full interest, whether computed on allowable contributions or not, will be allowed by the Income-tax Officer, so long as the limit of one-third of salary and the limit of rate of interest are not exceeded.

58-G. (1) Where the accumulated balance due to an employee participating in a recognised provident fund becomes payable, such accumulated balance shall be exempt from payment of super-tax except to the extent of an amount equal to the aggregate of

Exemption of accumulated balance from income-tax and super-tax.

the amounts of super-tax on annual accretions that would have been payable under section 58-E up to the first day of April, 1933,

if the Indian Income-tax (Second Amendment) Act, 1933, had come into force on the 15th March, 1930.

(2) Where an employee participating in a recognised provident fund has rendered continuous service with his employer for a period of not less than five years, and the accumulated balance due to him becomes payable, such accumulated balance shall be exempt from payment of income-tax, and shall be excluded from the computation of his total income : —

Provided that the Commissioner of Income-tax may allow such exemption and exclusion where the employee has rendered continuous service with the employer for a period of less than five years, if, in his opinion, the service has been terminated by reason of the employee's ill-health, or by the contraction or discontinuance of the employer's business, or other cause beyond the control of the employee.

(3) Where exemptions from payment of income-tax is not allowed under the provisions of sub-section (2) the Income-tax Officer shall calculate the total of the various sums of income-tax and super-tax which would have been payable by the employee in respect of his total income for each of the years concerned if the fund had not been a recognised provident fund, and the amount by which such total exceeds the total of all sums paid by or on behalf of such employee by way of tax for such years shall be payable by the employee in addition to any other income-tax and super-tax for which he may be liable for the year in which the accumulated balance due to him becomes payable.

History—Sub-section (1) was added in 1933 and sub-section (3) amended in 1939.

Sub-section (1).—Sub-section (1) together with the amendments made at the time to section 58 and to sub-sections (2) and (3) of section 58 G are intended to make it clear that contributions are liable to super tax from year to year though exempt to the extent specified in section 58 F from income-tax, and to ensure that super-tax shall not be levied a second time when an accumulated balance is paid to the employee. The super-tax payable up to 1st April, 1933, is to be computed with reference to the rates in force between 1930 and 1933, and is payable only when the balance is paid to the employee.

Sub-section (2).—There is no definition of "continuous service". Authorised leave of absence will evidently not be an interruption of continuous service.

The accumulated balance when paid will both be exempt from tax and also be excluded from total income, i.e., not affect the rate of tax on the employee's other income for the year. The Commissioner can use his dis-

cretion under the proviso and allow exemption only if the cause of termination of service was beyond the employee's control.

The decision in *In re S. R. Mitra*, 1942 I T R. 259 (Pat.), has been rendered obsolete by the subsequent amendment of Explanation 2 under section 7 (1), avoiding all reference to termination of service.

Sub section (3) —As it now stands after amendment in 1939, it places the employee in the same position as he would have been in if the fund had not been recognised.

58-H. The trustees of a recognised provident fund, or other person authorised by the regulations of the fund to make payment of accumulated balances due to employees, shall, at the time an accumulated balance due to an employee is paid, deduct therefrom any income-tax payable under sub-section (3) of section 58-G and any income-tax and super-tax payable on an employee's total income as determined under sub-section (3) of section 58-I and sub-sections (4) to (9) of section 18 shall apply as if the sum to be deducted were income-tax payable under the head "salaries".

This section enjoins on the persons making payment of accumulated balances the duty of collecting tax due, if any, at source and making it over to the Government. As regards the powers and liabilities of the trustees, see sub-sections (4) to (9) of section 18 and section 51 (a).

The tax to be recovered should be computed under section 58 G (3) and under section 58-J (3).

58-I. (1) The accounts of a recognised provident fund shall be maintained by the trustees of the fund and shall be in such form and for such periods, and shall contain such particulars as the Central Board of Revenue may prescribe.

(2) The accounts shall be open to inspection at all reasonable times by Income-tax authorities, and the trustees shall furnish to the Income-tax Officer such abstracts thereof as the Central Board of Revenue may prescribe.

Rules — The rules relating to accounts are contained in Rules 5 to 7 of the Central Board of Revenue (Provident Fund) rules.

As regards power to extend the date beyond the 15th June in the case of funds the accounts of which are kept outside British India, see rule 9-A of the rules made by the Governor-General in Council.

Among other things the accounts should show separately the debits or credits, as the case may be in individual accounts consequent on the revaluation, if any, of the securities of the fund, and if a concern has several branches, a copy of the annual abstract of the accounts of the fund should be sent to every Income-tax Officer who assesses the employees.

58-J. (1) Where recognition is accorded to a provident fund with existing balances, an account shall be made of the fund up to the day on which the recognition takes effect, showing the balance to the credit of each employee on such day, and containing such further particulars as the Central Board of Revenue may prescribe.

(2) The account shall also show in respect of the balance to the credit of each employee the amount thereof which is to be transferred to that employee's account in the recognised provident fund, and such amount (hereinafter called his transferred balance) shall be shown as the balance to his credit in the recognised provident fund on the date on which the recognition of the fund takes effect, and sub-sections (3) and (4) shall apply thereto.

Any portion of the balance to the credit of an employee in the existing fund which is not transferred to the recognised fund shall be excluded from the accounts of the recognised fund and shall be liable to income-tax and super-tax in accordance with the provisions of this Act other than this Chapter.

(3) Subject to such rules as the Central Board of Revenue may make in this behalf, the Income-tax Officer shall make a calculation of the aggregate of all sums comprised in a transferred balance which would have been liable to income-tax if this Chapter had been in force from the date of the institution of the fund, without regard to any tax which may have been paid on any such sum, and such aggregate (if any) shall be deemed to be income received by the employee in the year in which the recognition of the fund takes effect, and shall be included in the employee's total income for that year; and, for the purposes of assessment, the remainder of the transferred balance shall be disregarded, but no other exemption or relief, by way of refund or otherwise, shall be granted in respect of any sum comprised in such transferred balance:

Provided that, in cases of serious accounting difficulty, the Commissioner shall have power subject to the said rules, to make a summary calculation of such aggregate.

(4) Notwithstanding anything contained in condition (h) of sub-section (1) of section 58-G, an employee, in order to enable him to pay the amount of tax assessed on his total income as determined under sub-section (3), shall be entitled to withdraw from the balance to his credit in the recognised provident fund a sum not exceeding the difference between such amount and the amount to which he would have been assessed if the transferred balance had not been included in his total income.

(5) Nothing in this section shall affect the rights of the persons administering an unrecognised provident fund or dealing with it, or with the balance to the credit of any individual employee, before recognition is accorded, in any manner which may be lawful

Rules—See Rule 8 of the Central Board of Revenue (Provident Funds) Rules

Extract from Select Committee's Report—We have cast the duty on employers of making up final accounts of existing funds and of showing in them the portion of each employee's balance which is to be transferred to the recognised fund. Subject to the reservation that no tax already paid on an employee's own contribution will be refunded the portion so transferred will receive retrospectively exemption from tax up to the same limit as will be given to the employee's future account. As regards any excess over and above the exempted portion which may be transferred in order to avoid inconvenience in individual cases arising from the payment of a large amount of income-tax on such a lump sum we have provided that an employee may withdraw the amount of the excess tax payable by him for that year from his balance in the recognised provident fund

58-K (1) Where an employer who maintains a provident fund (whether recognised or not) for the benefit of his employees and has not transferred the fund or any portion of it, transfers such fund or portion to trustees in trust for the employees participating in the fund, the amount so transferred shall be deemed to be of the nature of capital expenditure

Treatment of fund transferred by employer to trustee

(2) When an employee participating in such fund is paid the accumulated balance due to him therefrom, any portion of such balance as represents his share in the amounts so transferred to the trustee (without addition of interest, and exclusive of the employee's contributions and interest thereon) shall, if the employer has made effective arrangements to secure that tax shall be deducted at source from the amount of such share when paid to the employee, be deemed to be an expenditure by the employer within the meaning of clause (xii) of sub-section (2) of section 10, incurred in the year in which the accumulated balance due to the employee is paid

Notes—The words *if the employer has made* in employee were added in 1939 consequentially on the amendment of section 7

When clause (xi) of section 10 (2) was changed to clause (xv) the consequential change in this section was omitted to be made

See notes under section 10 (2) (xv) and in particular *British Insulated and Helsby Cables Limited v. Atherton* 10 Tax Cases 155 set out under that section

'His share' includes interest up to the date of transfer and is not restricted to contributions only. *Commissioner of Income-tax, C P v. Cen*

tral India Spinning and Weaving Co., Ltd., 1939 I.T.R. 187. When an employee is paid out, the full amount (including interest) paid out of the fund will be allowed as a deduction in the employer's assessment. Where the fund is not an irrevocable trust, the employer will be allowed to deduct from his income only what he pays to the employees each year, (both contributions and interest) and not what he credits to the accounts of the employees. See notes under section 10 (2) (xv), formerly (xii).

This section has no retrospective effect and applies only to transfers made after this section came into force.

The object of this section is to prevent an employer getting undue advantage in reducing his taxable income in a single year by the accident of his employees' provident fund being recognised in that year. The deduction on account of past accumulations is therefore spread over several years and allowed gradually as employees receive their accumulations, the deduction being limited to the amount of the employer's share in the past accumulations at the time of recognition of the fund. After the recognition, the contributions made every year by the employer will be allowed as a deduction from his taxable profits year by year.

It should be specially noted that the section applies to all private provident funds whether recognised under this Chapter or not.

As regards 'effective arrangements', see notes under section 10 (4) (c).

58-L (1) All rules made under this Chapter shall be subject to the provisions of sub-sections (4) and (5) of section 59.

Provisions relating to rules.

(2) In addition to any power conferred by this Chapter, the Central Government make rules—

(a) prescribing the statements and other information to be submitted with an application for recognition ;

(b) limiting the contributions to a recognised provident fund by employees of a company who are shareholders in the company ;

(c) providing for the assessment by way of penalty of any consideration received by an employee for an assignment of, or creation of a charge upon, his beneficial interest in a recognised provident fund ;

(d) determining the extent to and the manner in which exemption from payment of income-tax and super-tax may be granted in respect of contributions and interest credited to the individual accounts of employees in a provident fund from which recognition has been withdrawn; and

(e) generally, to carry out the purposes of this Chapter and to secure such further control over the recognition of provident funds and the administration of recognised provident funds as it may deem requisite.

Rules by Central Government—It will be noted that rules are made by the Central Government under the Act in respect of this Chapter only. All

other rules are made by the Central Board of Revenue subject to the control of the Central Government

Sub-section (1)—Sub-section (4) of section 59 requires previous publication of the rules and sub-section (5) of section 59 requires publication in the *Gazette of India* and the rules have effect as if enacted in the Act

Sub section (2)—(a) See rules referred to under section 58 B

(b) Rule 11—Where an employee of a Company owns shares in the Company with a voting power exceeding ten per cent of the whole of such power the sum of the exempted contributions of the employee and employer to the recognised provident fund maintained by the Company shall not exceed Rs 250 in any month

Extract from Select Committee's Report—We have deleted the word 'private' before the word 'company' as in our opinion there may be cases of shareholders in public companies just as well as in private companies who should properly come within the scope of the clause. We have been assured that it is the intention of Government that the rules to be framed under this provision will apply only to employees who are shareholders holding a substantial portion of the shares of a company

(c) Rule 12—If an employee assigns or creates a charge upon his beneficial interest in a recognised provident fund the Income-tax Officer shall on the fact of the assignment or charge coming to his knowledge give notice to the employee that if he does not secure the cancellation of the assignment or charge within two months of the date of receipt of the notice the consideration received for such assignment or charge shall be deemed to be income received by him in the year in which the fact became known to the Income tax Officer and shall be assessed accordingly

(d) Rule 13—If the Commissioner withdraws recognition from a recognised provident fund the balance to the credit of each employee at the end of the financial year prior to the date of the withdrawal of recognition shall be paid to him free of income-tax and super tax at the time when such employee receives the accumulated balance due to him. The remainder of the accumulated balance due to him shall be liable to income tax and super tax as if the fund had never been recognised

58-M This Chapter shall not apply to any provident fund to which the Provident Funds Act, 1925, applies

Note—The provisions relating to funds to which the Provident Funds Act 1925 applies are contained in sections 4 (3) 7 and 15

CHAPTER IX B

SPECIAL PROVISIONS RELATING TO CERTAIN CLASSES OF SUPER ANNUATION FUNDS

General—This chapter which was introduced in 1939 extends to certain classes of superannuation funds concessions similar to those given to recognised provident funds under chapter IX A. The provisions it will be seen are more elastic than those in chapter IX A and a great deal is left to the discretion of the Central Board of Revenue who alone can recognise a superannuation fund and against whose orders by the way there is no appeal as in respect of orders passed by the Commissioner with reference to provident funds

Definitions.

58-N. In this Chapter, unless there is anything repugnant in the subject or context,—

(a) 'approved super-annuation fund' means a super-annuation fund or any part of a superannuation fund which has been and continues to be approved by the Central Board of Revenue in accordance with the provisions of this Chapter;

(b) 'employer', 'employee' and 'contribution' have, in relation to superannuation funds, the meanings assigned to those expressions in section 58-A in relation to provident funds;

(c) 'ordinary annual contribution' means an annual contribution of a fixed amount or an annual contribution computed on some definite basis by reference to the earnings, the contributions or the number of members of the fund.

Part of a fund—It should be noted that a part of a fund can be approved under this chapter. Contrast Chapter IX-A in this respect.

Ordinary annual contribution—Compare sections 58-A (a), 58-C (b) and 58-D.

58-O. (1) The Central Board of Revenue may accord approval to any superannuation fund or

Approval and withdrawal of approval. any part of a superannuation fund which in its opinion complies with the requirements of section 58-P, and may at any time withdraw such approval, if in its opinion the circumstances of the fund or part cease to warrant the continuance of the approval.

(2) The Central Board of Revenue shall communicate in writing to the trustees of the fund the grant of approval with the date on which the approval is to take effect, and, where the approval is granted subject to conditions, those conditions.

(3) The Central Board of Revenue shall communicate in writing to the trustees of the fund any withdrawal of approval with the reasons for such withdrawal and the date on which the withdrawal is to take effect.

(4) The Central Board of Revenue shall neither refuse nor withdraw approval to any superannuation fund or any part of a super-annuation fund unless it has given the trustees of that fund a reasonable opportunity of being heard in the matter.

Subject to conditions—It should be noted, that unlike Chapter IX-A, this section provides for approval on condition.

Appeal—Though the section gives an opportunity to the fund to show cause against withdrawal of approval and also compels the Board to give reasons for withdrawing approval, there is no provision for an appeal against

orders of withdrawal. If the Board refuses even to consider an application without applying its mind to the merits of the case, it will be a question whether an order cannot be made against it under the Specific Relief Act.

58 P *In order that a superannuation fund may receive and retain approval the following conditions shall*

Conditions for approval

be satisfied, namely —

(a) the fund shall be a fund established under an irrevocable trust in connection with a trade or undertaking carried on in British India,

(b) the fund shall have for its sole purpose the provision of annuities for employees in the trade or undertaking on their retirement *at or after a specified age or on their becoming incapacitated prior to such retirement, or for the widows, children or dependants of persons who are or have been such employees on the death of those persons,* and

(c) the employer in the trade or undertaking shall be a contributor to the fund

Provided that the Central Board of Revenue, may, if it thinks fit and subject to such conditions, if any, as it thinks proper to attach to the approval, approve a fund or any part of a fund—

(i) notwithstanding that the rules of the fund provide *for the return in certain contingencies of contributions paid to the fund, or*

(ii) *if the main purpose of the fund is the provision of such annuities as aforesaid, notwithstanding that such provision is not its sole purpose, or*

(iii) notwithstanding that the trade or undertaking in connection with which the fund is established is carried on only partly in British India

Or undertaking —These words are evidently intended to cover cases of business profession or vocation not covered by trade &c to include an enterprise of any kind

Under the corresponding law in the United Kingdom section 32 of the Finance Act of 1921 the trade should not only be carried on in that country but by a resident though this latter condition can be relaxed

General—It will be observed that this section is more elastic than section 58 C its counterpart in respect of provident funds

Dependants—There is no definition of this word as for example in the Provident Funds Act. It will apparently be for the Central Board of Revenue to satisfy itself that there is no abuse

58-Q. (1) An application for approval of a superannuation fund or part of a superannuation fund for any year of assessment shall be made in writing before the end of that year by the trustees of the fund to the Income-tax Officer, and shall be accompanied by a copy of the instrument under which the fund is established and by two copies of the rules and of the accounts of the fund for the last year for which such accounts have been made up. The Central Board of Revenue may require such further information to be supplied as it thinks proper.

(2) If any alteration in the rules, constitution, objects or conditions of the fund is made at any time after the date of the application for approval the trustees of the fund shall forthwith communicate such alteration to the Income-tax Officer, and in default of such communication any approval given shall, unless the Central Board of Revenue otherwise orders, be deemed to have been withdrawn from the date on which the alteration took effect.

58-R. Income derived from investments or deposits of an

approved superannuation fund shall be exempt from payment of income-tax, and any sum paid by an employer or an employee by way of contribution towards an approved superannuation fund shall, in the case of an employer, be deducted in computing his income, profits or gains for the purpose of assessment, and, in the case of an employee, be treated for all the purposes of this Act as if it were a sum to which the provisions of section 15 apply.

Provided that no such exemption shall be allowable to an employee in respect of any sum which is not an ordinary annual contribution :

Provided further that where a contribution by an employer is not an ordinary annual contribution it shall, for the purposes of this section, be treated, as the Central Board of Revenue may direct, either as an expense incurred in the year in which the sum is paid, or as an expense to be spread over such period of years as the Central Board of Revenue thinks proper

subject to—(1) The employee's contribution to the extent it is an approved contribution, will be dealt with under section 15 (2) Appeal—(2) Contribution will be allowed to the same extent as a deduction against withdrawal irrespective of the amount of contribution or of its reasons for withdrawing (3) Other contributions by the employer (not be allowed either as a deduction in the year of payment or over any years as the Board may desire; but they will be

allowed to be deducted at some time or other (4) Income of the fund from its investments will be exempt

Super tax—In the absence of any reference to section 58 R by way of exception in section 58 it would seem that the income of the fund from its investments is exempt both from income tax and from super tax and that the employer can claim a deduction for both. The employee however, will get relief for income-tax only under section 15 (which is excepted in section 58) *See also* notes under section 58-S

Total income—It will be seen that there is no provision in this section corresponding to the proviso in section 58 E. The contribution by the employee will obviously be part of his total income while that by the employer will not be part of the employee's income

Or deposits—These words are really superfluous

58-S (1) Where any contributions (including interest on contributions if any,) are repaid to an employee, the amount so repaid shall be deemed for the purposes of income tax to be income of the employee for that year

Treatment of repaid contributions

(2) Where any contributions (including interest on contributions, if any) are repaid to an employee during his lifetime but not at or in connection with the termination of his employment, income tax on the amount so repaid or paid shall except in the case of an employee whose employment was carried on abroad, be deducted by the trustees of the fund at the average rate of tax at which the employee was liable to income tax during the preceding three years or during such period, if less than three years, as he was a member of the fund, and shall be paid by the trustees to the credit of the Central Government within the prescribed time and in such manner as the Central Board of Revenue may direct

Changes—The references to super tax were omitted in 1940. As contributions to recognised superannuation funds by an employee will have been exempted only from income-tax (*see* sections 15, 58 and 58-R) no super tax will be levied when the contributions are refunded to the employee. The omission to amend section 58 is probably an oversight for even after the deletion in section 58-S of the reference to super tax it could still be held that income-tax would include super tax

Repaid contributions—This corresponds to section 58 A (3)

Employees abroad—The Act does not say how repaid contributions should be treated in such cases. The position is obscure and requires to be cleared up

Liability of trustees—Will default on the part of trustees attract the provisions of sections 18 and 51? If not what is to be the method of recovery? Can a demand notice under section 29 be issued on the ground that the tax is due in consequence of an order passed under or in pursuance of this Act

58-T. Where an employer deducts from the emoluments paid to an employee or pays on his behalf any contributions of that employee to an approved superannuation fund, he shall include all such deductions or payments in the return which he is required to furnish under section 21.

Deduction from pay of, and contributions on behalf of, employee to be included in return under section 21

58-U. If a fund or a part of a fund for any reason ceases to be an approved superannuation fund, the trustees of the fund shall nevertheless remain liable to account for tax on any sum paid—

Liabilities of trustees on cessation of approval of fund

(a) on account of returned contributions (including interest on contributions, if any), and

(b) in commutation or in lieu of annuities, in so far as the sum so paid is in respect of contributions made before the fund or part of the fund ceased to be an approved fund under the provisions of this Chapter.

General — Compare sections 58-I and 58-L (2) (a) and the rules made under section 58-L (2) (d).

58-V. The trustees of an approved superannuation fund and any employer who contributes to an approved superannuation fund shall, when required by notice from the Income-tax Officer, within twenty-one days of the date of such notice :—

Particulars to be furnished in respect of superannuation funds.

(a) furnish to the Income-tax Officer a return containing such particulars of contributions made to the fund as the notice may require ;

(b) prepare and deliver to the Income-tax Officer a return containing—

(i) the name and place of residence of every person in receipt of an annuity from the fund,

(ii) the amount of the annuity payable to each annuitant,

(iii) particulars of every contribution (including interest on contributions, if any) returned to the employer or to employees; and

(iv) particulars of sums paid in commutation or in lieu of annuities ;

(c) furnish to the Income-tax Officer a copy of the accounts of the fund to the last date prior to such notice to which such accounts have been made up, together with such other information and particulars as the Central Board of Revenue may reasonably require

General—No similar provision will be found in Chapter IX-A. because such information is not necessary in respect of provident funds. It should be noted that while approval is granted only by the Board, the information in this section can be called for by the Income-tax Officer.

CHAPTER X.

MISCELLANEOUS.

59. (1) The Central Board of Revenue may, subject to the control of the Central Government, make rules for carrying out the purposes of this Act and for the ascertainment and determination of any class of income. Such rules may be made for the whole of British India or for such part thereof as may be specified.

Power to make Rules

(a) Without prejudice to the generality of the foregoing power, such rules may—

(b) prescribe the manner in which, and the procedure by which, the income, profits and gains shall be arrived at in the case of—

(i) incomes derived in part from agriculture and in part from business ;

(ii) persons residing out of British India ;

(b) prescribe the procedure to be followed on applications for refunds ;

(c) provide for such arrangements with His Majesty's Government as may be necessary to enable the appropriate relief to be granted under section 27 of the Finance Act, 1920, or under section 49 of this Act ;

(d) prescribe the year which, for the purpose of relief under section 49, is to be taken as corresponding to the year of assessment for the purposes of section 27 of the Finance Act, 1920 ; and

(e) provide for any matter which, by this Act is to be prescribed.

(3) In cases coming under clause (a) of sub-section (2), where the income, profits and gains liable to tax cannot be definitely ascertained, or can be ascertained only with an amount of trouble and expense to the assessee which, in the opinion of the Central Board of Revenue, is unreasonable, the rules made under that sub-section may—

(a) prescribe methods by which an estimate of such income, profits and gains may be made, and

(b) in cases coming under sub-clause (i) of clause (a) of sub-section (2), prescribe the proportion of the income which shall be deemed to be income, profits and gains liable to tax,

and an assessment based on such estimate or proportion shall be deemed to be duly made in accordance with the provisions of this Act

(4) The power to make rules conferred by this section shall, except on the first occasion of the exercise thereof, be subject to the condition of previous publication

(5) Rules made under this section shall be published in the Official Gazette, and shall thereupon have effect as if enacted in this Act

Rules—With the exception of the rules first made under the Act, the power to make rules is under section 59 (4), subject to the condition of "previous publication". The meaning of the phrase "subject to the condition of previous publication" is given in section 23 of the General Clauses Act (X of 1897), viz —

Where by any Act of the Governor General in Council or Regulation a power to make rules or bye laws is expressed to be given subject to the condition of the rules or bye laws being made after previous publication then the following provisions shall apply, namely —

(1) the authority having power to make the rules or bye laws shall, before making them, publish a draft of the proposed rules or bye-laws for the information of persons likely to be affected thereby,

(2) the publication shall be made in such manner as the authority deems to be sufficient,

(3) there shall be published with the draft a notice specifying a date on or after which the draft will be taken into consideration,

(4) the authority having power to make the rules or bye-laws shall consider any objection or suggestion which may be received by the authority having power to make the rules or bye-laws from any person with respect to the draft before the date so specified

(5) the publication in the Gazette of a rule or bye-law purporting to have been made in exercise of a power to make rules or bye laws after previous publication shall be conclusive proof that the rule or bye-law has been duly made "

History—The Central Board of Revenue took the place of the Board of Inland Revenue in 1924. This section is radically different from the corresponding ones in the previous Acts: section 38 of the Act of 1886 and section 43 of the Act of 1912. Under these sections, the rules were made by the Governor General in Council and the power could be delegated to Local Governments. The Central Board of Revenue cannot delegate this power.

Sub-section (3) was added in 1927

The reference to insurance companies in sub-section (2) was deleted in 1939 the relevant rules being transferred to the schedule to the Act referred to in section 10 (7)

Rules by other authorities—Rules under section 59 as made by the Central Board of Revenue. Rules are made by the Central Government under specific sections which give power to make rules

Any class of income—Rules cannot be nor are intended to be made for the purpose of regulating individual cases

Sub-section (3)—In the absence of this sub-section doubts had arisen as to the validity of certain rules made under sub-section (2). While sub-section (2) gives powers only to describe "procedure" and "the manner in which" certain things could be done the new sub-section explicitly empowers the framing of rules to ascertain income when it cannot be easily ascertained. The object of such arbitrary formulæ is convenience both to Revenue and to the assessee.

Unreasonable—The Central Board of Revenue has absolute discretion as to whether the trouble to the assessee is unreasonable. *Indian Relief and Benefit Insurance Company Ltd v Commissioner of Income tax, Sind*, 1939 I T R 352.

Agriculture and business—This section at first sight suggests that agriculture and business as contemplated by this Act—see definitions in section 2 (1) and in section 2 (4)—are mutually exclusive categories but see rulings cited in notes under section 2 (1) in connection with usufructuary mortgages and in particular *Commissioner of Income tax Madras v Mathias* 1939 I T R 48 (P C) which will show that there is no inherent contradiction between business and agriculture.

Scope of section—If the rules are made and published in accordance with this section they have the force of law and have effect as if enacted in this Act. The section is clear on this point, but see also *Garnett v Bradley*, (1878) 3 A C 944, *Brandford v McAnnally*, (1883) 8 A C 456, *R v Walker*, (1875) 10 Q B 355, *Patents Agents Institute v Lockwood* (1894) A C 347 and *Kandasami Pillai v Emperor*, 42 Mad 69. If the rules do not strictly comply with the provisions of the section they will be *ultra vires*. The authority to make rules is given to the end that the provisions of the Act may be better carried into effect and not so as to contradict or neutralise its provisions. Where a power to make regulations is given by a statute no regulations made under the statute can abridge a right conferred by the statute itself. Thus an assessee cannot be deprived of his right of appeal by the Central Board of Revenue not prescribing forms of appeals nor of his right to refund of tax by the Central Board of Revenue not appointing an Income tax Officer. But the rules would be *intra vires* if the Act expressly gave permission to the rule making authority to regulate and if necessary abridge the right, see *R v Bird* ex parte *Needles*, (1898) 2 Q B 340, *Queen v Marain* 17 Mad 118, *Secretary of State v Venkatesalu* 30 Mad 113, *Madurai v Muthu*, 33 Mad 823. So long as the rules can be reconciled with the Act they will be construed to be *intra vires*, see *Baker v William* (1898) 1 Q B 23. If as the result of objections received the rules as finally made differ slightly from the first draft published it would not affect the validity of the rule, *Guru Charan v Hararup*, 34 All 391. But the draft rule must not be altered so substantially as to make it almost a new rule in which case republication would be necessary. See also the Introduction—"Rules of Construction" particularly as regards Rules Schedules and Forms.

How far rules and statute alternative—It was ruled by the Lahore High Court in the case of *Lakshmi Insurance Company Ltd v Commissioner of Income tax*, 5 I T C. 24 that though the provisions of section 59 were enabling provisions only once a Rule had been made of mandatory

character giving no alternatives, that rule must prevail and it would not be open to the Crown to rely on the ordinary provisions of the Act as an alternative

60 (1) The Central Government may, by notification in the Official Gazette make an exemption, ^{Power to make exemptions, etc.} reduction in rate or other modification, in respect of income-tax in favour of any class of income, or in regard to the whole or any part of the income of any class of persons

(2) Where, by reason of any portion of an assessee's salary being paid in arrears or in advance, or by reason of his having received in any one financial year salary for more than twelve months or a payment which is under the provisions of sub-section (1) of section 7 a profit in lieu of salary his income is assessed at a rate higher than that at which it would otherwise have been assessed, the Central Government may grant the appropriate relief.

(3) After the commencement of the Indian Income-tax (Amendment) Act 1939 the power conferred by sub-section (1) shall not be exercisable except for the purpose of rescinding an exemption, reduction or modification already made.

History—Sub-section (1) is practically the same as section 6 of the 1886 Act and section 44 of the 1918 Act. Sub-section (2) was inserted in 1930 and added to in 1933 and in 1939. Sub-section (3) was inserted in 1939.

Individuals—Exemptions in favour of—Inadmissible—'Other modification' cannot obviously be made *against* the subject. The exemption or other favour can only be made in respect of a class of income or a class of persons. The exemption cannot therefore be made in respect of individuals except under sub-section (2). Also the exemption can be made only by notification in the *Gazette of India*.

Partial exemptions—Though, under section 58, 'income tax' includes super-tax, it is open to the Central Government under section 60 to exempt, reduce in rate or otherwise modify income-tax alone or super tax alone, *A C T Nachiappa Chethar v. Commissioner of Income-tax, Madras, 1933 I T R 241*.

No fresh standing exemptions in future—It will be seen from sub-section (3) that while the Central Government will continue to exercise powers in respect of individual cases relating to 'salaries' it cannot grant fresh general exemptions under sub-section (1).

Free of tax—The Indian Income tax Act does not recognize contracts for payments 'free of tax'. In such cases the tax would be levied on the gross income of the recipient, and it would be a matter of arrangement between the contracting parties that the recipient was paid such gross income as would after deduction of tax, leave him the stipulated net income. See notes under section 3.

Appropriate relief—These words take the place of 'such relief as it, the Central Government may think fit' and if the object of the change is to limit the discretion of the Government and regulate relief on an objective and uniform basis it is not clear what basis is contemplated for no other part of the Act throws light on such basis. It is presumed however that accumulated receipts will be apportioned over the relative years in which the sums were earned. In any case if salaries are taxed every year on the *due* ('accrued') basis the occasion for relief because of receipt of salary in a year for more than twelve months cannot arise.

According to the Income tax Manual in calculating relief to be granted to an assessee in respect of any year under sub-section (2) any advantage gained by him in a previous year in which part of his salary was short paid (e.g. in respect of an assessment for a year prior to 1st April 1939) will be taken into account. The sub-section applies to all cases irrespective of the consideration that the payment of salary in advance or in arrears was in accordance with rules governing the payment. 'Salary' in this sub-section has the same meaning as in section 7.

An official liquidator of a Company holds an office to which he is appointed by the Court and his emoluments are 'salary' within the meaning of section 7 even though he may be paid only by commission. He is accordingly entitled to relief under section 60 (2). In *re Bhagwati Shankar*, 1944 I T R 193 (Lah.)

Exemptions by statute—See sections 4 (3) regarding complete exemptions given by the statute itself and the limited exemptions under proviso to section 7 (1) provisos to section 8 section 14 section 15 and section 17.

See also the Introduction regarding exemptions conferred by statutes outside the Income tax Act.

Exemption and modifications—See Notifications below. The exemptions it will be seen are either (a) complete i.e. the income is ignored for all purposes or (b) partial in which case it may be (i) included in total income, i.e. to regulate the rate on other blocks of income but is itself exempted both from super tax and from income-tax or (ii) exempted from super tax only or (iii) from income tax only. There are also a few modifications permitting the computation of profits on a special basis.

The reference to sub-section (4) of section 48 (which refers to the old section) in the Notification No 878-F—the main one—is obsolete.

Co-operative Societies—The meaning of the word 'profits' in the Notifications relating to such societies gave rise to litigation. *Madras Central Urban Bank case*, 3 I T C 357 *English and Scottish Wholesale Co-operative Society's case* 3 I T C 385 *The Madras Provincial Co-operative Bank case*, 1933 I T R 158 and *The Bengalee Urban Co-operative Credit Society's case* 1934 Rang 27. These rulings are not of much interest now in view of the departmental instructions which say that 'profits' in the case of such societies refers only to 'profits' in the strict sense (i.e. section 10) and not to 'income' from securities or dividends and which permit set-off under section 24 of loss under an exempted head against gain under a non exempted head.

Interest on debentures of a co-operative institution taken up by another such institution in the open market and not as a loan under the by-laws (which may require the general or special sanction of the Registrar

constitutes taxable income not being income arising from the ordinary business of co-operative lending *Madras Provincial Co-operative Bank v Commissioner of Income tax, 1942 I T R 490*

Notifications—Total Exemptions—The following are the existing exemptions under sub-section (1)

The following classes of income shall be exempt from the tax payable under the said Act and they shall not be taken into account in determining the total income or salary of an assessee for the purposes of the said Act except for the purposes of sub-section (4) of section 48 —

(1) *Omitted*

(2) Sums paid in pursuance of Article 3 of the agreement dated the 17th August 1825 between the British Government and the King of Oudh

(3) Income derived from the *Bua* tax defined in clause (c) of section 2 of the Teri Dues Regulation 1902.

(4) The salary and allowances paid by a State in India during the period of deputation to any person deputed by the State for training in British India

(5) Scholarships granted to meet the cost of education

(6) Such portion of the income of a member of His Majesty's Naval, Military or Air Forces British or Indian or of the Royal Indian Marine as is compulsorily payable by him under the orders or with the approval of Government to a mess wine or band fund

(7) The allowances attached to—

The Victoria Cross

The Military Cross

The Order of British India

The Indian Order of Merit

The King's Police Medal

The Indian Police Medal

(8) The interest on Government securities held by or on behalf of Ruling Chiefs and Princes of India as their private property

(9) Jangi Inams awarded to Indian officers Indian other ranks and followers in respect of services in the Great War

(10) The yield of Post Office cash certificates

(11) The interest on deposits in the Post Office Savings Bank

(12) The income of a University or other educational institution existing solely for educational purposes and not for purposes of profit

(13) The income of Thana Funds administered by Political Agents in Kathiawar and of the Secunderabad Local (Abkari etc) Fund administered by the Resident at Hyderabad

(13 A) The income of the Rewa Kantha Mewas Administration Fund and of the Sunkheda Mewar Road Fund administered by the Political Agent Rewa Kantha

(13 B) The income of—

(a) the following funds controlled by the Resident for the States of Western India namely —

The Kathiawar Consolidated Local Fund the Rajkot Civil Station Land Improvement Fund the Rajkot Civil Station Fund the Kathiawar Mounted Police Fund the Consolidated Local Fund Mahi Kantha the Consolidated Local Fund Banis Kantha including the

Palampur Agency Educational, Sihori, Deodar, Varathi Santalpur Dispensaries and Survey Funds, and the Sadar Bazar Fund

(b) the village Police Funds Kankrej Deodar, Sungam Varchi, Santalpur controlled by the Political Agent Sabar Kantha Agency and

(c) the Wadhwan Civil Station Fund controlled by the Political Agent Eastern Kathiawar Agency

(13 C) *Deleted*

(13-D) The income of Regimental Institutes derived from rebate payable by institute contractors

(13 E) The interest on securities held by the Kathiawar Education Provident Fund

(13-F) The income of recognised Regimental Thrift and Savings Funds the assets of which consist solely of deposits made by members and the profits earned by the investment thereof

(13 G) The Income of the Kolhapur Residency Area Fund

(14) (15) and (16) *Deleted*

(16-A) and (16 B) *Deleted*

(17) The salaries of the correspondent of the International Lahore Office New Delhi and his staff

(18) The salaries of the Organiser and Manager of the Branch Office of the League of Nations Bombay and his staff

(19) The salaries of Khisadars Levies and Badraggas employed in the tribal territory on the North West Frontier and of all persons employed in the tribal levy service in Baluchistan

(20-23) *Omitted* (These relate to leave salaries paid abroad)

(24) The pensions of officers of Government residing out of India drawn from any Colonial Treasury or paid in the United Kingdom whether such pensions are paid in sterling or by means of negotiable rupee drafts on a bank in India

(25) The salaries of the light house keepers of light houses in the Red Sea

(26) The pensions paid in the United Kingdom or in a Colony to officers of local authorities or employees of companies or of private employers such officers or employees being resident out of India

(27) The interest on Mysore Durbar Securities

(28) Pensions granted to officers of His Majesty's Naval Military or Air Forces British or Indian or of the Auxiliary Force India or of the Indian Territorial Force or of the Royal Indian Marine in respect of wounds or injuries received in action or in the performance of their duties as members of such forces otherwise than in action

(28 A) Extraordinary pensions granted to Civil Officers (excluding family pensions granted as the result of the death of such an officer) under Chapter XXXVIII of the Civil Service Regulations or the Army Regulations India as the case may be in respect of wounds or injuries received in the performance of their duties

(29) Pensions granted to members of His Majesty's Naval Military or Air Forces British or Indian or of the Auxiliary Force India or of the Indian Territorial Force or of the Royal Indian Marine who have been

invalided from service with such forces on account of bodily disability attributable to, or aggravated by, such service

(30) Value of rations issued in kind or money allowances paid in lieu thereof, to any officer or other rank in His Majesty's Naval, Military or Air Forces British or Indian or in the Auxiliary Force, India, or in the Indian Territorial Force or in the Royal Indian Marine

(31) Value of rent free quarters occupied by or money allowance paid in lieu thereof to Indian officers British Warrant and non commissioned officers and men of His Majesty's Military or Air Forces, and British and Indian Warrant Officers of His Majesty's Naval and Marine Forces, in all cases irrespective of whether the individual concerned is married or single

(32) Conservancy allowance granted in lieu of free conservancy to non-departmental Warrant and non commissioned officers of the India Unattached List departmental non commissioned officers of the India Unattached List not in receipt of consolidated rates of pay and Warrant and non commissioned officers of the permanent staff of the Auxiliary and Territorial Forces

(33) The value of the free education provided for the children of British Warrant and non commissioned officers and any grants in aid made to British Warrant and non commissioned officers in lieu of the provision of free education for their children

(34) Deleted

(35) Deferred pay within the meaning of para 254, Pay and Allowance Regulations for the Army in India Part II paid to soldiers or non-commissioned officers of the Army in India

NOTE —Indian Warrant Officers class II, who are also non Commissioned officers though not called as such are entitled to the deferred pay and are also eligible for exemption

(35 A) Shore allowance granted to Warrant Officers of the Royal Indian Navy when employed in Marine Survey Duties under para 89 (c) of the Regulations for the Royal Indian Navy Vol I

(36) The income of indigenous hillmen, other than persons in the service of Government residing in the following areas as Assam —

The Naga Hills District
The Lushai Hills District
The Sadiya Frontier Tract
The Balipara Frontier Tract
The Lakhimpur Frontier Tract
The Garo Hills

The Jowai sub-division of the Khasi and Jaintia Hills District and
The North Cachar Hills in the district of Cachar

(37) The perquisite represented by the right of any of the officers specified in the annexed list to occupy free of rent as a place of residence any premises provided by the Central Government the Crown Representative or the Provincial Government as the case may be

List of officers

The Governor General
The Commander in Chief
The Governor of a Governor's Province

The Chief Commissioner of any of the following Provinces
namely —

British Baluchistan

Delhi

Ajmer Merwara

Coorg

The Andaman and Nicobar Islands and any first class Resident in the Political Department

(38) Such part of income in respect of which the said tax is payable under the head property as is equal to the amount of rent payable for a year but not paid by a tenant of the assessee and so proved to be lost and irrecoverable where—

(a) the tenancy is *bona fide*,

(b) the defaulting tenant has vacated or steps have been taken to compel him to vacate the property

(c) the defaulting tenant is not in occupation of any other property of the assessee

(d) the assessee has taken all reasonable steps to institute legal proceedings for the recovery of the unpaid rent or satisfies the Income Tax Officer that legal proceedings would be useless and

(e) the annual value of the property to which the unpaid rent relates has been included in the assessed income of the year during which that rent was due and income-tax has been duly paid on such assessed income

(39) The lump grants made by Government to the Indian Church—

(1) for the provision of episcopal supervision and ministrations

(2) for the payment of allowances to clergymen entertained in lieu of Chaplaincies reduced and

(3) in lieu of the grants in aid at present given for the entertainment of clergymen of the Additional Clergy Society under articles 602 and 603 of the Civil Service Regulations

(40) When in any year an assessee has ceased to be an employee participating in a recognised Provident Fund and has been declared by the employer maintaining the fund not to be eligible to receive the whole of the accumulated balance due to him so much of his income as is assessable for that year shall be exempted from income-tax and shall be excluded from the computation of his total income for the purposes of the said Act as is equivalent to so much of the accumulated balance due to him as has not been paid or is not payable to him and if such amount exceeds the amount of his income in that year so much of his income in the following year or years as is equal to the amount of such excess shall be so exempted and excluded in such year or years

(41) Income of a Service Fund derived from interest on Government securities or interest on funds deposited with the Central or any Provincial Government

For the purpose of this exemption a Service Fund means a fund established under the authority of or with the permission of the Central or any Provincial Government for the purpose of securing deferred annuities to the subscribers or payments to them in the event of their resignation or dismissal from the service in which they are employed or provision for their wives or children after their death or payments to their estate or their nominees upon their death to which servants of the Crown are alone admissible as subscribers or members and the funds of which are either deposited

with the Central or any Provincial Government or invested in Government Securities

Incomes included in "total income" and exempt from both super-tax and income-tax—The following classes of income shall be exempt from the tax payable under the said Act, but shall be taken into account in determining the total income of an assessee for the purposes of the said Act —

- (1) The interest on Government securities purchased through the Post Office and held in the custody of the Accountant General Posts and Telegraphs provided that the exemption shall apply only to interest on securities so held on account of any one assessee upto a face value of Rs 22 500 [This shall cease to have effect in respect of interest paid after the 31st March 1939]
- (2) The profits of any Co operative Society other than the Sanikatta Salt owners' Society in the Bombay Presidency for the time being registered under the Co operative Societies Act 1912 (II of 1912), the Bombay Co operative Societies Act, 1925 (Bombay Act VII of 1925), the Burma Co-operative Societies Act 1927 (Burma Act VI of 1927) or the Madras Co-operative Societies Act 1932 (Madras Act VI of 1932), or the dividends or other payments received by the members of any such Society out of such profits

Explanation —For this purpose the profits of a Co operative Society shall not be deemed to include any income, profits or gains from—

- (1) investments in (a) securities of the nature referred to in section 8 of the Indian Income tax Act, or (b) property of the nature referred to in section 9 of that Act
- (2) dividends or
- (3) the 'other sources' referred to in section 12 of the Indian Income tax Act

The above exemption which extends both to income tax and super tax applies only to 'profits' in the strict sense of the word as used in the Act and does not include 'income' derived by Co operative Societies from interest on securities or dividends. The Societies whose income liable to income tax is not taxable at the maximum rate or who have no income liable to tax should apply to the Income-tax Officer concerned for the issue of exemption certificates authorising persons paying interest on securities not to deduct any tax at source or to deduct tax at a lower rate than the maximum as the case may be

Where a Co-operative Society incurs a loss under any head of income that has been exempted from tax by notification under section 60 (1) of the Act, such loss may be set off under section 24 against any income that is not so exempted

Income included in total income and exempt from income tax but not from super tax —

- (1) Sums received by an assessee on account of salary, bonus, commission or other remuneration for services rendered or in lieu of interest on money advanced to a person for the purposes of his business

where such sums have been paid out of, or determined with reference to, the profits of such business

and, by reason of such mode of payment or determination have not been allowed as a deduction but have been included in the profits of the business on which income tax has been assessed and charged under the head business

Provided that such sums shall not be exempt from the payment of super tax unless they are paid to the assessee by a person other than a company and have already been assessed to super tax

- (2) Such part of the profits or gains of a firm which has discontinued its business profession or vocation as is proportionate to the share of an assessee in the firm at the time of such discontinuance if income-tax has at any time been charged on such business profession or vocation under the Indian Income tax Act 1918 (VII of 1918) or if an assessment has been made on the firm in respect of such profits or gains under sub-section (1) of section 25 of the Indian Income tax Act 1922 (XI of 1922)

The above exemption applies only to income tax and not to super tax

Income exempt from super tax but not from income tax—The Governor General in Council is pleased to exempt from super tax

"So much of the income of any Investment Trust Company as is derived from dividends paid by any other Company which has paid or will pay super tax in respect of the profits out of which such dividends are paid

Explanation—For this purpose an investment trust company means a company in respect of which the Governor General in Council is satisfied that—

- (i) it is a company having for its principal business the acquisition and holding of investments in the stocks shares, bonds, debentures, or debenture-stocks of other companies or in securities issued by public authorities
 - (ii) it is not a company formed for the purpose of or engaged in acquiring or exercising control over any other company or group of companies or enabling any other persons to acquire or exercise such control,
 - (iii) it is a company deemed under clause (b) of the Explanation to sub-section (2) of section 23 A of the said Act to be a company in which the public are substantially interested "
- Notification No 47, dated 9th December, 1933

The above exemption applies only to super tax and not to income-tax

Depreciation—Railways and Tramways—The following modification has been made in respect of income tax in favour of income derived from railway or tramway business (other than an electric tramway) —

An assessee deriving income from a railway or tramway business may at his option require that in computing the profits or gains of such business

the following allowance shall be made in lieu of the allowances specified in clause (v), clause (vi) and clause (vii) of sub-section (2) of section 10 of the said Act, namely, the actual expenditure incurred by the assessee during the previous year on repairs, replacements and renewals of plant, machinery, buildings and furniture which are the property of the assessee.

Provided that an assessee who in any year has exercised the option hereinbefore conferred shall not be entitled, save with the consent of the Commissioner of Income-tax to withdraw that option in any subsequent year.

Provided further that nothing in this Notification shall apply to an electric tramway (Notification No 23 dated 11th June, 1927.)

Marginal relief—Where owing to the fact that the total income of an assessee has reached or exceeded a certain limit he is liable to pay super-tax or to pay super-tax at a higher rate the amount payable by him on account of income tax and super-tax shall, where necessary, be reduced so as not to exceed the aggregate of the following amounts, namely,

(a) the amount which would have been payable on account of income-tax and super-tax if his total income had been a sum less by one rupee than that limit and

(b) the amount by which total income exceeds that sum (Notification No 12, dated 4th April, 1931.)

61. (1) Any assessee, who is entitled or required to attend before the Appellate Tribunal or any Income-tax Authority in connection with any proceeding under this Act otherwise than when required under section 37 to attend personally for examination on oath or affirmation, may attend by a person authorised by him in writing in this behalf, being a relative of or a person regularly employed by the assessee or a lawyer or accountant or Income-tax practitioner, and not being disqualified by or under sub-section (3)

Appearance by authorised representative

(2) In this section,—

(i) a person regularly employed by the assessee shall include any officer of a Scheduled Bank with which the assessee maintains a current account or has other regular dealings;

(ii) 'lawyer' means a Barrister-at-law or Solicitor or any other person entitled to plead in any Court of law in British India;

(iii) 'accountant' means a registered accountant enrolled in the Register of Accountants maintained by the Central Government under the Auditors Certificate Rules, 1932, or a holder of a restricted certificate under the Restricted Certificate Rules, 1932, or a member of an association of accountants recognised in this behalf by the Central Board of Revenue;

(iv) 'Income-tax practitioner' means—

(a) any person who, before the 1st day of April, 1938 attended before an Income-tax authority on behalf of any assessee otherwise than in the capacity of an employee or relative of that assessee ;

(b) any person who has passed any accountancy examination recognised in this behalf by the Central Board of Revenue ; or

(c) any person who has acquired such educational qualifications as the Central Board of Revenue may prescribe for this purpose.

(3) No person who has been dismissed from Government service after the 1st day of April, 1938, shall be qualified to represent an assessee under sub-section (1) ; and if any lawyer or registered accountant is found guilty of misconduct in connection with any income-tax proceedings by the authority empowered to take disciplinary action against members of the profession to which he belongs, or if any other person is found guilty of such misconduct by the Commissioner of Income-tax, the Commissioner of Income-tax may direct that he shall be thenceforward disqualified to represent an assessee under sub-section (1) :

Provided that—

(a) no such direction shall be made in respect of any person unless he is given a reasonable opportunity of being heard,

(b) any person against whom such direction is made may, within one month of the making of the direction, appeal to the Central Board of Revenue to have the direction cancelled, and

(c) no such direction shall take effect until one month from the making thereof or when an appeal is preferred, until the disposal of the appeal.

Rules.—See Rules 44, *et seq*

History—Before 1939, the assessee could attend by any person authorised by him in writing in this behalf. The present section dates from 1939. The reference to the Tribunal was added in 1940.

Signing returns—This section applies only to attendance before the authorities on behalf of an assessee and does not authorise the signing of returns or verifications by a representative, which can be done only by the assessee.

Authorised in writing—Departmental instructions require that in all cases a power of attorney, on stamped paper, must be filed, even in cases where the assessee sends his own employee or an officer of a scheduled Bank, and that there should be a declaration both by the assessee and by this representative that the latter is competent to appear under section 61.

See also Appendix about stamp fees.

The word "relative" has not been defined and whatever the degree of kinship, a relative can evidently represent the assessee.

Persons other than these mentioned in this section will not be allowed to appear.

Regularly employed—Not necessarily employed whole time; all that is needed is regularity of employment, as distinguished from casual employment, *e g*, *ad hoc* for representing before the Income-tax authorities. *See also* sub-section (2) (i).

Scheduled Bank—*I.e.*, with reference to the Reserve Bank of India Act. "Other regular dealings" is a vague expression.

When Income-tax Officer requires personal appearance of an assessee—The words "otherwise than where required under section 37" added in 1939 make it clear that the assessee must appear in person if the Income-tax Officer acting as a Court under section 37 summons him personally. An ordinary notice under the other sections of the Income-tax Act, which does not explicitly summon the assessee personally, would not be sufficient for this purpose. In response to such a notice, the assessee would be entitled to send a representative.

Asking for copies of orders—It has been held by the Patna High Court that, because Income-tax proceedings are confidential, the mere fact that an agent appeared before the authorities at earlier stages on behalf of the assessee does not *ipso facto* authorise the agent to obtain copies of orders passed. To enable him to obtain them, the agent should be expressly authorised to do so by the assessee by writing, *Basantilal Ramjidas v. Commissioner of Income-tax, Bihar and Orissa*, 5 I.T.C. 383.

Power to compromise—A vakalatnama, authorising a pleader to represent his client in an application under section 66 (2), and also ("for all purposes under all sections of the Act") gives the pleader power to compromise regarding the application, and his action binds the client who cannot afterwards ask for a case to be stated to the High Court *Mussammat Hashim Banu Bibi v. Commissioner of Income-tax, Bengal*, 1940 I.T.R. 482. In this case, the pleader had informed the Commissioner that the compromise had the consent of the client.

Receipts to be given. **62.** A receipt shall be given for any money paid or recovered under this Act.

63. (1) A notice or requisition under this Act may be served on the person therein named either by post, or, as if it were a summons issued by a Court, under the Code of Civil Procedure, 1908.

Service of Notices.

(2) Any such notice or requisition may, in the case of a firm or a Hindu undivided family, be addressed to any member of the firm or to the manager, or any adult male member of the family and, in the case of any other association of persons, be addressed to the principal officer thereof.

History—Corresponds to section 46 of the 1886 Act and section 46 of the 1918 Act. The reference to "any other association of individuals" was made by Act XI of 1924, and the word 'persons' was substituted for 'individuals' in 1939.

By Post—'By post' means 'by registered post'. Section 27 of the General Clauses Act (X of 1897) is as below—

"Where any act of the Governor General in Council or Regulation made after the commencement of this Act authorizes or requires any document to be served by post, whether the expression 'serve' or either of the expressions "give" or 'send' or any other expression is used then, unless a different intention appears, the service shall be deemed to be effected by properly addressing, pre-paying and posting by registered post, a letter containing the document, and unless the contrary is proved to have been effected at the time at which the letter would be delivered in the ordinary course of post."

This section however creates only a presumption which can be rebutted, *DeSouza v Commissioner of Income tax, U P*, 6 I T C 130, 54 All 548.

Where a letter of authority had been given to the Post Office to deliver all postal articles addressed to the assessee to a named person and that person in fact received all such articles, it was held that a registered notice delivered to the named person had been validly served on the assessee. *In re Anuradha Lakundal* 1941 I T R 193 (All).

Notice—How to be served—Alternative forms—See Appendix as to how summonses are to be served under the Civil Procedure Code. Intimation of adjournment of proceedings in compliance with the request of an assessee is not a notice under the Act requiring to be served in accordance with this section. *Commissioner of Income tax Madras v Periantha Pillai*, 4 I T C 217, A I R 1930 Mad 113, *Commissioner of Income tax Madras v Laxminarain Badridas*, 1937 I T R 170 (P C), see also notes under section 23 as regards adjournments.

This section does not require that service of a notice must be by its being placed in the hands of the person named therein by the officer of the court and does not exclude other forms of service permitted by Order V of the Civil Procedure Code, per *Halsfax*, A J C, in *Ismail Bhai v Government*, 1 I T C 192.

The section is permissive and not exhaustive and it is open to the Income tax Officer to adopt any method of service that is effective so long as the assessee is not prejudiced thereby. Thus the signature on the margin of an order sheet of the Income tax Officer by the assessee would be equivalent to due service of notice, *Ramkhetawan Ugamlal v Commissioner of Income tax, Bihar and Orissa* 3 I T C 225, 7 Pat 852.

Similarly, the service of a notice under section 22 (4) for the production of certain accounts on the gumastha of the assessee who produced certain other accounts before the income-tax Officer was held to be valid service. *Jangi Bhaqat Ramavtar v Commissioner of Income tax, Bihar and Orissa* 3 I T C 418, 8 Pat 877, A I R 1930 Pat 127. On the other hand the Nagpur Court held that service of notice on an accountant, who was not a recognised agent or empowered in writing to act as agent, though, he had in fact received notices on some occasions, was not valid notice,

Baxtram Radhmal v Commissioner of Income tax, C P, 1934 I T R 438, 7 I T C 254, so also, the Rangoon High Court, that the mere fact that a particular employee had accepted previous notices or that according to the practice of the business the employees were expected to hand over all communications to the manager (authorised agent of the employer) was not sufficient evidence to find that the manager had been duly served with notice, *Dey Bros v Commissioner of Income tax, Burma*, 1935 I T R 213, 8 I T C 186

An Income tax Inspector went several times to the place of business of an assessee to serve a notice in person on his agent but the agent was away and his assistants would not give any information as to his whereabouts. The Inspector had reason to believe on other information which reached him that the agent was avoiding the notice and thereupon posted the notice on the door of the business premises and made an affidavit before the Income tax Officer as to the service of notice. The Income tax Officer then declared that the notice had been properly served. *Held*, that the service was legal and that it was immaterial when the agent actually saw or obtained the notice, *S P N C T Chethyar Firm v Commissioner of Income tax, Burma* 5 I T C 191. The actual service of notice is a question of fact, *Abdul Rahman and Co v Commissioner of Income tax, U P*

Under Rule 12 of Order V and Rule 3 of Order III of the Civil Procedure Code service on a recognised agent is sufficient and has the same effect as service on the principal unless the Income tax Officer otherwise directs. Authority to accept service on behalf of a principal can be implied from the nature of the agent's duties, and in the case of a recognised agent carrying on the business of the principal this is well implied because the acceptance of the notice is connected with the business. *Hinatram Palwam v Commissioner of Income tax, Bihar and Orissa*, 5 I T C 133. *Sundarlal v Commissioner of Income tax, Bihar and Orissa* A I R 1931 Pat 282, 10 Pat. 441

Whether or not a receiver appointed by a Court, *ad interim* or permanently as such without more authority, can be regarded as "manager or agent" within the meaning of Rule 10, Order V of the Civil Procedure Code an assessee who has ratified the acts of the receiver as manager or agent cannot ask for the setting aside of proceedings under the Income tax Act (under section 27) solely on the ground that the receiver had been appointed only *ad interim* and not been confirmed. *A L A R N Firm (by the Official Receiver) v Commissioner of Income tax, Burma*, 1936 I T R 97

If a person is absent or cannot be personally served service may be made on any adult male member of the family residing with him. See Order V, Rule 15 Civil Procedure Code. *Pandit Manoharlal v Commissioner of Income tax U P*, 6 I T R 101

Failure to serve a notice in strict accordance with this section renders subsequent proceedings void—see *Emperor v Ramcharan*, 49 IC 781, 1 I T C 21, cited under section 51 also *Berry v Farrow*, (1914) 1 KB 632. The fact that in some way or other the notice reached the person on whom it was to be served is not in itself sufficient compliance with this section. *Dey Bros v Commissioner of Income tax, Burma*, 1935 I T R 213, 8 I T C 186

Partners of firms—A notice under section 23 (2) need not be served on the particular partner of a firm who signed the return under section 23 (2) *Commissioner of Income tax v Chidambara Nadar* 2 ITC 27, 48 Mad 602 A I R 1925 Mad 1047

Notice need not specify section of Act—It was ruled in *Ra ikhela van Ugamlal v Commissioner of Income tax Bihar and Orissa* 3 ITC 225 7 Pat 852 that a notice is not bound to state the section or sections under which it is issued and that in the absence of this detail the notice is not illegal

Notice on minor son—A minor son can be agent of his father in certain defined circumstances (*cf* section 184 Indian Contract Act) and delivery of notice sent by registered post to a minor son who used to take delivery of registered letters addressed to his father has been held to be valid service *De Sou a v Commissioner of Income tax U P* 6 ITC 130, 54 All 548

Trust—Under section 2 (12) (a) and section 63 a notice can be served on the managing trustee of a trust *Commissioner of Income tax Bombay v Ibrahim, Hakim* 1940 ITR 501

Hindu undivided family—Sub-section (2) does not override sub-section (1) the word used is only may and not shall it only enables the notice to be served on a single person instead of several which might be necessary otherwise There is nothing therefore to prevent a notice being served under sub-section (1) on an agent of a Hindu undivided family doing business Where such a family resided in Madras and the business was carried on at Rangoon service on the agents at Rangoon was held to be legal *Commissioner of Income tax Burma v A R A N Chettiar Firm* 6 Rang 21 2 ITC 477 The second sub-section is not surplusage since it fastens personal responsibility so that the penal provisions of section 51 can be set in operation *Commissioner of Income tax Burma v V D M R M Chettiar* 2 ITC 474

A trading Hindu undivided family carried on business in the name of X Y the names of two members After the death of X and Y the family continued to trade under the same name and notices were issued under the Income-tax Act in the name of X Y on the karta of the family who appeared in the proceedings and filed a return Later on he challenged the legality of the notices and it was held that as the family in its trading capacity was known as X Y and the notices were served on the karta there was no defect of procedure either in substance or in form *Sonulal v Commissioner of Income tax Bihar and Orissa* 1938 ITR 94

64 (1) Where an assessee carries on a business, profession or vocation at any place, he shall be assessed by the Income tax Officer of the area in which that place is situate or, where the business, profession or vocation

is carried on in more places than one, by the Income tax Officer of the area in which the principal place of his business profession or vocation, is situate

(2) In all other cases an assessee shall be assessed by the Income tax Officer of the area in which he resides

(3) Where any question arises under this section as to the place of assessment, such question shall be determined by the Commissioner, or, where the question is between places in more provinces than one, by the Commissioners concerned, or, if they are not in agreement, by the Central Board of Revenue :

Provided that, before any such question is determined, the assessee shall have had an opportunity of representing his views :

Provided further that the place of assessment shall not be called in question by an assessee if he has made a return in response to the notice under sub-section (1) of section 22 and has stated therein his principal place of business, profession or vocation, or if he has not made such a return shall not be called in question after the expiry of the time allowed by the notice under sub-section (2) of section 22 or under section 34 for the making of a return :

Provided further that if the place of assessment is called in question by an assessee the Income-tax Officer shall, if not satisfied with the correctness of the claim, refer the matter for determination under this sub-section before assessment is made.

(4) Notwithstanding anything contained in this section, every Income-tax Officer shall have all the powers conferred by or under this Act on an Income-tax Officer in respect of any income, profits or gains accruing, or arising or received within the area for which he is appointed

(5) The provisions of sub-section (1) and sub-section (2), shall not apply and shall be deemed never at any time to have applied to any assessee—

(a) on whom an assessment or re-assessment for the purposes of this Act has been, is being, or is to be made in the course of any case in respect of which a Commissioner of Income-tax appointed without reference to area under sub-section (2) of section 5 is exercising the functions of a Commissioner of Income-tax, or

(b) where by any direction given or any distribution or allocation of work made by the Commissioner of Income-tax under sub-section (5) of section 5, or in consequence of any transfer made by him under sub-section (7-A) of section 5, a particular Income-tax Officer has been charged with the function of assessing that assessee, or

(c) who or whose income is included in a class of persons or a class of income specified in any notification issued under sub-section (6) of section 5, but the assessment of such person, whether the proceedings for such assessment began before or after the 1st day of April, 1939, shall be made by the Income-tax Officer for the time being charged with the function of

making such assessment by the Central Board of Revenue or by the Commissioner of Income-tax to whom he is subordinate, as the case may be

History—This corresponds to section 47 of the 1886 Act and section 47 of the Act of 1918. The section was expanded in 1922 so as to cover all cases. Sub-section (1) was expanded in 1939 so as to cover cases of profession or vocation and the second and third provisos were also then added. The Calcutta High Court decision in *Hajee Adam v Secretary of State* 5 C W N 257 (under the 1886 Act) is now obsolete. Sub-section (5) was added in 1940 as a result of the decision of the Bombay High Court, in *Dayaldas Kushiram v Commissioner of Income tax* 1940 I T R 139 that the jurisdiction of the officer of the principal place of business had not been ousted. The amendment which is retrospective was made first by an ordinance and then by an Amending Act.

See also notes under section 5

Question when to be raised—The second proviso to sub-section (3) lays down the limit of time within which the assessee can question the jurisdiction of the Income-tax Officer and the third proviso compels the Income-tax Officer to refer the point to the Commissioner if the claim of the assessee is not accepted by the Commissioner. Sub-section (3) comes into operation only if there is a dispute between the assessee and the Income-tax Officer and if there is no dispute there is no need for any reference to the Commissioner. In *re Bisheshwar Nath and Co* 1942 I T R 103 (All). The sub-section obviously cannot apply when a transfer is made in accordance with the wishes of the assessee. *Tarak Nath Bagchi v Commissioner of Income tax Bengal* 1946 I T R 319.

Specific Relief Act—The right to be assessed by a particular officer is a right to which section 45 of the Specific Relief Act applies. *Dayaldas Kushiran v Commissioner of Income tax Bombay* 1940 I T R 139.

Assessee to be bound by his own admission—The new form of return [see section 22 (5)] requires the assessee to state his principal place of business etc. and if he has made a statement he should obviously be bound by it.

If return not submitted—Where a person defaults in submitting a return even though asked to do so under section 22 (2) he is deprived of the right to raise any question about his principal place of business etc.

Concurrent jurisdiction—The provisions of the fourth sub-section do not oust the jurisdiction of the Income-tax Officer of the principal place of business to assess the profits of a branch business in an area in the jurisdiction of another Income-tax Officer. In such cases both Income-tax Officers have jurisdiction. *Lachmandas Baburam v Commissioner of Income tax* 2 I T C. 35 47 All 631. In *re Abey Ram Churn Lal* 1933 I T R 126 (All). It is open therefore to the Income-tax Officer at the principal place of business to call for the accounts of branches irrespective of whether they have been produced before the local Income tax Officers or not and of whether the branches have submitted returns of income to them. Further the Income-tax Officer at the principal place of business is not bound to accept the reports if any made by the Income tax Officers at the branches and need not refer back to them the points on which he is not

prepared to accept their reports, *Lachmandas Baburam v Commissioner of Income tax, U P*, 4 I T C 61, AIR 1930 All 49 Where notices have been issued by one officer, it is unnecessary for the other officer to issue them again *Tarak Nath Bagchi v Commissioner of Income tax, Bengal*, 1946 I T R 319, In re *Bisheshwar Nath and Co*, 1942 I T R 103 (All)

The same income cannot be taxed twice—once by the Income tax Officer of the branch and again by the Income tax Officer of the principal place of business *Ramkhelawan Ugamlal v Commissioner of Income-tax, Bihar and Orissa*, 3 I T C 225 If the Income tax Officer of a branch, instead of merely making a report to the Income tax Officer of the principal place of business makes a final assessment himself in respect of the Income within his jurisdiction, it would seem to be still open to the Income tax Officer of the principal place of business to assess the branch income on a footing different from that assessed by the Income tax Officer of the branch cf., *L R M S T Chettiyar Firm v Commissioner of Income tax, Burma*, 3 I T C 416

The obligation to make a return at the principal place of business is not discharged by filing returns before the Income-tax Officers at the branches and it is therefore open to the Income-tax Officer of the principal place of business to assess under section 23 (4) in the absence of a return without waiting for reports from the Income tax Officers of the branches *Mohanlal Hardeodas v Commissioner of Income tax Bihar and Orissa* 9 Pat 172 See also notes under section 23

If an assessee has more than one place of business, it is open to an Income tax Officer in whose jurisdiction income accrues to issue a notice under section 22 (2) pending the orders of the Commissioner as to the principal place of business and the Income-tax Officer of the principal place of business as determined by the Commissioner need not issue a further notice under section 22 (2), *Bisheshwar Prasad v Commissioner of Income tax, U P*, 7 I T C 74 (All)

Where an assessee's case is transferred from one Income-tax Officer to another and again back to the former, and both Income tax Officers had issued notices under section 22 (2), the omission on the part of the first Income-tax Officer to issue a notice for the second time under section 22 (2) will not necessarily vitiate the proceedings before him especially if the assessee appeared before him in response to notices under section 23 (2) section 22 (4) *Huralal v, Commissioner of Income tax, U P*, 1942 I T R 148 (All)

Opportunity—If the assessee is not given an opportunity the assessment will not be in accordance with the Act and a fresh assessment will be necessary after giving the assessee an opportunity to represent his views His views are not bound to be accepted, nor has he a right of appeal An assessee who has been allowed by the Commissioner to state his objections in an affidavit must be held to have an opportunity to state his views In re *Seth Kanhayalal Goenka* 1941 I T R 25 (All)

It is only if the Commissioners are not in general agreement that the question need be referred to the Central Board of Revenue If the Commissioners agree the assessee must abide by their decision But in all cases he has the right to represent his point of view to the Commissioner, i.e. even if the Income tax Officers are agreed While therefore the assessee must abide by the decision of the Commissioners where they agree he is not similarly bound by the opinion or orders of the Income tax Officers even if they are

in agreement *Lachmandas Baburam v Commissioner of Income tax U P*, 2 I T C 35 (All)

The assessee may approach the Commissioner or the Central Board of Revenue direct if he is so inclined

Appeal and reference—There is no right of appeal to the Assistant Commissioner or of reference to the High Court in respect of orders issued under this section. The question cannot be raised on appeal and even if raised cannot be said to arise out of the appellate order. It is of course open to the Commissioner to refer the question to the High Court *suo motu* under section 66 (1) *Dinanath Hemraj v Commissioner of Income tax, U P* 2 I T C 304 (All), *Seth Kanhaiyalal v Commissioner of Income tax U P* 1937 I T R 739 (All). The Commissioner is no longer empowered to make a reference to the High Court.

The question of jurisdiction having been settled in accordance with section 64 (3) by the Commissioner or the Central Board of Revenue as the case may be the question cannot be raised on appeal before the Assistant Commissioner or the Tribunal or on a reference to the High Court. In re *Seth Kanhaiyalal Goenka* 1941 I T R 25 (All)

The Act does not determine the place of assessment it only determines the officer empowered to assess and in some cases, it does so by reference to locality. An appeal under section 30 lies not against an order under section 64 (3) but against the consequences arising from such order. *Dayaldas Kushiram v Commissioner of Income tax, Bombay* 1943 I T R 67

The determination of the principal place of business is primarily a matter of administrative convenience rather than of jurisdiction and in any case it is not a matter for adjudication by the Court. The scheme of the Act does not contemplate an objection as to the place of assessment being raised on appeal after the assessment has been made. *Wallace Bros Ltd v Commissioner of Income tax Bombay* 1945 I T R 39 (F C)

Misdesignation—The fact that an Income tax Officer designated himself wrongly will not divest him of jurisdiction if in truth he has it. *Seth Kanhaiyalal v Commissioner of Income tax U P* 1937 I T R 739 (All)

Principal place of business—The law does not define the expression. It is essentially a question of fact which is the principal place of business in a given case. Principal is a vague word and involves only a relative concept. This idea of the principal place of business is really the English theory of control with respect to residence stated somewhat differently the difference being that there can be only one principal place of business though there can be more than one place of control. Various considerations have to be taken into account and balanced against each other before it can be decided which is the principal place of business in a particular case. Such balancing involves the determination of questions of degree and therefore questions of fact. In accordance with the general scheme of the Act therefore it has been left to be decided by the Revenue Authorities in each case which is the principal place of business. Questions of law can arise only if the authorities decide without evidence to justify their findings. Relevant considerations would be where the partners reside and which among them have the real control where the accounts are kept of the business as a whole which is the parent business out of which the business has grown,

where, in the case of a company, the registered office is located; whether the business at any place is conducted with partners and at other places without partners, where the finance is arranged, and contracts entered into, where the goods are actually manufactured and sold, and so forth, and most of these considerations are relevant only in ascertaining where the effective control is exercised. The object of giving the assessee an opportunity to state his view, is partly to help him to decide where he can most conveniently appear before the Department and look after his interests and partly to safeguard the secrecy of his business matters. Ordinarily the principal would not like a branch manager of his to see all his accounts. The section therefore says that the assessment shall be made at the principal place of business. If the principal however to suit his own convenience, resides at some other place, that would be no reason for not making the assessment at the principal place of business.

The mere fact that goods are manufactured or sold at a place will not make that place the principal place of business, nor the fact that an expert partner or partners on whom the efficient conduct of the business largely depends resides or reside at a particular place while the financing and contracts are regulated elsewhere. The relative volume of transactions and profits will in themselves prove nothing, *Dinanath Hemraj v Commissioner of Income tax, U P*, 2 I T C 304 (All). Their relevancy comes in only incidentally helping to decide where the real control is exercised. It is conceivable that the principal place of business may be a place where the business may be making an actual loss, large profits being made elsewhere, or a place where goods are neither bought nor sold but effective control is exercised.

In connection with the service of a writ which had to be made at the "principal office" of a company, it was held by Lord Campbell, C J, in *Garton v Western Ry*, E B & E 837 that

'The words 'principal office' indicate one particular office for the whole line, not an office for the traffic station."

This was followed in *Palmer v Colclough* (1892) O B D 823 in which Lord Esher, M R said —

"I should have thought without doubt that the principal office of the company must be the place where the business of the Company is controlled and managed. See *Palmer v Colclough*, (1892) O B D 823 in which Lord Esher, M R said —

"What I understand by 'principal office' is the place where the general superintendence and management of the business is carried on."

In this connection attention may be invited to the decisions (1) which declare that the carrying on of a business is a question of fact—see notes under section 2 (4), (2) which declare that carrying on business or exercising a trade in a particular place is also a question of fact—see notes under section 4 (1). *A fortiori* it would seem that the question which is the principal place of business is also a question of fact. As already stated the concept involves the added factor of relativity which can only be a matter of degree or of opinion and therefore essentially a question of fact.

Partners of firms.—The expression 'place of business' is not restricted to places where an assessee carries on business individually, but includes places where he carries on business as a partner in a firm. Stress should

not be laid on the use of the word 'assessee' in section 64 and it is in fact inappropriate since a person cannot become an assessee within the meaning of section 2 (2) of the Act until he has been assessed. Moreover, though a partner in a firm cannot become an assessee in respect of his income from the firm so long as the firm is assessed he has none the less to be assessed in respect of it. The verb to assess can only mean to ascertain the amount of a person's income in order to determine whether he is liable to tax (and if so at what rate and in what sum) or not.

Take the case of a person residing in Madras who is a partner in registered firms at Calcutta Bombay and Rangoon and has no other business. Each firm has a principal place of business, but one of the three has to be selected as the principal place of business of the person who is a partner in all the three firms. Similarly when a person is a partner in a firm and carries on business independently of the firm it has to be determined whether the principal place of business is the place where the person carries on business individually or the place where he carries on business as a partner in a firm. It does not follow that the principal place of business of a firm is also the principal place of business of each partner in the firm.

Effect on assessment proceedings pending settlement—Principal place of business.—If an assessee declines to produce his branch books called for under a notice issued under section 22 (4) for inspection by the Income-tax Officer of the principal place of business on the ground that it is not convenient to do so an assessment by the Income-tax Officer of the principal place of business under section 23 (4) would not be illegal. *Lachmandas Baburam v. Commissioner of Income tax* 2 I T C 35. Whether the Income tax Officer should re-open the assessment under section 27 or not would depend on whether the assessee was prevented by sufficient cause from producing the books i.e. on the circumstances of each case. But if an Income-tax Officer assesses a person whether under section 23 (4) or under section 23 (3) when a question under section 64 is pending his proceedings are irregular. *Dinanath Hemraj v. Commissioner of Income-tax*, 2 I T C 304. This is now laid down in the second proviso. He should wait till the question under section 64 is decided by the relative authority—the Commissioner or the Central Board of Revenue as the case may be—before making the assessment. But it is clearly open to the Income-tax Officer to go on under section 64 (4) with the assessment of that part of the income arising or accruing or received in his jurisdiction.

Resides.—As regards the meaning of this word see notes under section 4 A. The question of residence will arise under section 64 only if the assessee is not carrying on a business profession or vocation. If he does the principal place of business etc., settles the place of assessment and not the residence no matter whether the assessee be an individual firm or company. If an assessee who is not carrying on business etc. has more than one residence the Income-tax Officer at any of the places of residence can assess him. The law does not require the Income-tax Officer of the principal place of residence i.e., of ordinary residence to assess. But whether the assessee carries on business etc., or not sub-section (3) will apply if any difference arises.

Non resident.—A non resident partner in a firm assessed in British India is assessable by the same officer as assesses the firm. *Wallace Bros., Ltd. v. Commissioner of Income tax Bombay* 1943 I T R 559.

United Kingdom Law—In the United Kingdom, in cases in which there is a possible conflict of jurisdiction, one way of settling the doubt is by an application to the High Court for a Writ of Prohibition, but there is a provision authorising the Board of Inland Revenue to decide in cases of doubt in which parish an assessee should be assessed—see section 97 of the Act of 1918

65 Every person deducting, retaining or paying any tax in pursuance of this Act in respect of income belonging to another person is hereby indemnified for the deduction, retention or payment thereof

Indemnity

History—There were indemnity sections in previous Acts also. See section 49 of the 1886 Act and section 48 of the 1918 Act. Such a provision is obviously necessary in all systems in which tax is deducted 'at source'.

Scope of section—Before any person can seek relief from Government on account of this indemnity, he must actually lose something as a consequence of his having deducted, retained or paid the tax. See *Collinge v Haywood*, 8 L.J.Q.B. 98. The indemnity will, of course, cover only such acts as were made *bona fide* and in accordance with the Act, and the question whether any one else committed default or not would be irrelevant to the indemnity. The liability of Government is conterminous with that of the person deducting and paying the tax and will be neither more nor less.

Operation outside British India—Payment of British Indian Income-tax to the British Indian Government on behalf of a third person will not enable the person deducting tax at source to claim under the law of a foreign country a discharge of an equivalent corresponding debt. In British India of course, he automatically gets the discharge, but if the contract between the person deducting tax and the person from whom it is deducted is under foreign law and to pay a specified rate of interest in the foreign country, this indemnity is of no help. A company in British India which raises debentures outside, the interest on which is payable outside and the contract relating to which is governed by the law of a foreign State cannot deduct under that law, Indian Income-tax from the foreign debentureholder in the absence of a contract to that effect. Similarly, a company paying interest on debentures in British India, cannot in the absence of a contract to that effect claim to deduct from such interest tax paid by it else where, and if it does so deduct, indemnity under this section will be of no avail, see *India and General Investment Trust v Borax Consolidated*, (1920) 1 K.B. 539, also *London & South American Investment Trust, Ltd v British Tobacco Co., (Australia) Ltd*, 42 T.L.R. 771, (1927) 1 Ch. 107.

As regards the enforcement in one country of Revenue, etc., laws of another, see *Attorney General for Canada v Schulze*, 9 S.L.T. 4 and *Re Visser, Queen of Holland v Drukker and others* (1928) 1 Ch. 877.

The general principle is that Courts will not collect the taxes of other States for the benefit of the sovereigns of those States.

It is because of the difficulty in respect of foreign contracts that sections 8, 9, 10 and 12 instead of seeking to deduct tax at source from the payee, disallow from the taxable income of the payer of interest the deduction of interest payable abroad except in certain restricted circumstances.

66 (1) Within sixty days of the date upon which he is served with notice of an order under sub-section (4) of section 33 the assessee or the Commissioner may, by application in the prescribed form, accompanied where application is made by the assessee by a fee of one hundred rupees, require the Appellate Tribunal to refer to the High Court any question of law arising out of such order, and the Appellate Tribunal shall within ninety days of the receipt of such application draw up a statement of the case and refer it to the High Court

Provided that, if, in the exercise of its powers under sub-section (2), the Appellate Tribunal refuses to state a case which it has been required by the assessee to state, the assessee may, within thirty days from the date on which he receives notice of the refusal to state the case, withdraw his application and, if he does so, the fee paid shall be refunded

(2) If on any application being made under sub section (1) the Appellate Tribunal refuses to state the case on the ground that no question of law arises, the assessee or the Commissioner, as the case may be, may, within six months from the date on which he is served with notice of the refusal, apply to the High Court, and the High Court may, if it is not satisfied of the correctness of the decision of the Appellate Tribunal, require the Appellate Tribunal to state the case and to refer it, and on receipt of any such requisition the Appellate Tribunal shall state the case and refer it accordingly

(3) If on any application being made under sub section (1) the Appellate Tribunal rejects it on the ground that it is time barred the assessee or the Commissioner, as the case may be, may, within two months from the date on which he is served with notice of the rejection, apply to the High Court, and the High Court, if it is not satisfied of the correctness of the Appellate Tribunal's decision, may require the Appellate Tribunal to treat the application as made within the time allowed under sub section (1)

(4) If the High Court is not satisfied that the statements in a case referred under this section are sufficient to enable it to determine the question raised thereby, the Court may refer the case back to the Appellate Tribunal to make such additions thereto or alterations therein as the Court may direct in that behalf

(5) The High Court upon the hearing of any such case shall decide the questions of law raised thereby and shall deliver its judgment thereon containing the grounds on which such

decision is founded and shall send a copy of such judgment under the seal of the Court and the signature of the Registrar to the Appellate Tribunal which shall pass such orders as are necessary to dispose of the case conformably to such judgment.

(6) Where a reference is made to the High Court the costs shall be in the discretion of the Court.

(7) Notwithstanding that a reference has been made under this section to the High Court income-tax shall be payable in accordance with the assessment made in the case :

Provided that if the amount of an assessment is reduced as a result of such reference the amount overpaid shall be refunded with such interest as the Commissioner may allow unless the High Court on intimation given by the Commissioner within thirty days of the receipt of the result of such reference that he intends to ask for leave to appeal to His Majesty in Council makes an order authorising the Commissioner to postpone payment of such refund until the disposal of the appeal to His Majesty in Council.

(7-A) Section 5 of the Indian Limitation Act, 1908, shall apply to an application, the High Court by an assessee under sub-section (2) or sub-section (3).

(8) For the purposes of this section "the High Court" means—

(a) in relation to British Baluchistan, the High Court of Judicature at Lahore ;

(b) in relation to the province of Ajmer-Merwara, the High Court of Judicature at Allahabad ; and

(c) in relation to the province of Coorg, the High Court of Judicature at Madras.

History.—Under Act of 1886, the assessee had no express right of reference to a High Court; but it had been held in more than one case that he could invoke the assistance of a Civil Court if the Revenue Officer exceeded his jurisdiction or otherwise acted *ultra vires* of the Act. Under the Act of 1918, the authority corresponding to the present Commissioner could, at the assessee's instance, refer a case to the High Court on any question of interpretation of the Act or the rules made under it, unless the authority thought the reference unnecessary or frivolous, and the assessee had no right to force a reference to the High Court (except to a limited extent, through the Specific Relief Act).

From 1922 to 1941, references were made to the High Court by the Commissioner; and the section was amended several times between these two years. Of these amendments the following still remain in the section, *viz.*—

(1) The words "within six months of the date on which he is served with notice of the refusal" inserted in 1924. There was no time-limit

before (2) Sub-section (8) added in 1926 The words "sixty days of the date on which he is served with notice" and "sixty days" in sub-section (2) were substituted for "one month of the passing" and "one month" respectively in 1930 (3) Option to the assessee to withdraw the application (4) Extension of section 5 of the Limitation Act to applications under sub-sections (3) and (3-A) of this section Both (3) and (4) were added in 1933 (5) Provision for the stay of refund of tax after taking the High Court's orders (6) Cases in the North West Frontier Province being referred to the Judicial Commissioners' Court instead of to the Lahore High Court The last three items date from 1939

The section was radically recast when the Appellate Tribunal was set up in 1941 References are now made by the Tribunal, and the Commissioner is placed in the position of a party before it and given the right to ask for a reference and to approach the High Court in case a reference is refused

Limitation—Section 5 of the Limitation Act referred to in sub section (7-A) above is as follows —

5 Any appeal or application for review of judgment or for leave to appeal or any other application to which this section may be made applicable by or under any enactment for the time being in force may be admitted after the period of limitation prescribed therefor, when the appellant or applicant satisfies the Court that he had sufficient cause for not preferring the appeal or making the application within such period

Explanation—The fact that the appellant or applicant was misled by any order, practice or judgment of the High Court in ascertaining or computing the prescribed period of limitation may be sufficient cause within the meaning of this section

Form of application for reference—See Form R (T) in Rule 22 A There was no prescribed form before the Tribunal was set up, i.e., when the Commissioner made the reference to the High Court

References suo motu—The Appellate Tribunal is not empowered to refer cases *suo motu* to the High Court and can do so only at the instance either of the assessee or of the Commissioner Formerly, both under the 1918 Act and under the present one, till 1941, (before the Tribunal was set up) the Commissioner could do so and there was a spate of litigation as to whether, under the Specific Relief Act or otherwise, he could be compelled to exercise that power These rulings [there were nearly twenty of them, a few important ones being *Alcock Ashdown v Chief Revenue Authority*, 11 I T C 221, 50 I A 227, 47 Bom 742 (P C), *V E A Chettyar v Commissioner of Income tax, Burma*, 7 Rang 581, 3 I T C 436, *Surajmal Brijlal v Commissioner of Income tax*, 5 I T C 82, 10 Pat 218, *Commissioner of Income tax v Bombay Trust Corporation*, 1936 I T R 323 (P C)] are of no interest now

Specific Relief Act—Furthermore, till 1939 appeals to the Assistant Commissioner lay only in respect of certain specified matters and such a reference could be made to the High Court only in respect of questions of law arising out of the Assistant Commissioner's orders (and prejudicial orders of the Commissioner) it was a matter of importance to the assessee somehow to seek to bring other questions within the scope of the Specific Relief Act and thus compel a reference to the High Court in some way or

other An appeal to the Assistant Commissioner and from him to the Tribunal lies now in respect of almost every matter and questions of law arising out of the Tribunal's order come automatically within the jurisdiction of the High Court

The Court cannot claim even in appearance to command the Crown, and where an obligation is cast on the principal the Court cannot enforce it against the servant merely as such Before *mandamus* can issue against a public servant therefore it must be shown that a duty towards the applicant has been imposed on the public servant by Statute so that he can be charged thereon and independently of any duty which as servant he may owe to the Crown his principal Under section 45 (g) of the Specific Relief Act therefore orders cannot be made to enforce the satisfaction of a claim on the Crown even if such orders have some ulterior motive *e.g.*, to enforce an order made by the High Court itself *Commissioner of Income tax Bombay v Bombay Trust Corporation Ltd* 1936 I T R 323 (P C) Whether the Commissioner is under any provision of law charged with some duty so as to make him amenable to an order under section 45 (g) of the Specific Relief Act is an open question (*ibid*) Orders made by a Court under the Specific Relief Act should specify with exactitude and clarity the specific act which the person holding a public office is being commanded to do (*ibid*)

The right to be assessed by a particular officer in accordance with section 64 of the Income-tax Act is a right to which section 45 of the Specific Relief Act applies, *Dayaldas Kushiram v Commissioner of Income tax*, 1940 I T R 139 (Bom)

There is no right of reference now in respect of revisional orders passed by the Commissioner under section 33 A He cannot pass in revision any orders prejudicial to the assessee Formerly when he could pass such orders and a reference could be demanded to the High Court on questions of law arising out of a prejudicial order there was difference of opinion as to what was a prejudicial order

These rulings are of no interest but it remains to be decided to what extent the High Court can intervene if the Commissioner either refuses to apply his mind to a petition before him under section 33 A or passes an order which is prejudicial, or whether a suit will lie in such cases

Offences and Penalties—Chapter III—No case to High Court— No case can be stated to the High Court in respect of proceedings under Chapter VIII (Offences and Penalties) These offences go before Criminal Courts and the accused have the ordinary remedies under the criminal law It is immaterial whether the Assistant Commissioner's order to prosecute is given separately or included in an appellate order under section 31 or 32 In neither case can the order to prosecute form the subject of a reference to the High Court *In re Naramdas Mohanlal* 1933 I T R 182 A I R 1933 All 231 6 I T C 48

Penalties under sections 28 28 44-E 44 F and 46 which are imposed by Income tax authorities are appealable under section 30 and a reference therefore will lie to the High Court in respect of them

Jurisdiction of Income tax Officer—The question as to principal place of business under section 64 has to be raised at the very outset by the assessee and the final decision rests with the Commissioner or the Central Board of Revenue as the case may be. The question cannot be raised either in appeal or by way of reference *See notes under section 64*

Recognition of provident and superannuation funds—No appeal lies under section 30 in respect of refusal to recognise such a fund or of cancellation of its recognition, therefore no appeal lies to the Tribunal, and no reference to the High Court

Double Income tax relief—Indian States and Dominions—This is allowed by Notifications under section 49 A, and no appeal lies under section 30 though one is allowed by the notifications. Consequently no reference can lie to the High Court in respect of such relief. On the other hand, there is a right of appeal in respect of claims under section 49 and consequently a right of reference. In respect of relief under section 49 D relating to countries with which there is no reciprocal arrangement an appeal would seem to lie as part of the appeal against the assessment.

Service of notice—Sub section (1) makes it clear that this limitation of 60 days runs from the date on which the assessee or the Commissioner is served with notice of the Tribunal's order under section 33. As regards the procedure for service of notice, see section 63. Where, however, a judgment has been pronounced in Court in the presence of the assessee or his agent no further written notice will be required. *Lala Harkishen Das v Commissioner of Income tax, Punjab*, 1934 I T R 484.

Limitation—As to computation of the period see section 67 A.

Note also that section 66 (7 A) as introduced in 1933 lays down that section 5 of the Limitation Act applies to an application to the High Court under this section. An application therefore can be admitted after the period of limitation if the Court is satisfied that the applicant had sufficient cause for not making the application in time. As regards "sufficient cause" see notes under section 27.

Sub section (7-A) applies only to applications under sub-section (2) and sub-section (3), and not to applications under sub-section (1). In re *Lala Ganesh Prasad* 1942 I T R 288 (All.)

Old rulings—Before the Appellate Tribunal was set up a reference lay to the High Court on questions of law arising out of appellate orders, both of the Assistant Commissioner and of the Commissioner, and out of prejudicial orders passed by the Commissioner in revision. Now a reference lies in respect of questions of law arising out of the orders of the Tribunal. Most of the principles laid down in earlier rulings of Courts as to the extent to which references lie would apply *mutatis mutandis* to the orders of the Tribunal.

High Court—Function of—Not Court of Appeal—The High Court is not a Court of Appeal to which resort may be had if the assessee happens to be dissatisfied with the decision against them. It will not examine further evidence or examine books of account and try to arrive at findings contrary to those of the Tribunal. Still less will it allow evidence to be produced before it which ought to have been produced before the Revenue authorities. In re *Binjraj Hukumchand*, 58 Cal 1446, In re *Baldeodas Rameswar* 135 I C 280. Its functions are strictly confined to the disposal of references on points of law under section 66, In re *Makham Lal Ram Sarup* 1 I T C 416. In *Trustees Corporation v Commissioner of Income tax Bombay*, 54 Bom 437, 4 I T C 378, A I R 1930 P C 151, the Privy Council observed that the stringency of these requirements is clearly deliberate. It is the intention of the enactment that the High Court is not to be flooded with such applications. The High Court will not enter-

claim any question under this section unless the preliminary statutory conditions have been fully observed

If the Tribunal refers certain questions of law only and refuses to refer others on the ground that there is no question of law involved the High Court will not except on very strong grounds adjourn the hearing of the reference in order to hear a petition under section 66 (2) in respect of the questions not referred by the Tribunal. *In re Multanchand Johurmaj* 51 T C 154. The function of the High Court in respect of a stated case is only advisory and restricted to considering and answering the actual question raised. *Sir Rajendra Narayan v Commissioner of Income tax B & O* 1940 I T R 495 (P C). Even if there is a point of law on which the Tribunal has refused to state a case the High Court will not order a reference if it is satisfied that the point of law had been rightly decided by the Tribunal. *Taraknath Bagchi v Commissioner of Income tax, Bengal* 1946 I T R 319.

High Court—Who can move?—An application for a reference can be made only after the appeal under section 33 has been disposed of. The assessee must exhaust his remedies under the Act before asking for a reference.

The High Court may be moved under section 66 (2) only if the assessee is competent to apply to the Tribunal under section 66 (1). Accordingly, an assessee who for any reasons forfeits his right of appeal to the Tribunal is not competent to move the High Court under section 66 (2). *Benarsi Das v Commissioner of Income tax* 7 Lah 226 2 I T C 170. *A fortiori* a person who has no right of appeal at all (e.g. one who has not been assessed at all) cannot move the High Court. *Shyam Lal v Commissioner of Income tax* 5 I T C 474. So also a person whose assessment has been set aside by the Tribunal. *Palunial Bholanath v Commissioner of Income tax* 5 I T C 458 (All).

Unless there is an order under section 33 there can be no question of reference to the High Court. If the Tribunal having rejected an appeal on the ground that no appeal lay, also went into the merits of the case the latter part of the order is not an order under section 33 and cannot therefore form the foundation of a reference. *Kun varji Ananda v Commissioner of Income tax, Bihar and Orissa* 5 I T C 417.

In a case in which no claim was made before the Income-tax Officer under section 25 A that a Hindu family had been partitioned and the Assistant Commissioner on appeal declined to consider the claim when it was put forward before him for the first time the High Court held that the question did not arise out of his appellate order. *Chiranjy Lal & Sons v Commissioner of Income-tax Punjab* 7 I T C 42.

Section 30 (1) as it was before 1939—prevented the High Court from examining whether an assessment purporting to be made under section 23 (4) was rightly so made. *Abdul Baree Chaudhuri v Commissioner of Income tax Burna* 5 I T C 352 overruling *A R A N Chettyar's case* 2 I T C 479 and other rulings. In such cases no appeal lay and therefore no question of law arose out of an appellate order under section 31.

No reference can be made on (a) the merits of an assessment or (b) the validity of the notice calling for accounts as questions arising out of an appellate order under section 33 confirming the refusal of the Income-tax Officer to reopen the assessment under section 27. *Cf. A K R P L A*

Chettiyar Firm v Commissioner of Income tax, Burma, 5 I.T.C. 182. Cases of this kind, however, do not often arise now since assessments made under section 23 (4) may be appealed against under section 30 instead of being sought to be reopened through section 27.

Till 1933, an original order passed by the Commissioner under section 28 in the course of proceedings under section 33 was not subject to appeal, and could not therefore form the subject matter of a reference under sub-section (2) of section 66 *Jangi Bhagat Ramavtar v Commissioner of Income tax, Bihar and Orissa*, 3 I.T.C. 418. A reference was allowed to the High Court from 1933 onwards on questions of law arising out of prejudicial orders passed by the Commissioner. His power of revision was withdrawn when the Appellate Tribunal was set up in 1941, but was restored soon after though in a modified form. He cannot now levy a penalty or pass a prejudicial order and there is no provision for any reference to the High Court against his orders.

The essential condition for an application under section 66 (2) is, that an application under section 66 (1) has been made to the Tribunal and refused by it, cf. *Leong Mah & Co v Commissioner of Income tax, Burma*, 2 I.T.C. 103. *Panchu Gopal Banerji v Commissioner of Income tax, Bihar and Orissa*, 4 I.T.C. 324, *Aminoff v Commissioner of Income tax, Punjab*, 1938 I.T.R. 474. A question not raised before the Tribunal under section 66 (1) cannot, therefore, be raised in an application to the High Court under section 66 (2), *In re Babulal Raj Garhia* 1936 I.T.R. 148 (Cal.), *Somchand Malukchand v Commissioner of Income tax Punjab*, 1938 I.T.R. 297, *In re Lakshminarain Gadodia and Co*, 1943 I.T.R. 491 (Lah.). Still less will the High Court refer the case back to the Tribunal under section 66 (5) for finding additional facts to enable the Court to determine such new questions. *In re Lakshminarain Gadodia and Co*, 1943 I.T.R. 491 (Lah.).

Legal representative—Before sections 24 B and 49 F were embodied in the Act and section 48 had not taken its present form the question arose whether the heirs of a deceased assessee who were refused by the Income tax Officer a refund under section 25 (3) could claim a reference to the High Court, and was answered in the negative, *Gobind Saran v Commissioner of Income tax, U.P.*, 2 I.T.C. 480. The question will not arise now because firstly the heirs take the place of the assessee under sections 24-B and 49 F, and secondly section 30 provides for appeals against orders under section 25 (3).

Death of assessee before case filed in High Court—In the United Kingdom proceedings are held to commence as soon as the written notice requiring the Commissioners to state and sign a case has been given, such proceedings are not abated by reason of the death of a party before the case is stated, in order to give effect to the intention of the Legislature the Court has jurisdiction to order the case to proceed by adding the personal representative of the deceased, and the requirement that a copy of the case should be served upon the other party is sufficiently met by service upon the executor, *Hemming v Williams*, (1871) L.R. 6 (C.P.) 480, *Canning v Farren*, (1907) 2 I.R. 485.

Per Sankey, J.—“In my view as soon as the notice in writing referred to in that section has been given, that is a notice to state and sign a case for the opinion of the High Court—the proceedings have begun.

The notice having initiated the proceedings the second step is the duty of the Commissioners to state a case setting forth the facts and their determination and the next step in the proceedings is to transmit the case when so stated and signed to the High Court the proceedings are proceedings which begin with a notice in writing and may end with the decision of the highest tribunal in the land the construction (should be followed) of allowing the matter to proceed by adding a personal representation of the deceased in order to give adequate effect to the intention of the Legislature I am of opinion that I am entitled to do what it seems to me has been done both in the English Divisional and the Irish Appeal Courts namely to so mould a convenient form of procedure to meet the case Mr Latter in reply to that part said 'Oh, but that cannot be done where the Crown is a party I am of course thinking of what would happen when the boot is on the other leg and when it is the subject who wants to appeal I think it would be the height of injustice—and I use the words advisedly—if in any case when the subject wished to appeal—and I am not using in any way offensive words—against an assessment which is considered to be grossly excessive the mere fact of his death should shut out those who would benefit from the appeal from prosecuting it', *Smith v Williams* 8 Tax Cases 321

A reference before the High Court is not a suit and no question of abatement therefore arises The High Court has to deal with a reference which it has to decide whether or not the assessee or his heirs appear before it Further the heirs are directly interested in the result of a reference since they are entitled to any refund of tax and even if the proceeding before the High Court had been a suit and the question of parties material the Court would not decide the question without hearing Counsel for the heirs at least as *amici curiae* The Patna High Court therefore heard the arguments on behalf of the heirs in the *Darbhanga* case 9 Pat 240, so also the Allahabad High Court in *In re Kesarlal Mahundilal* 1941 I T R 193

Points of law not raised in first instance—Parties requiring decisions on questions of law under this section should formulate them in a proper manner The parties have no right to expect the Court to deduce from the application of the parties what the questions in their minds may have been It is not open therefore to an assessee merely to ask for a reference to the High Court without at the same time precisely setting out the questions of law desired to be referred *Debidas Mandanlal v Commissioner of Income tax UP* 7 I T C 132 (Luck) If however, in the opinion of the Tribunal, there is a question of law it is under no obligation to refuse a reference merely because the assessee or the Commissioner has not formulated it properly, but may itself frame the correct question and refer it *cf*, *In re Krishna Kumar Ghose*, 5 I T C 295 (Cal)

Even if the application for a reference has been made in time supplementary questions of law cannot be raised after the time has expired *In re Raghunath das Seolal* 139 I C 599 (Cal)

If the Tribunal holds that there is no point of law, the assessee or the Commissioner has to satisfy the High Court that a distinct point of law was raised before the Tribunal and treated by it as a question of fact. The High Court will not listen to suggested points of law which were not first taken in the original proceedings and also submitted clearly and definitely on appeal

or in the application for a reference under section 66 (1), *cf*, In *re Mahan Lal Ram Sarup*, 1 I.T.C 416, *Tiruvengada Mudaliar v Commissioner of Income tax*, 27 L.W 729, 2 I.T.C. 514, *A K A C T V Chettyar Firm*, 3 I.T.C 213, In *re Radheylal Balmukund*, 52 All. 991, *Husseinbhas Muham madhbar v Commissioner of Income-tax, Sind*, 5 I.T.C. 31, In *re Lalla Mal Hardeodas*, 1 I.T.C 266, *S A S Subbiah Iyer v Commissioner of Income-tax, Madras*, 53 M 510, *Manbhumi Transport Co v Commissioner of Income tax, Bihar and Orissa*, 6 I.T.C. 203, *Neki Devi v Commissioner of Income tax, Punjab*, 1934 I.T.R. 365. A question not raised before the Tribunal cannot be said to arise out of its appellate order under section 33, *cf*, *Jamnadas Potdar & Co v Commissioner of Income-tax, Punjab*, 1935 I.T.R. 112, In *re Chanan Devi*, 1944 I.T.R. 153 (Lah.)

Similarly, if a number of points be taken before the Tribunal but only one point made in the application to the High Court under section 66 (2), the Tribunal need refer to the High Court that point only and cannot be made to refer other points, *cf*, In *re Ishardas Dharamchand* 2 I.T.C. 12

Regarding the United Kingdom Act, which says "the High Court shall hear and determine any question or questions of law arising on the case (section 149, Act of 1918), Atkin L.J., said in *Attorney General v Armayo and others*, 9 Tax Cases 445 —

"No doubt there may be a point of law in respect of which the facts have not been sufficiently found, and if that point of law was not raised below at all so as to require further facts on either side the Court may very well refuse to give effect to it, and either party may have precluded themselves by their conduct from raising in the Court of Appeal the point of law which they deliberately refrained from raising down below. But if the point of law or the erroneous nature of the determination of the point of law is apparent on the case as stated, and there are no further facts to be found, it appears to me that the Court can give effect to the law"

The High Court is seized only of such questions as are raised by the Tribunal. If, therefore the Tribunal agrees to refer only some of the questions raised by the assessee or the Commissioner, the party should move the High Court within the time allowed by section 66 (2) in respect of the questions on which the Tribunal does not agree to make a reference. The party cannot afterwards argue that there can be no such thing as a partial statement of a case, and that he can therefore raise before the High Court, in the course of the reference made by the Tribunal, points that the latter has not referred, though the party raised them before the Tribunal, *Radha kishan and Sons v Commissioner of Income tax, Punjab*, 3 I.T.C. 73, *P K N P R Chettyar Firm's case (Burma)*, 4 I.T.C. 340, *Burjorjee v Commissioner of Income tax, Burma*, 5 I.T.C 270. In considering a reference, the High Court is not competent to consider questions not referred by the Tribunal. In *re The National Tannery* 1941 I.T.R. 618 (All.), *Special Manager, Court of Wards v Commissioner of Income tax (Oudh)*, 1945 I.T.R. 94, *Raja Mustafa Ali Khan*, (*ibid*), 1945 I.T.R. 98

According to the Allahabad High Court in *Shiva Prasad Gupta v Commissioner of Income tax*, 3 I.T.C 406, the provision in sub-section (4) under which the Court may refer back the case to the Commissioner if the statements are insufficient to enable the Court to determine the question

Procedure—Form of case—Points raised—The form of the case and the procedure for stating it and hearing it is regulated by Rules of High Courts. As observed by *Sankey, J.*, in *Smith v Williams* 8 Tax Cases 321, (1922) 1 K B 158 it is open to the High Court to mould the procedure when the Act makes no provision.

As to the way in which a case is to be presented the following dicta may be noted. The allusions to the Commissioner who formerly made the reference apply with equal force to the Tribunal now.

In *Jatharam Jankidas v Commissioner of Income tax B & O* 1944 I T R 344, the Patna High Court desired that the 'paper book' in a reference should ordinarily include the assessment order of the Income-tax Officer, the appellate order of the Assistant Commissioner, the order of the Tribunal under section 33, the application of the assessee under section 66 (1), the statement of case by the Tribunal, the order of the High Court if it had ordered the Tribunal to state a case and other relevant papers which the Tribunal or either party the assessee or the Commissioner may consider relevant.

In *Hanmantram Ramnath v Commissioner of Income tax Bombay* 1945 I T R 203 the Bombay High Court deprecated the mixing up of allegations of fact and statements of fact with arguments and questions of law. There should either be a paragraph or paragraphs in the case itself setting out the findings of fact as such or if such findings have been properly set out in the judgment they could be incorporated in the case by reference to the relevant paragraphs in the judgment. The duty to find facts lies on the Tribunal and it has to state those facts and the questions of law arising out of them.

The Privy Council deprecated the statement of questions of law in an abstract form divorced from the facts of the particular case under consideration. *Raja Raghunandan Prasad Singh v Commissioner of Income tax, Bihar and Orissa* A I R 1933 P C 101 60 I A 133, 12 Pat 305 1933 I T R 113, *In re Charusila Das* 1937 I T R 1 (Cal). In *Bihar v Haribhajan Das* 1942 I T R 399 a case under the Bihar Agricultural Income-tax Act with provisions closely akin to section 66 of the Indian Income-tax Act, the High Court pointed out that it could not itself find facts and that the Board of Agricultural Income tax must not therefore refer a bare question of law without setting out the relevant facts. The case was therefore returned to the Board for resubmission with the appropriate facts. The Privy Council have also said that for convenience of reference the questions of law should be assembled and numbered consecutively at the end of the stated case. *Maharajadhiraj of Darbhanga v Commissioner of Income tax Bihar and Orissa* 1933 I T R 94. Two or more questions should not be combined and rolled up in the form of one question. *In re Gopiram Gobindram* 1936 I T R 157 I L R (1937) 1 Cal 697. The Bombay High Court in *In re Maharaja of Patiala v Commissioner of Income tax* 1943 I T R 202 deprecated the putting of questions in a negative form.

a statement of a case under section 66 ought to be drawn up in such a form as to state with precision and in a condensed form (the usual and most convenient practice is to do so in numbered paragraphs) all the facts and proceedings in chronological order which have led to the question of law arising. The statement of facts ought to be

framed in such a form as whilst stating completely and impartially every relevant fact to show what is the question of law to which such statement of facts has given birth. To use a colloquial illustration the statement of facts is the matrix the question of law is the product and the statement should conclude by framing in the most clear and concise language the exact question of law and the section under which it arises per *Walsh C J*, in *In re Lachmandas Naraindas* 1 I T C 378 47 All 68 A I R 1925 All 115

The case stated is in fact an argumentative expression of his opinion as to the law to be applied in the course of which certain facts incidentally appear. It is his first duty to state clearly and fully the material facts admitted or proved in evidence before him. To adopt any other course must in most cases result in embarrassment and uncertainty when the matter comes before the Court for its decision the Court being bound by the findings of fact arrived at per *Dawson Miller, C J* in *Raja Shivaprasad v Crown* 1 I T C 384 4 Pat 73

It is the duty of the Commissioner to find all the relevant facts he is required above all things to state the facts upon which the questions of law must be decided per *Rankin C J*, in *Ananda Mohan Saha's case* 3 I T C 1

The Commissioner should state specifically what facts are admitted or proved. Merely quoting the submissions of the parties is insufficient. He must not make any mis statement and if he does so they are not binding on the Court. *Commissioner of Income tax Bombay v Remington Type writer Co* 3 I T C 166 52 Bom 726. His findings of fact should be definite and adequate. *Commissioner of Income tax Bombay v Ahmedabad New Cotton Mills Co* 3 I T C 91 52 Bom 669 A I R 1928 Bom 510. When a question was formed in the following manner viz, 'whether on the facts of the case the sum of _____ was rightly included in the assessment' the High Court returned the proceedings to the Commissioner and asked him to state more specifically the particular point of law that arose. It is not for the Court to investigate the facts for the purpose of finding out if some point of law could be extracted and then to determine it. *Commissioner of Income tax Burma v V S A R Firm* 1935 I T R 64. The use of the words 'in the circumstances of the case without a more precise reference to the circumstances is to be deprecated since it casts on the Court the duty of searching out the circumstances on which the questions are founded. *Punjab Co-operative Bank v Commissioner of Income-tax Punjab* 1938 I T R 355

A question of law should be so framed as to enable the Court hearing the reference to decide on the facts what is the answer to the question. It should not be so framed as to assume hypotheses compelling an answer in one way only when the hypotheses themselves have to be tested. *Chengal varaya Chetti's case* 2 I T C 14 48 Mad 836 A I R 1925 Mad 1242

An order on an application for a case to be stated should be separate from the case stated to the High Court. The former will give reasons as to why the Commissioner refers a point to the High Court or refuses to do so while the other will confine itself to the actual points referred. In re *Krishna Kumar Ghose* 5 I T C 295, A I R 1931 Cal 513

Per Lord Sumner in Lysaght v Commissioners of Inland Revenue, (1928) A C 234, 13 Tax Cases 511 "It is certainly much to be wished that the Commissioners should be scrupulously careful to say that they 'find a conclusion of fact, arrived at from other facts found, or if they only mean to apply the law as they understand it to be and not to draw any conclusion of fact, should say that they hold so and so in accordance with what they conceive to be the law, for a debate on the meaning of a case stated is an unsatisfactory prelude to a debate on the general law applicable

Their determinations of questions of pure fact are not to be disturbed any more than are the findings of a jury unless it should appear that there was no evidence before them upon which they, as reasonable men could come to the conclusion to which they have come and this even though the Court of Review would on the evidence have come to a conclusion entirely different from theirs. With their rulings upon questions of law it is entirely different. The Court of Review is quite entitled indeed I think bound to overrule their decisions if they think them erroneous. What I have many times in this House protested against is the attempt to secure for a finding on a mixed question of law and fact the unassailability which belongs only to a finding on questions of pure fact. This is sought to be effected by styling the finding on a mixed question of law and fact a finding of fact. What is the proper construction of a statute, or of any other printed or written document, is a question of law.

It is essential, therefore, that the Commissioners should when stating a case clearly set forth the conclusions of law at which they have arrived and separate and distinct from these, the conclusions of fact at which they have arrived. ", *Per Lord Atkinson in Great Western Ry Co v Bater*, 8 Tax Cases 231, (1922) 2 A C 1

'A case should not be so stated that one of the parties is ruled out by an averment that the Commissioners found as a fact something that is being raised as a point of law', *Per Farwell, J J in New Zealand Shipping Co v Stephens*, 5 Tax Cases 553

" the Commissioners ought not to state either side out of Court by stating under the guise of fact that which is really law. But this does not mean that the Commissioners ought only to state the circumstances and leave the Court to draw its own conclusions of fact as well as law. The Commissioners are bound to find the facts. In finding the facts they are bound to act upon legal principles and upon evidence which in law can support their finding, and they should state their findings of fact, but if they are required to do so and if it be possible—sometimes it might not be—then I think they should upon which they have come to that conclusion in order that the Court may judge whether in law those circumstances afford any evidence for the conclusion of fact to which the Commissioners have come", *Per Stern J in New Zealand Shipping Co v The S. S. Thew* 8 Tax Cases 203

"No doubt there are many cases in which Commissioners having had proved or admitted before them a series of facts may derive therefrom further conclusions which are themselves conclusions of pure fact. But in such cases the determination in point of law is that the facts proved or admitted provide evidence to support the Commissioner's

conclusion I think it would tend to clearness and be in closer accord with the (law) if Commissioners in such a case would state that the question of law is whether the facts formed or admitted can support their further conclusions of fact. Per *Viscount Simon in Bomford v Osborne*, 1942 I T R 27 (sup.)

Admissions by parties—The Income tax Authorities are bound by their admissions and the Court will not resurrect a question which has been answered by the Department itself in favour of the assessee. *Chamber of Commerce Hapur v Commissioner of Income tax U P* 1936 I T R 397 58 All 1003. A case of this kind is however unlikely to arise now that the Commissioner's dual role has disappeared. Similar considerations would also apply to the admissions of the assessee.

Hypothetical questions—The High Court will not answer academic questions e.g. when the question will not recur so far as the assessee is concerned and the assessee in any event is not entitled to or has no intention to claim a refund of tax already paid. *Surpat Singh v Commissioner of Income tax, Bengal* 1943 I T R 549. *Ahemji Walji & Co v Commissioner of Income-tax B & O*, 1945 I T R 421.

Amendment—Case stated—The practice in the United Kingdom is to permit the amendment of the case if both parties agree. But the Court of Appeal and the House of Lords will not permit any points to be raised which are not raised in the High Court in the first instance. see *City of London Contract Corporation v Styles* 2 Tax Cases 239. *Apthorpe v Peter Schoenhofen Brewing Co* 4 Tax Cases 41. In the same way, there is little doubt that in regard to cases in India the Privy Council will not take notice of a point not raised before the High Court.

Remission—See the remarks of the Privy Council in the case of the *Trustees Corporation* 57 I A 152 54 Bom 437 A I R. 1931 PC 151, deprecating the unnecessary remission of cases under sub-section (4).

Hearing—Right to begin—In the absence of any rules on the subject made by a High Court the appellant i.e., the party at whose instance the Tribunal makes the reference will be heard first and also have the right of reply. Rulings given when the Commissioner was the referring authority are of little interest now.

Applications under section 66 (2)—According to the Rangoon High Court *Commissioner of Income tax Burma v Kokine Dairy* 1938 I T R. 502, A I R 1938 Rang 260 (F B) it would be wrong to require the appearance of the Counsel for the Commissioner (now, the other party) in the first instance in respect of such applications as most of them do not raise any question of law and may be dismissed *in limine*. If after hearing the applicant the Court desires to hear the Commissioner's Counsel, the case can be adjourned for hearing the latter.

Costs—Broadly speaking, costs follow the event, and income-tax cases do not form an exception to the rule that the successful party recovers from the other party the costs necessary to enable him to place the case before the Court. see *In re Jagannath Vasudeo Pandit* 45 Bom. 1177 and cases cited therein. Where the success is partial the Court will use its discretion. In *Killing Valley Tea Co v Secretary of State* 1 I T C. 54 48 Cal. 161 and *Birendra Kishore Manikya v Secretary of State*, 1 I T C. 67 48 Cal 766 each party was made to bear its own costs as both parties advanced claims.

much beyond their rights. Where a subsequent admission by the Commissioner rendered an answer to the reference unnecessary, the Commissioner was made to pay costs, *Champalal v Commissioner of Income tax, C P*, 7 ITC 148 (Nag). Similarly where a reference was made by the Commissioner under a misapprehension of facts for which the assessee was responsible, the latter was made to pay costs *Barakumar Banja Ramcharan Singh v Commissioner of Income tax, Bihar and Orissa*, 6 ITC 190. Varying amounts have been given by High Courts as costs, e.g., in *re Aurangabad Mills*, 1 ITC 116, 45 Bom 1286, see also *Girtanlal Rasiklal v Commissioner of Income tax, Bombay*, 7 ITC 209, where costs were taxed as on the Original Side. On the other hand, Madras and Allahabad have allowed lump sums as costs.

High Courts usually include in costs the fee of Rs 100 deposited under this section. In *re Radhey Lal Balmukund*, 4 ITC 454, 52 All 991, and the Allahabad High Court have ruled that if the assessee is awarded costs against the Crown without any exception the fee should be included in the costs. In *re Lachmandas Baburam*, 1933 ITR 275, AIR 1933 All 853. While stating that in the absence of authority, it would have held the fee not to be part of the costs of the reference, the Rangoon High Court decided, to fall in line with the practice of Madras Allahabad and Patna, *Commissioner of Income tax, Burma v Milne*, 1934 ITR 28.

The authorities were reviewed by the Bombay High Court, in *Manohar v Commissioner of Income tax Bombay*, 1936 ITR 417 and it was held that while the Court had no jurisdiction to order the refund of the fee as such and could deal with it only as part of costs an order directing the Commissioner to pay costs should be held to include the return of the fee, as part of the costs of the assessee. When the assessee is ordered to pay costs it would be open to the Court to give the Commissioner his costs less the fee of Rs 100.

While a successful assessee would ordinarily be allowed his costs, including the refund of the fee of Rs 100 an unsuccessful assessee would not except on special grounds be allowed credit for the fee of Rs 100, which he would have to bear in addition to paying the full costs to the Commissioner. *Commissioner of Income tax v Central Popular Assurance, Co*, 1939 ITR 556 (Sind), *Mohammad Mohsin Manik Bakshi v Commissioner of Income tax*, 1940 ITR 247 (Lah).

As the discretion is given to the Court it cannot be delegated to the Taxing Officer or other officer of the Court see *Lambton v Parkinson* (1886) 35 WR 545. It is only the discretion that cannot be delegated and the Court may award costs on the usual scale, subject to check by the Taxing Officer. Where references are withdrawn at the instance of either party, costs are usually allowed to the other party. No court fees are payable, *Khemchand Ramdas v Commissioner of Income tax (Sind)*, 6 ITC 360, AIR 1933 Sind 148.

The proceedings relating to a reference start with the assessee's application under section 66 (1) and it is therefore open to the High Court to deal with all costs from that stage. So in a proper case, the Taxing Master may allow the assessee, if he is allowed costs, the cost of advice in settling the application and similarly to the Commissioner, if he is given costs the costs of getting the reference settled by the Government Solicitor and Counsel. It is however discretionary to the Taxing Master to decide whether a case was of sufficient importance to justify the Commissioner in

adopting this course *Sir Chinubhai Madhavlal v Commissioner of Income tax, Bombay* 1938 I T R 148. This ruling was given before the Appellate Tribunal was set up. In the United Kingdom the Scottish Court disallowed costs for getting the case settled by the Commissioner—see *Scottish Union and National Insurance Co v Inland Revenue*, 26 Sc.L.R. 489 but the English Court allowed them on the ground that such costs save costs of the hearing—see *Manchester Corporation v Sugden Gresham Life Insurance Co v Bishop* 4 Tax Cases 595.

Costs in respect of applications under section 66 (2) should ordinarily be settled with reference to whether there was a question of law and not with reference to the ultimate success on the question of law after a reference is made. *Central Talkies Circuit v Commissioner of Income tax Bombay* 41 Bom.L.R. 919, 1939 I T R. 629. *Dhanrajmal Chitandas v Commissioner of Income tax Sind* 1942 I T R. 384. An assessee whose application under section 66 (2) has been dismissed by the High Court and who has been ordered to bear the costs of the case cannot claim that the costs be met out of the deposit of Rs 100. *Balchand Juvandas v Commissioner of Income tax Sind* 1942 I T R. 507.

Costs—Resident agents of non residents.—In *re Ilcock v Pinto & Co* 9 Tax Cases 111 under section 4 (1) the point was raised in the United Kingdom whether an order for costs could be made against the resident agent of a non resident assessee. It was contended on behalf of the agent that the payment of the duty in question could not be enforced against the agent and therefore no order for costs could be made against him. The Court of Appeal held that the possibility of enforcing the duty against the agent was not in issue before them and that so far as they were concerned the appellant on the case stated by the Commissioners was the resident agent and that the Court were only concerned with the appellant as so stated namely the resident agent.

Privy Council—Costs.—See section 66-A and notes thereunder.

Security for Refund.—It is not open to the Commissioner, when making a refund of tax as a consequence of a decision of the High Court adverse to him to ask the assessee to give security for payment of tax again if an appeal by the Commissioner to the Privy Council succeeds or if the Commissioner finds it possible on further enquiries to arrange for a reassessment. *Commissioner of Income tax Bombay v Bombay Trust Corporation* 1936 I T R. 323 60 Bom. 900 (1937) 1 M.L.J. 200 (P.C.)

The High Court however may permit the Commissioner to postpone refund till the appeal to the Privy Council is disposed of. The section gives no right to the assessee to be heard in this connection.

Interest.—In the United Kingdom the interest paid to the assessee on the tax refunded is fixed by the High Court here it is fixed by the Commissioner. The Commissioner has a discretion in the matter and unless he acts flagrantly against equity and good conscience "no Court can interfere with his discretion. The rate must obviously depend *inter alia* on the market rate of interest from time to time.

Jurisdiction—Original or appellate.—In *Birendra Ashore Manikya v Secretary of State* 1 I T C 67, 48 Cal 766 the Calcutta High Court held

that, though when hearing a reference it really performed the functions of a Court of Appeal, the test for the purpose of right of audience of Counsel, Attorneys, etc., should be the residence of the assessee or his place of business. Therefore, if such residence or place was outside the limits of original jurisdiction of the Court, only Vakils and not Attorneys, could appear. In *Raja Probhat Chandra Barua's case*, 1 ITC 414, 52 Cal 546, the same Court suggested that income-tax cases came neither under the original nor the appellate jurisdiction of the High Court, but under a special jurisdiction. The Court has since made rules under which all references under the Income-tax Act are dealt with by a Special Bench, before whom Vakils and Attorneys can appear. In connection with an appeal to the Privy Council *Commissioner of Income tax v Hungerford Investment Trust*, 1935 ITR 188, 62 Cal 671 (see notes under section 66-A) the same Court decided that Income tax cases came under the High Court's "special jurisdiction—neither "original" nor "appellate."

The Madras High Court held in *Chief Commissioner of Income tax v North Anantapur Gold Mines*, 1 ITC 133, 44 Mad 718, that the Court exercises original jurisdiction in deciding income-tax references, but this view was not accepted by the Privy Council—see *Alcock Ashdown case*, 1 ITC 221, 50 IA 227, 47 Bom 742.

In *re Aurangabad Mills, Ltd.*, 1 ITC 119, 45 Bom 1286 the Bombay High Court held that, in view of the fact that the reference is made by an officer within the local limits of the original jurisdiction of the Court, costs should be given on the Original Side scale.

Decision of High Court—How far binding—Neither the Commissioner nor the assessee can go back on the High Court's judgment under section 66 (5) except by appealing against it in accordance with section 66-A. *Tehri case*, 1934 ITR 1, 61 IA 1.

Every case should be reassessed in the light of the High Court's orders after notice to the assessee. It is not enough to say that a material alteration in the figure of assessment is not expected and that therefore no reassessment need be made, *Basant Rai v Secretary of State*, 5 ITC 441, AIR 1932 All 372. As to the extent that the Commissioner should reopen assessments declared wrong by the High Court see *Tribunal Trust v Commissioner of Income tax, Punjab*, 1944 ITR 370 which, however, relates to a period when under section 33 (as it stood) there was no limit of time within which the Commissioner could exercise his revisional powers. Under section 33 A, now, if an application for revision is presented in time, the Commissioner must set aside assessments which have been subsequently found to be wrong in the light of decisions of the High Court or the Privy Council.

The Commissioner is evidently under no obligation to re-open the cases of other assesseees unless they are within time to appeal under section 30 and do so appeal.

Authorities in different provinces differing on facts—The Income tax authorities in a province are not bound by the findings of fact of the authorities in another, and if they differ, no question of law arises merely because of the difference, *L R M S T Chettyar v Commissioner of Income tax, Burma*, 3 ITC 416.

Delay in appeals—No question of law arises in connection with non condonation of delay in presenting an appeal, and therefore no reference lies to the High Court, *Kasi Chettyar v Commissioner of Income tax*, 2 I T C. 98, but a reference can arise as to whether the time bar had been rightly applied or not for the correct application of the time bar may be a question of law

Facts of preceding years—In regard to questions like residence, though the question of each year's liability is a separate issue the facts over a period of years may be taken into account in order to get a clear picture as to the position in the year in question. See per Lord Sumner in *Levene v Commissioners of Inland Revenue* (1928) A C 217 13 Tax Cases 486 Even facts relating to subsequent years can be relevant

High Court bound by findings of fact—It is not open to the High Court to consider the facts and then order the Commissioner to alter his findings of fact and then refer the questions of law that arise That is to say, the Commissioner's findings of fact must be accepted and only such questions of law considered as arise from the findings of fact In *re Binjaj Hukamchand* 5 I T C 303 (Cal) The fact that some other findings of fact might give rise to other questions of law gives no jurisdiction to the High Court to consider such questions of law, *Commissioner of Income tax v Ar Ar S M Somasundaram Chettiar* 2 I T C 61 It is not open to an assessee in any case, to omit to produce relevant evidence before the Income-tax Officer and then to raise questions of law depending on the investigation of this evidence In *re Baldeodas Rameswar*, A I R 1931 Cal. 761, 5 I T C 476

Findings of fact will ordinarily be presumed to be complete, and the case will not be remitted back to the Commissioner for further findings unless there are obvious lacunae *T S Firm v Commissioner of Income tax*, 50 Mad 847 A I R 1927 Mad 732

"The Court has no jurisdiction to consider the findings of fact arrived at by an Income-tax authority and it is immaterial whether the grounds stated for these findings are sound or unsound or whether no reasons at all have been stated per Carr J in *E M Chettyar Firm's case*, 4 I T C. 464, A I R 1930 Rang 224

Mr Scrutton in his very excellent argument suggested that the facts were all wrong Well they may be all wrong I cannot help it The only thing sent to us is these facts, and it is points of law upon these facts that we have to decide' per A L Smith L J, in *Apthorpe v Peter Schoenhofen, Brewing Co* 4 Tax Cases 41 see also *Sungel Rinsching Rubber Co v Commissioners of Inland Revenue*, 133 L T 670

It is not a question of what was before the Commissioners, but what the facts were You cannot escape paying income tax because some one raised a wrong question before the Commissioners" per Lord Esher, M R, in *Blake v Imperial Brazilian Ry*, 2 Tax Cases 58

If there had been a misunderstanding the Court may strain a point to put it right and if the Commissioner fails to include or to allude sufficiently to some topic that was brought before him by evidence, the Court may agree to put that right but it will not remit a case for findings on additional facts in respect of which the assessee led no evidence before the Revenue officers,

Bird & Co v Commissioners of Inland Revenue, 12 Tax Cases 785, 1925 S C 188.

Counsel for the assessee argues that we are not entitled to look beyond the Commissioner's specific findings of fact, and that if they are not sufficient to justify his opinion, we must either refer the case back or decide in favour of the assessee. The point of law to be decided is not a hypothetical point but a specific point raised by the facts of the particular case. The documents and proceedings annexed to the statement of the case are annexed for our consideration and we are entitled to look at them. To shut our eyes to them because there is no specific reference to them in the body of the statement appears to me to be a trifle pedantic", per *Panckridge, J.*, in *In re George & Co*, 1937 I T R 12, I L R (1937) 2 Cal 7.

Where a Commissioner was asked to state a case regarding the admissibility of certain deductions from the taxable income, and he determined on the evidence before him whether the various items in dispute ought to be allowed as deductions or not, it was held that Commissioner's decision was one of fact on the evidence before him and that there was no question of law for the High Court to consider, *Dr R N Singha v Commissioner of Income tax, Burma* 5 I T C. 188.

Fact and law—As to the difference between fact and law and the extent to which the High Court is bound by the findings of the Tribunal the following dicta may be referred to

To draw an inference of fact from evidence before you is not a question of law at all. The inference is a question of fact just as much as the direct evidence of fact per *Lord Esher* in *R v Special Commissioners of Income tax (In re G Fletcher)*, 3 Tax Cases 289, *Commissioner of Income tax, Burma v E M Chettyar Firm*, 4 I T C. 111, 7 Rang 635, A I R. 1930 Rang 4. Whether a fact has been proved when evidence for and against it has been admitted, is necessarily a pure question of fact *Nafar Chandra Pal Choudhury v Shukur Sheikh* 46 Cal 189 (P C).

If the Commissioners have misconstrued a section of an Act or have not done or applied their minds to doing that which the section directed, or if it is clearly shown that they have included in coming to their result, some element—where the result is one of money and value—which they ought not to have included, or *vice versa* an appeal to the High Court will lie, *P and O Steam Navigation Co v Leslie*, 4 Tax Cases 177.

The facts of a case are not before the Court in the matter of proof, but they are before it in the matter of findings, *Macpherson & Co v Moore*, 6 Tax Cases 107.

The proper inferences to be drawn from admitted facts may involve legal considerations, and questions of law and fact being sometimes difficult to disentangle the Court has the right to say whether the Income tax Officer has misdirected himself on the facts *Scottish Provident Institution v Allan*, 4 Tax Cases 409 *Subbiah Iyer v Commissioner of Income tax, Madras*, 4 I T C 345, 53 Mad 510 A I R. 1930 Mad 449 *Commissioner of Income tax, Burma v Zaveri* 1937 I T R 664 (following certain Privy Council rulings). The proper effect of a proved fact is a question of law *Dhannalal v Molisagar*, (1927) I L R 8 Lah 573 (P C).

Sardar Indra Singh v Commissioner of Income tax B & O, 1943 I T R 16, *Commissioner of Income tax Madras v The Shanmugham Rubber Estate* 1945 I T R 329

Though stated as a point of law the Court may declare it to be one of fact *Metropolitan Water Board v Kingston Union Assessment Committee* (1925) 2 K B 529 and a mere question of fact cannot be converted into one of law by merely asking whether as a matter of law the officer came to a correct conclusion on a matter of fact *Commissioner of Income-tax, C P v Laxminarain Badridas* 1937 I T R 170 (P C) *Manohardas Munnulal v Secretary of State* 1945 I T R 356 (All)

Whether on the facts stated the case falls under a particular section or not is obviously a question of law and it is always open to an assessee who desires to argue the legal consequences of facts to require a reference as to whether the Commissioner has attributed in law the correct legal consequences of the facts he has found *Commissioner of Income tax Burma v Zavers* 1937 I T R 664 *Commissioner of Income tax, Sind v Central Popular Assurance Co* 1939 I T R 293

If the Commissioners find something as a fact the Court is entitled to look and see whether there were materials on which they could properly find it, *English Crown Spelter Co v Baker* 5 Tax Cases 327 *American Thread Co v Joyce* 6 Tax Cases 163 *Commissioner of Income-tax Burma v E M Chettyar Firm* 4 I T C 111 7 Rang 635 A I R 1930 Rang 4

On the other hand if the insufficiency of materials is due to the neglect of the assessee the insufficiency cannot be used in order to throw over a question of fact the cloak of law *Ramanatha Reddiar v Commissioner of Income tax Burma* 3 I T C 10 6 Rang 175 A I R 1928 Rang 152

The High Court will not declare the findings of fact by the Tribunal as altogether vitiated so long as there are materials to support the finding apart from confidential materials not communicated to the assessee *Seth Gurmukh Singh v Commissioner of Income tax Punjab* 1944 I T R 393

If the Commissioners find a fact, the High Court cannot question it unless there is no evidence to support it. If however the Commissioners state the evidence which was before them and add that upon such evidence they hold that certain results follow it is open to the Court to say whether the evidence justified what the Commissioners held *Bonner v Basset Mines* 6 Tax Cases 146 *American Thread Co v Joyce* 6 Tax Cases 163

The decision of the Commissioners must not be inconsistent with their own findings of fact and if it is the Court will interfere on the ground that they have misdirected themselves. Having found for example that an item of expenditure was cost of acquisition of a site and buildings was exclusively laid out for the assessee's trade they cannot simultaneously hold that the item relates to some other trade (i.e. of letting premises) merely because the assessee sub-let a part of the buildings which he found surplus and thus reduced his loss *Allied Newspapers v Hindley* 16 A T C 410 (C A). Similarly they cannot in arriving at a conclusion assume a fact which they have not found *Scammell and Nephew Ltd v Rowles* 17 A T C 324 (K B)

It is as a rule a point of law whether there is evidence on which a certain finding of fact can be made. If the true question of law is whether on the evidence it was possible for the Commissioners to come

to a certain conclusion of fact, the assessee may request the Court to send the case back, in order that the facts proved before the Commissioners may be set out to enable the assessee to raise the point of law whether it was possible, on such facts or such evidence, to come to the conclusion of fact. But this objection to a case must be taken *in limine*," *Fletcher-Moulton, L J*, in *New Zealand Shipping Co. v Stephens*, 5 Tax Cases 553.

"That would be a question of law, a question of evidence or no evidence, but if there is any evidence at all, then it is for the Commissioners and not for the Court," per *Farewell, L J*, (*ibid*).

"I only say with regard to the finding of the Commissioners that it seems to be based entirely upon a misapprehension, and therefore I cannot look upon their finding as a distinct finding upon a question of fact, upon which there is no appeal. I think I have all the facts before me and can determine what is the proper conclusion of law to be drawn from them," per *Bray, J*, in *Merchiston Steamship Co v Turner*, 5 Tax Cases 520.

"It is undoubtedly true that, if the Commissioners find a fact, it is not open to this Court to question that finding unless there is no evidence to support it. If, however, the Commissioners state the evidence which was before them and add that, upon such evidence, they hold that certain results followed. I think it is open, and was intended by the Commissioners that it should be open, to the Court to say whether the evidence justified what the Commissioners held. They have carefully

stated the evidence, but they have not, in my opinion, to use the words found in one of the authorities, 'stated the appellants out of Court' " , per *Cozens Hardy, M R*, in *Stanley v Gramophone and Type writer, Ltd*, 5 Tax Cases 358, (1908) 2 K.B. 89, see also per *Hamilton, J*, in *American Thread Co v Joyce*, 6 Tax Cases 1.

"Now, the question where an artificial person like a Corporation resides is clearly not a pure question of fact. It would not be so even in the case of an individual. It is a pure question of fact whether an individual was in a house on a particular day or on a particular series of days, but you cannot say whether those acts or presence are sufficient to make him a resident in that house until you know what in the eye of the law is sufficient and is necessary to constitute residence. If that is true of an individual, it must be still more evidently true in the case of a Corporation in which the word 'residence' cannot in any very natural sense be applied. The question of pure fact must be decided in the same way whatever be the system of law in force, and whatever be the purpose for which it is necessary to decide it, but when you come to a question of residence it is easily conceivable that, under different systems of law, there might be different requisites to constitute residence, and even under the same system of law, residence for one purpose might be proved under certain circumstances which would not constitute residence for another purpose. We therefore have here to see what are the findings of pure fact, and then we have to apply to those the proper legal principles in order to see whether the true deduction from those facts is that this Company resided in the realm.

"Now, in finding questions of pure fact, the tribunal is a tribunal without appeal. It is perfectly true that if it finds facts where there is no evidence, that becomes a matter of law, and we can set aside the

finding, but I cannot doubt that there was evidence to support the findings and therefore they must be accepted by us legally and without criticism," per *Fletcher Moulton, L J*, in *The American Thread Co v Joyce*, 6 Tax Cases 1

Where what the Commissioner says he has found as facts is actually a series of conclusions which are founded partly on pure facts and partly inferences which he has drawn from these facts (as to the character of certain payments), it is open to and the duty of, the Court to examine whether the Commissioner's findings follow from his premises, In re *Imperial Chemical Industries, Ltd*, 1935 I T R 21 7 I T C 414 (Cal)

"It is not for us to enter into the question how, on the materials which came before the Inland Revenue Commissioners, we should have dealt with the question of fact. The Taxes Management Act of 1880 precludes us from looking at the finding of the Commissioners except in so far as it is necessary to see whether there was any evidence which could have supported it, per the *Lord Chancellor*, in *American Thread Company v Joyce*, 6 Tax Cases page 163

"The facts set out by the Commissioners are found by them under circumstances when we have no authority to review the finding if it was wrong. It is enough to say that they have found it, and that there was evidence upon which they might find it, and if they did find it and if there was evidence upon which they might find it, there is no question of appeal here at all," per the *Earl of Halsbury*, 6 Tax Cases 163

The first question that has been debated before us is this. Is the question whether a man is carrying on a profession or not a matter of law or a matter of fact? I do not know that it is possible to give a positive answer to that question, it must depend upon the circumstances with which the Court is dealing. There may be circumstances in which nobody could arrive at any other conclusion than that what the man was doing was carrying on a profession, and therefore, looking at the matter from the point of view of a judge directing a jury, the judge would be bound to direct them that on the facts they could only find that he was carrying on a profession. That reduces it to a question of law. On the other hand, there may be facts on which the direction would have to be given the other way. But between those two extremes there is a very large tract of country in which the matter becomes a question of degree, and where that is the case the question is undoubtedly, in my opinion, one of fact, and if the Commissioners come to a conclusion of fact without having applied any wrong principle then their decision is final upon the matter, per *Lord Sterndale, M R*, in *Currie v Commissioners of Inland Revenue*, (1921) 2 K.B. 332, 12 Tax Cases 245

"If the questions arising in the case are questions of fact the determination of the Commissioners is final, provided that there was evidence on which they could come to the conclusion they did, and that the Court itself or any member of the Court, might on the facts have come to a different conclusion is perfectly irrelevant provided that there was evidence from which the Commissioners' conclusion could be reasonably drawn. I do not say that all the authorities on the subject have been consistent. I rather agree with what *Lord Parker* said in *Farmer v Cotton's Trustees*, (1915) A.C. 922, 6 Tax Cases 590. 'It may not always be easy to distinguish between questions of fact and questions

of law for the purpose of the Taxes Management Act, 1880, or similar provisions in other Acts of Parliament. The views from time to time expressed in this House have been far from unanimous'. I think the reason is, as has been suggested by the Master of the Rolls, that there has been a very strong tendency, arising from the infirmities of human nature, in a judge to say, if he agrees with the decision of the Commissioners, that the question is one of fact, and if he disagrees with them that it is one of law, in order that he may express his own opinion the opposite way. Undoubtedly the less a judge has tried cases with juries, the greater is the tendency on his part to think that the view he forms on the evidence is the only possible one; but when he has tried innumerable cases with juries and continually finds twelve reasonable and intelligent men taking a different view of the evidence from that which he himself takes, he becomes more and more convinced that there may be in many states of facts more than one possible view of the evidence, and that the fact that he would have taken a different view himself does not show that the view taken by the twelve persons was necessarily wrong.

" They are the judges of fact, and whether a man carried on a profession is in the last resort a question of fact. The reason why it appears to me to be so is this. In my view it is impossible to lay down any strict legal definition of what is a profession, because persons carry on such infinite varieties of trades and businesses that it is a question of degree in nearly every case whether the form of business that a particular person carries on is, or is not, a profession. Accountancy is of every degree of skill or simplicity. I should certainly not assent to the proposition that as a matter of law every accountant carries on a profession or that every accountant does not. The fact that a person may have some knowledge of law does not, in my view, determine whether or not the particular business carried on by him is a profession. Take the case that I put during the argument, of a forwarding agent. From the nature of his business he has to know something about Railway Acts, about the classes of risk that are run in sending goods in a particular way, and under particular forms of contract. That may or may not be sufficient to make his business a profession. Other persons may require rather more knowledge of law, and it must be a question of degree in each case. Take the case before *Rowlatt, J.*, of a photographer: *Cecil v. Inland Revenue Commissioners*, 36 Times L.R. 164. Art is a matter of degree, and to determine whether an artist is a professional man again depends, in my view, on the degree of artistic work that he is doing. All these cases which involve questions of degree seem to me to be eminently questions of fact, which the Legislature has thought fit to entrust to the Commissioners, who have, at any rate, from their very varied experience, at least as much knowledge, if not considerably more, of the various modes of carrying on trade than any judge on the bench

" I very much doubt whether it would be possible for me even if I held a different view to decide otherwise. After all, the Commissioners are judges of fact, and they have not disclosed to me what view of the law they took. I cannot possibly say there is no evidence in support of that finding. But as the Commissioners have not disclosed to me upon what view of the law they proceeded, I very much doubt

whether they have stated a case upon any point which is open to me and indeed if I were invited to define exhaustively as a matter of law what a profession was I should find the utmost difficulty in doing so

At the same time I am not at all clear that the fact that there may be two inconsistent findings of fact by the tribunal which is bound to decide facts would in itself justify this Court in interfering That may be the mistake of the Legislature in entrusting the decision to such a body as the Commissioners or it may be due to the infirmity of human nature in sometimes making mistakes

per *Scrutton J*, in *Currie v Commissioners of Inland Revenue*, (1921) 2 K B 332 12 Tax Cases 245

It is for a Court of law to construe these several paragraphs as written documents just as the Courts of law often have to construe the answers (in writing) of Juries to questions put to them by the Judge presiding at a trial or as such Courts have to construe a correspondence between parties litigant to determine whether their letters in the aggregate contain a concluded contract in writing In doing this the tribunal of law does not usurp the exclusive jurisdiction of the tribunal of fact and from facts found by the latter draw a further inference of fact It merely discharges its proper and exclusive function of construing written documents per *Lord Atkinson in Usher's Wiltshire Brewery Limited v Bruce* 6 Tax Cases 399 (1915) A C 433

This involves the construction of the language of the case stated It must be interpreted in the light of common knowledge and by the common sense of the language used but the findings of fact as such when ascertained are final In the judgment appealed from it is said I can see no such finding of fact in the case This is so in terms but in substance it is otherwise Furthermore the judgment seems to say that the question whether a given disbursement is wholly or exclusively laid out for the purposes of the trade or concern is a question of law and not of fact With this I am not able to agree Though the answer to the question may itself be an inference from a wide area of facts it is an answer of fact There is no suggestion here that the Commissioners found the facts under any mistake in law including in that term the view conscious or unconscious that a fact may be found when there is no relevant evidence to support per *Lord Sumner (ibid)*

These findings (of fact) of the Commissioners must be accepted and the Courts are precluded from questioning them except so far as it is necessary to see whether there is relevant evidence per *Lord Parmoor (ibid)*

Your Lordships were pressed with the usual argument that as the county court judge though a judge of law and facts is the sole judge of fact, his findings cannot be disturbed if there be any evidence before him upon which he as a reasonable man could find as he has found That argument is quite sound if it be applied to pure findings of fact It is utterly unsound if it be applied either to findings on pure questions of law or on mixed questions of law and fact The rule is analogous to that followed in setting aside the verdicts of juries There is however this vital difference between the two cases Juries can only decide questions of fact The arbitrators in these cases can decide questions both of law and of fact There is no danger in trials by juries that

they will return composite findings of law and fact. It is wholly illegitimate, in my view, in cases such as the present, by finding in the words of the statute to endeavour to secure for a finding on a pure question of law, or on a mixed question of law and fact, that unassailability which properly belongs only to a finding on a question of pure fact', per Lord Atkinson in *Herbert v Samuel Fox & Co*, (1916) 1 A C 405 (a case under the Workmen's Compensation Act, 1906)

As their determination is conclusive unless it be erroneous in point of law, we have no jurisdiction to review it upon any issue of fact. We could, of course, interfere if it were clear that the Commissioners had proceeded upon a wrong construction of the Act. There is another ground of law upon which I think, the Commissioners are wrong. There is upon a true construction of the Act no evidence in this case upon which their decision can be supported. They have given us the relevant facts in detail, and we can see for ourselves that taking those facts as found there are no materials at all upon which the conclusion they reached can be based. If the facts were such that on a true construction of the Act a different conclusion could reasonably be reached, then there would be no power in a Court of law to interfere,' per Lord Loreburn in *Farmer v Cotton's Trustees* 6 Tax Cases 590, (1915) A C 922 (a case relating to Inhabited House Duty)

'In so far as the Special Commissioners are skilled persons in matters of business if, on an analysis of the business arrangements that have been made out of which the case has arisen they came to the conclusion as businessmen that a particular payment has, what my Lord called, the accountancy quality of a capital payment or an income payment, that is a view to which, in my opinion, the Court is entitled to give great weight. The position is analogous to the case of a trial in the Commercial Court before a city of London Special Jury, on a question of business and keeping of accounts, where the special jury have expressed a view on the issue whether a particular payment is a capital payment or an income payment. In such circumstances the Court ought to be very slow to disagree with the skilled opinion' per Scott L J, in *Commissioners of Inland Revenue v British Salomon Aero Engineers*, 17 A T C 187

'It may not always be easy to distinguish between questions of fact and questions of law for the purpose of the Taxes Management Act, 1880, or similar provisions in our Acts of Parliament. The views from time to time expressed in this House have been far from unanimous but in my humble judgment, when all the material facts are fully found, and the only question is whether the facts are such as to bring the case within the provisions properly construed of some statutory enactment the question is one of law only' per Lord Parker of Waddington in *Farmer v Cotton's Trustees*, 6 Tax Cases 590 (1915) A C 922

"It is well settled that when the Commissioners have thus ascertained the facts of the case and then have found the conclusion of fact which the facts prove their decision is not open to review, provided (a) that they had before them evidence from which such a conclusion could properly be drawn and (b) that they did not misdirect themselves in law in any of the forms of legal error which amount to misdirection', per Lord Sumner in *Lysaght v Commissioners of Inland Revenue* (1928) A C 234, 13 Tax Cases 511

It was for the Special Commissioners to find and state all the facts respecting the nature of the office or employment as to which the question arises. It was not for the Court to question those facts in any way. But the question for the Court was whether upon those facts Mr. Hall held an office or employment of profit within the meaning of the Act. That is a question of law per *Lord Wrenbury* in *Great Western Railway Company v. Bator* 8 Tax Cases 231 (1922) 2 A C 1.

The facts are ascertained for us. There is no doubt that in ascertaining from time to time what is a taxable amount it might have an extremely difficult problem but these facts have been ascertained for us and I do not think it is competent for us to go out of what has already been determined by the tribunal which the Legislature has considered sufficient to determine the form in which such a question if it arises should be determined per *Lord Halsbury* in *Smith v. Lion Brewery Limited* 5 Tax Cases 568 (1911) A C 150.

Now partnership or no partnership is a question of fact. I agree with the learned Judge that it is a mixed question of fact and law in this case in the sense that if the persons who have to ascertain questions of fact apply a wrong principle of law as to instructing themselves as to what they have to find then their finding of fact is not conclusive because they have done it according to wrong principles. But if they direct themselves properly as to the principles which have to be applied then it is a pure question of fact for the Commissioners per *Mr. R. Sterndale* in *Marden Rigg & Co. and R. B. Eskridge & Co. v. Monks*, 8 Tax Cases 450.

The question whether what (they) did here was carrying on of trade or an adventure in the nature of trade is a matter of law only if in coming to that conclusion (i) the Commissioners had no material from which to come to their conclusion, or (ii) they relied on irrelevant matters or excluded relevant matters, or (iii) if they have misunderstood or misconstrued the statute per *Wrottesley J.* in *Williams v. Davies and Misbit* (1945) 1 All E. R. 304.

A finding by the Commissioners that a particular expenditure is in fact capital expenditure does not necessarily foreclose a consideration by the Court of a particular piece of expenditure in the light of the terms of the Income-tax Acts themselves *Lothian Chemical Co. v. Rogers* 11 Tax Cases 508.

The construction of the charter and bye-laws of a society is not a pure question of fact *Institution of Civil Engineers v. Commissioners of Inland Revenue* 16 Tax Cases 158 (1932) 1 K B 149.

There is hardly a case in which the question whether a particular matter is one of law or of fact does not arise in fact that is a preliminary point to be considered before there can be a reference to the High Court. In addition to the decisions already referred to cases which have been set out under the following other sections in the Act may also be referred to.

Cases under Capital and Income—section 3 Casual profits—section 4 (3) (vii) those under sections 25 and 26—Succession and Discontinuance under section 10—Admissible deductions Capital losses etc. under sections 4 4-A and 4-B—Residence Place of accrual Foreign Remittances etc. and in particular *Ramanatha Reddiar's case* 3 I T C 10 in which the leading English cases were reviewed.

Estimating income is a question of fact, and merely because the Income-tax Officer disbelieves the assessee no question of law can arise. The High Court accordingly refused to issue notice in a case to the assessee even though the Commissioner of Income tax referred the case, *Bhagwat Halwai v Commissioner of Income tax*, 3 ITC 48 (All). An adverse inference against the assessee in suspicious circumstances which the assessee cannot explain satisfactorily does not give rise to a question of law, *Gangaprasad v Ibid*, 1941 I T R 373 (All). Where there is a finding of fact that the assessee has books of account, an assessment under section 23 (4) as a result of his failure to prove the books when called for cannot give rise to a question of law, *Haji Ali Muhammad v Commissioner of Income tax*, C P, 1940 I T R 243. The question of the existence of other sets of accounts is one of fact, *Rahomal, Kannomal v Commissioner of Income tax*, U P, 1942 I T R 386 (All).

Whether an alleged gift to a lady in a Hindu undivided family is *bona fide* or not is a question of fact and not of law, *Seth Gopaldas v Commissioner of Income tax*, 1943 I T R 168 (Nag). Whether a person is an individual or represents a Hindu undivided family is a question of fact, *In re Lakshminarain Gadodia & Co*, 1943 I T R 491 (Lah).

The question whether an assessee is a member of a joint family sharing in the funds, or whether he is separate, is a pure question of fact which must be tried according to law like every other question of fact. *In re Makhn Lal Ram Sarup*, 1 ITC 416, A.I.R. 1925 All 295. But the legal effect of the disruption of a Hindu undivided family and its business is a question of law, *Nathumal v Commissioner of Income tax*, 103 I C 522, 9 Lah 201, 5 ITC 23.

Whether a particular document, on which the status of a family depends, is genuine or fabricated is a question of fact, *Chokeylal Murdhhar v Commissioner of Income tax*, 4 ITC 7, A I R 1932 All 471.

Accountancy—Questions of—As to the extent to which questions of accountancy are questions of fact or law, see notes under section 13, *Fassett and Johnston v Commissioners of Inland Revenue* 4 A T C 89, and other cases cited thereunder.

Question of degree—Any question which involves an exercise of personal discretion or the determination of a matter of degree is essentially a question of fact and cannot be a question of law, *Stubbs v Cooper*, 10 Tax Cases 29, (1925) 2 K.B 753. *Currie v Commissioners of Inland Revenue*, 12 Tax Cases 245, (1921) 2 K B 332.

Sub section (8)—The use of the definite article 'the' in the other sub-sections shows that the High Court contemplated is the High Court having jurisdiction over the subject matter, that is to say, over the place of assessment. Sub section (8) makes certain exceptions to this principle.

See also the case of *Lucknow Ice Association v Commissioner of Income tax*, 2 ITC 156, where it was held that the Chief Court of Oudh which took the place of the Judicial Commissioner of Oudh was the "High Court" for purposes of references arising out of assessments in Oudh. A similar question arose with regard to an assessee resident in Peshawar in *Tora Gul Bai v Commissioner of Income-tax*, 2 ITC 164. In this case the reference was made by the Commissioner to the High Court at Lahore and the High Court held that it had no jurisdiction to hear the reference, as the 'High Court' invested with jurisdiction under section 66 in respect of the North West Frontier Province was the Court of the Judicial Commissioner of the North West Frontier Province. Section 66 was subse-

quently amended in 1926 the Lahore High Court being specified as the High Court but the section was again amended in 1939 restoring jurisdiction to the Judicial Commissioner

It was decided by the Bombay High Court in the case of the *Indian Life Assurance Company Limited* 33 Bom L.R. 36 and in that of *Bulchand Kesavdas* 128 I.C. 678 by the Judicial Commissioner's Court of Sind that the High Court in respect of assessments in Sind and for the purpose of this Act is the Judicial Commissioner of Sind

Does High Court include Judicial Commissioner?—Under section 3 (24) of the General Clauses Act 1887 the High Court includes a Court of a Judicial Commissioner the definition of a High Court being—

High Court used with reference to civil proceedings shall mean the highest Civil Court of appeal in the part of British India in which the Act or Regulation containing the expression operates

It was argued at one time that because the Income-tax Act expressly excludes the jurisdiction of Civil Courts the proceedings are not civil proceedings and the power given to the High Court under section 66 belongs to it not inherently as a Civil Court but by express legislative provision In the absence of a definition in the Income-tax Act it was contended accordingly that for this purpose the High Court cannot include the Court of a Judicial Commissioner *Ramchand Gopaldas v Commissioner of Income tax* but this view was not upheld

66-A (1) When any case has been referred to the High Court under section 66, it shall be heard by a Bench of not less than two Judges of the High Court, and in respect of such case the provisions of section 98 of the Code of Civil Procedure, 1908, shall, so

References to be heard by Benches of High Courts and appeal to lie in certain cases to Privy Council

far as may be, apply notwithstanding anything contained in the Letters Patent of any High Court established by Letters Patent or in any other law for the time being in force

Provided that where in any reference heard by the Bench of the Court of the Judicial Commissioner of the North-West Frontier Province, a difference of opinion arises between the Judicial Commissioner and the Judge of the said Court, the opinion of the Judicial Commissioner shall prevail

(2) An appeal shall lie to His Majesty in Council from any judgment of the High Court delivered on a reference made under section 66 in any case which the High Court certifies to be a fit one for appeal to His Majesty in Council

(3) The provisions of the Code of Civil Procedure, 1908, relating to appeals to His Majesty in Council shall, so far as may be, apply in the case of appeals under this section in like manner as they apply in the case of appeals from decrees of a High Court

Provided that nothing in this sub section shall be deemed to affect the provisions of sub section (5) or sub section (7) of section 66

Provided, further, that the High Court may, on petition made for the execution of the order of His Majesty in Council in respect of any costs awarded thereby, transmit the order for execution to any Court subordinate to the High Court

(4) Where the judgment of the High Court is varied or reversed in appeal under this section effect shall be given to the order of His Majesty in Council in the manner provided in sub-sections (5) and (7) of section 66 in the case of a judgment of the High Court

(5) Nothing in this section shall be deemed—

(a) to bar the full and unqualified exercise of His Majesty's pleasure in receiving or rejecting appeals to His Majesty in Council, or otherwise howsoever, or

(b) to interfere with any rules made by the Judicial Committee of the Privy Council, and for the time being in force, for the presentation of appeals to His Majesty in Council, or their conduct before the said Judicial Committee.

History—Before 1926 no appeal lay to the Privy Council in the ordinary course. The proviso to sub-section (1) was added in 1939.

It was decided in the case of the *Tata Iron and Steel Company v The Chief Revenue Authority Bombay*, 1 ITC 206 that a judgment of the High Court under section 66 of the Income-tax Act (section 51 of the Act of 1918) is not a final order or judgment within the meaning of clause 39 of the Letters Patent of the Bombay High Court that the judgment was only advisory and that therefore no appeal to the Privy Council lay. Though express provision has since been made for appeals to the Privy Council, it was reaffirmed by the Privy Council that the judgment of the High Court under section 66 is still only advisory. *Commissioner of Income tax Bombay v Bombay Trust Corporation* 1936 ITR 323 (P.C.)

Review of judgments—There is no provision in the law under which the High Court can review or revise its judgment delivered on a reference under section 66. Even if it be considered that the application of section 98, Civil Procedure Code attracts other provisions of that Code the judgment on a reference is neither a decree nor an order. In *re Kajari Mal Kalyandas* 41 T C 50 (All) AIR 1930 All 211. In determining questions referred under section 66 the High Court is not functioning as an ordinary Civil Court attracting to it the provisions of the Civil Procedure Code. The reference by the Privy Council in *Commissioner of Income-tax B & O v Maharajadhiraj of Darbhanga* 1933 ITR 94 to a formal decree by the High Court does not necessitate the inference that proceedings under sections 66 and 66 A are automatically governed by all the provisions of the Civil Procedure Code. An application for a review of a judgment under section 66 does not therefore lie. *Seth Mathurdas v Commissioner of Income tax C P* 1940 ITR 413 (Nag)

Difference of opinion.—Where there was a difference between the two judges who heard an application under section 66 (3) (now section 66 (2)) and the case was referred to a Full Bench it was argued that as the judges had expressed their views they were *functus officio* and that in the

absence of a majority the opinion of the Commissioner should stand. This view was rejected and it was held that the reference to the Full Bench was valid, *Umar Baksh v Commissioner of Income-tax, Punjab*, 5 ITC 402, 12 Lah. 725, AIR, 1931 Lah 578.

Orders refusing a reference—Appeals against—Under sub section (1) of section 66 A, it is only when a reference has been made that it has to be heard by a bench of not less than two judges. An application under section 66 (2) need not necessarily be heard by a bench of not less than two judges. An application for a writ is neither a reference nor an application under section 66 (2) and neither the Act nor the rules made under it are applicable to it, which can therefore be heard by a single judge on the original side, *In re Ramjadas Mahaliram* 1936 ITR 25 (Cal). It all depends on the Rules of the High Court.

In *Tohar Mal Uttam Chand v The Crown*, 2 ITC 301, the High Court held that in view of the difference between the provisions of the 1922 Act and those of the 1918 Act the former conferring a right of reference to the High Court, the decision in the *Tata case*, 1 ITC 206, could be distinguished, and that an appeal lay from an order of a single judge of the High Court refusing to ask the Commissioner to state a case. The same view was also taken by the Madras High Court in the case of *Shiva Pratap Battudu*, 2 ITC 40. See also the case of *Rathan Singh v Commissioner of Income tax, Madras*, 2 ITC 294.

Even under the 1918 Act appeals were allowed from the orders of a single judge—see *The North Anantapur Gold Mines v Chief Commissioner of Income tax*, 1 ITC 133 and *Jubilee Mills v Commissioner of Income-tax*, 2 ITC 25.

No appeal (apart from special leave) lies to the Privy Council from an order of the High Court under section 66 (2) refusing to direct the Tribunal to make a reference, neither under section 66-A nor under Letters Patent. Proceedings connected with the assessment of tax are mainly concerned with questions of fact and where both the Tribunal and the High Court are agreed that there is no question of law, it is neither convenient nor desirable that the Judicial Committee should be called upon to consider such cases. Further if an appeal lay under Letters Patent, an appeal against an order under section 66 (2)—in which both the Tribunal and the High Court agreed that there was no question of law—would lie on less stringent conditions than an appeal against a judgment in a reference made under section 66 (1), and the Legislature could not have contemplated such an anomalous situation, *E M Chettyar Firm v Commissioner of Income-tax, Burma*, 5 ITC 18. On the other hand a Full Bench of the Lahore High Court held that an order under section 66 (2) refusing to direct the Commissioner to make a reference is a final judgment, and that the assessee can claim a certificate for leave to appeal if the other conditions are satisfied, *Ferozeshah Kaka Khel v Commissioner of Income tax*, 5 ITC 198. The question was raised before but not decided by the Privy Council, *Ferozeshah Kaka Khel v Commissioner of Income-tax* 1933 ITR 219. The Madras Patna and Allahabad High Courts have followed Rangoon and dissented from Lahore, *O V R S V Arunachalam Chettyar v Commissioner of Income-tax, Madras*, *Gurmukh Rai v Secretary of State*, 1934 ITR 412, *Harihar Gir v Commissioner of Income tax B & O*, 1941 ITR 246.

When disposing of an application under section 66 (3) (corresponding to present section 66 (2)), the Madras High Court overruled an earlier decision of the same Court on which the Commissioner had relied when refusing a reference and directed him to make a reference. Thereupon the Commissioner asked for a certificate to enable him to appeal to the Privy Council and it was held that the order of the Court being interlocutory in a matter in which the Court acts in an advisory capacity the Court had no jurisdiction to give a certificate either under section 66-A (2) or under the Letters Patent. *Commissioner of Income tax v Voora Sreeramulu Chetti*, 1939 I T R 566

North West Frontier Province—Proviso (1) it will seem refers only to references heard by the Judicial Commissioner's Court and does not cover applications under section 66 (3)

Substantial question of law—Under sub-section (2) no appeal lies to the Privy Council unless the High Court certifies that the case is a fit one for appeal to the Privy Council. Sub-section (3) deals with the procedure to be applied when an appeal lies under sub-section (2). *Commissioner of Income tax U P v Maharaj Kumar of Vizianagaram* 1935 I T R 155 (All)

Section 66-A is in terms the same as section 109 (c) of the Civil Procedure Code. The section is intended to enable an appeal to His Majesty in Council in cases in which the High Court could certify that the question of law involved was one of great private or public importance. The grant of a certificate under section 109 (c) of the Civil Procedure Code is not a matter which is left entirely to the discretion of the Court but is a judicial process which could not be performed without special exercise of that discretion—see *Banarsi Prasad v Kashi Krishna Narain* 23 All 227 (P C) and *Delhi Cloth Mills v Commissioner of Income tax*, 8 Lah 269

A certificate will be granted in cases involving questions of public importance or cases forming important precedents governing numerous other cases. *Nattu Kesava Mudahar v Govindasami and others* 76 I C 811. On the other hand even if the issue is of general importance leave would be refused if the matter is not of sufficient importance to the respondent to justify his being put to the expense of an appeal to the Privy Council. The question whether through a disruption of a Hindu family a particular member had or had not succeeded to the business of the family has not been considered to be a sufficiently important question of law to justify the grant of leave to appeal. *Nathumal v Commissioner of Income tax Punjab* AIR 1930 Lah 109. So also the following questions viz whether a notice calling for a return of income issued by the Income-tax Officer had been abandoned because of subsequent proceedings taken by a Special Income-tax Officer whose appointment was invalid and whose proceedings had to be ignored. *Lachram Basantilal v Commissioner of Income tax Bengal* 5 I T C 262 whether after assessing a person for a number of years on the basis of an accounting year of less than 365 days it is open to the Income-tax Officer to make up for the accumulated difference by assessing in a particular financial year on the profits of two accounting years. *M E R Malak v Commissioner of Income tax, C P* AIR 1929 Nag 336 and whether a sum of Rs 7721 being interest paid by a firm to its partners can be deducted from its profits. *Commissioner of Income tax Bombay v Tej bhai das Motumal* 1936 I T R 227. Leave to appeal was also refused in a

case in which the issue was whether profits from the growing and manufacture of tea abroad were profits from business, *R M S T Ponnusami Pillai v Commissioner of Income tax, Madras*, 3 I T C. 378

The question whether interest awarded under section 28 of the Land Acquisition Act is income or damages (capital) for the loss of possession of property was considered to be a mixed question of fact and law and in any case not a question of general importance or a substantial question of law, *Commissioner of Income-tax U P v Beharilal Bhargava*, 1942 I T R. 388 (All)

On the other hand, even though the tax was only Rs. 3,500, leave was given in a case because the question would recur every year and there was a substantial question of law, *Commissioner of Income tax, Madras v Mathias*, 1938 I T R. 8. The question whether income from spontaneously growing forests is agricultural, is a substantial question of law, *Raju Mustafa Ali Khan v Commissioner of Income tax*, 1946 L T R. 265 (Oudh)

The words 'so far as may be' in sub-section (3) confine the statutory right of appeal to the Privy Council to the cases described in sub-section (2). Even though the requirements of section 110, Civil Procedure Code, be satisfied, a High Court will be justified in refusing a certificate in circumstances in which it would not grant a certificate under section 109 (c), Civil Procedure Code *Delhi Cloth Mills v Commissioner of Income tax*, 9 Lah. 284 (P C)

Appeal by special leave—Sub section (5) makes it clear that in any case it is open to an assessee to appeal to the Privy Council by special leave and that this prerogative right is not affected by the express provision for appeals to His Majesty in Council in the ordinary course

Costs—The Select Committee added a clause as below —

"Provided that no such certificate shall be granted ~~of~~ ^{on} application on behalf of the Secretary of State for India in Council, unless the High Court is satisfied that if the respondent does not appear at the hearing of the appeal and the judgment of the High Court is varied or reversed, the right to recover any costs which may be awarded by the order of His Majesty in Council to the appellant will not be exercised."

This clause was omitted by the Assembly as the result of an undertaking given by the Finance Member that in such cases the Crown would not demand costs

The High Court has no power, when granting leave to appeal, to impose a condition that the appellant should bear the costs of the appeal, *Commissioner of Income-tax, Madras v Mathias*, 1938 I T R. 8

Special jurisdiction.—The High Court exercises a special jurisdiction under section 66 of the Income-tax Act, and rules and orders framed by a High Court under its Original or Appellate jurisdictions modifying the provisions of the Civil Procedure Code have no application to Income-tax appeals which are governed entirely by the relevant provisions of the Civil Procedure Code and section 66-A of the Income-tax Act, *Commissioner of Income tax, Bengal v Hungerford Investment Trust, Ltd*, 1935 I T R. 188

United Kingdom Law—See section 149 (3) of the 1918 Act which permits of appeals from the High Court to the Court of Appeal and the House of Lords

67 No suit shall be brought in any Civil Court to set aside or modify any assessment made under this Act, and no prosecution, suit or other proceedings shall lie against any

Bar of suits in civil court

Officer of the Crown for anything in good faith done or intended to be done under this Act

History—The first part of the section has been the same since 1886 *see* section 39 of the 1886 Act The second part of the section first found a place in the 1918 Act

United Kingdom Law—There are no corresponding provisions in the law in the United Kingdom *See* however sections 133 (2) and 148 (2) under which an appeal, once determined by the Commissioners shall be 'final and conclusive' and neither the determination of the Commissioners nor the assessment thereon shall be altered except by order of the Court when a case has been stated as provided by the Income tax Act The law in the United Kingdom is governed by various rulings regarding the circumstances in which writs of *certiorari* and *mandamus* can be granted or petitions of right will lie The more important rulings are referred to below

Scope of section—This section consists of two parts the first part of which saves assessments made under the Act from interference by a Civil Court and the second part gives immunity to every Government officer for anything in good faith done or intended to be done under this Act It will be seen that in the first part there is no reference to good faith and intention. An assessment which is not strictly in accordance with the Act but purports to be made under the Act will not be set aside or modified by a Civil Court in so far as the assessee does not avail himself of the remedies provided for him under this Act, *viz.* appeal to the Appellate Tribunal, and a reference to the High Court under section 66 *R N Singha v Secretary of State for India* 2 ITC 462 5 Rang 825 A.I.R. 1928 Rang 70 It is only in those cases in which the assessee has exhausted all his rights under the Act and is at the same time the victim of an illegal assessment or other proceeding for which no relief has been provided by the Act that a Civil Court can if at all interfere with an assessment *see Holborn Viaduct v R* 2 Tax Cases 228 Whenever a statute deals with certain rights it is right to conclude that it deals with the total ambit of those rights and leaves nothing outside the provisions of the statute *Sheobaran Singh v Kulsum un Nissa*, 49 All 367

It will be noticed also that the protection from interference by Civil Courts is only in regard to *assessments* The word 'assessment' has nowhere been defined in the Act but obviously it includes the determination of the tax payable by a person including penal assessments under sections 25 and 28 It presumably also includes refunds under sections 48 and 49 inasmuch as such refunds involve as a preliminary the determination of the tax for which the assessee is liable

The first part of the section clearly does not refer to matters other than assessments for example penalties under Chapter VIII or summary proceedings under section 46 for the recovery of tax, etc. In respect of all such matters the Courts can interfere

The Rangoon High Court ruled that a suit for a declaration that the registration of a firm (*see* section 26-A) was *ultra vires* and void is not barred by section 67, since it is not a suit to set aside or modify an assessment. Following the dictum of Lord Cranworth, L.C., in *O'Flaherty v M'Dowell*, (1857) 6 H.L.C. 142, the Court also held that a remedy by suit was not necessarily ruled out by the existence of a concurrent remedy under the Income tax Act. It is for the Income-tax authorities to consider the consequential effects of a declaration by a Court, *C T A C T Nachiyappa Chettiar v Commissioner of Income tax*, 1933 I.T.R. 330, 11 Rang 380, A.I.R. 1933 Rang 330. On the other hand, according to the Nagpur High Court, the remedy against an Income-tax Officer's refusal to register a firm under section 26 A is by way of appeal to the Assistant Commissioner and thence to the Appellate Tribunal and reference on questions of law if any to the High Court under section 66 and not by way of civil suit against the Crown, *Governor General in Council v Mulla Mahomed Bhai, etc*, 1945 I.T.R. 10 Nag.)

According to the Patna High Court, a suit, not to set aside or modify an assessment, but to contest whether a claim for refund had been validly discharged by the Income-tax department is not barred by section 67, *Inder Chand v Secretary of State*, 1941 I.T.R. 673.

A determination of fact by the Income-tax Officer in the course of his proceedings does not bind third parties, and while the assessee cannot invoke a Civil Court to set aside the finding third parties can, *Secretary of State v. Radha Swami Sat Sang*, 1945 I.T.R. 520 (All.)

The second part of the section gives personal immunity to Government officers for anything done by them in good faith or intended to be done under the Act. They are protected from prosecution, suit or other proceeding. With reference to section 270 of the Government of India Act, 1935, which runs as follows: "No proceedings, civil or criminal, shall be instituted against any person in respect of any act done or purporting to be done in the execution of his duty as a servant of the Crown in India before the relevant date except with the consent of the Governor General" (the 'relevant date' being the date of establishment of Federation), it was held that the motive with which acts are done is immaterial and that so long as such acts are done in purported execution of duty as servants of the Crown, no suit could be instituted against the person without the consent of the Governor General, *Kesarichand Kaverlal v Nayudu, etc*, 1942 I.T.R. 413 (Mad.) In this case, the Assistant of the Income tax Officer was alleged to have trespassed into the premises of the plaintiff and taken away the latter's account books.

The word 'proceeding' is comprehensive. In *Commissioner of Income tax v North Anantapur Gold Mines*, 44 Mad. 718, 41 M.L.J. 177, 1 I.T.C. 133, it was held by the Madras High Court, following *In re Onward Building Society*, (1891) 2 Q.B. 463, that an application under section 45 of the Specific Relief Act is a 'proceeding' within the meaning of this section of the Income-tax Act. In the *Onward Building Society's case*—a case under the Companies Act, it was held, with reference to a section which prohibited any 'suit, action or other proceeding against the company', that an application against the liquidator of a company directing him to register shares was within the prohibition of the Act.

" . . . gives a summary mode of enforcing rights which might have been prosecuted by a suit in Chancery or possibly by an action for a mandamus at common law. It would be impossible to say that if the circuitous proceeding would have been a proceeding against the company, that the compendious one is not so also"—Per *Bowen, L.J.*

Though the view of the Madras High Court that no proceeding under section 45 of the Specific Relief Act would lie against the Chief Revenue Authority was overruled by the Privy Council in the *Alcock Ashdown case*, 50 I A 227, 47 Bom 742, 1 ITC 221 the protection given by the second part of the section to officers is evidently unaffected.

Anything done—'Anything done' includes 'anything omitted to be done'. See *Chief Commissioner of Income tax v North Anantapur Gold Mines*, supra and *Jolliffe v Wallasey Local Board*, (1873) L.R. 9 CP 62, also section 3 (2) of the General Clauses Act, 1897, "words which refer to acts done extend also to illegal omissions

"In good faith"—Under section 3 (20) of the General Clauses Act (X of 1897), a thing shall be deemed to be done in good faith where it is in fact done honestly, whether it is done negligently or not

In *Spooner v Juddow*, (1850) 4 M I A 353, with reference to section 8 of the East India Company's Act, 1780 (corresponding to section 106 of the Government of India Act, 1915) which was in the following terms—

"The said Supreme Court shall not have or exercise any jurisdiction in any matter concerning the revenue or concerning any act or acts ordered or done in the collection thereof according to the usage and practice of the country or the regulation of the Governor General in Council" the Privy Council observed "The point, therefore, is whether the exception of jurisdiction only arises where the defendants (the Revenue authority) have acted strictly, according to the usage and practice of the country, and the regulations of the Governor General in Council. But upon this supposition the proviso is wholly nugatory, for, if the Supreme Court is to enquire whether the defendants in this matter concerning the public revenue were right in the demand made and to decide in their favour only if they acted in entire conformity to the regulations of the Governor General in Council, they would equally be entitled to succeed if the statutes and charters contained no exception or proviso for their protection. Our books actually swarm with decisions putting a contrary construction upon such enactments, and there can be no rule more firmly established than that if parties *bona fide* and not absurdly believe that they are acting in pursuance of statutes, and according to law they are entitled to the special protection which the legislature intended for them, although they have done an illegal act"

"I agree that if a person knows that he has not under statute authority to do a certain thing and yet intentionally does that thing, he cannot shelter himself by pretending that the thing was done with intent to carry out that statute. In this case nothing is stated showing that the defendants, when they made the rate in question, knew that it was not allowed by the statute under which they were appointed, and it has not been found that the defendants were trying under the colour of the law to get money to which they had no right, in which case they would not have been protected by the Act," per *Blackburn, J.*, in *Selmes v Judge*, (1874) L.R. 6 Q B 724, a Highway Rating case in which it was held with reference to a statutory provision which said that "no action or suit

shall be commenced against any person for anything done in pursuance of or under the authority of this Act until notice has been given that such notice was necessary in so far as the rating was made *bona fide*

Wrong description of assessee—It was held in *A V Sughia v The Secretary of State in Council* 2 I T C 462, 5 Rang 825 A I R 1928 Rang 70, that the wrong description of the assessee in the notice issued under section 22 (2) would not make the assessment *ultra vires* or wholly illegal. *Ultra vires* and erroneous are not synonymous terms. The assessee could have availed himself of the remedies provided by the Income-tax Act if he desired to challenge the assessment. The Court therefore declined to interfere.

Section 67 not *ultra vires* of Government of India Act—Under section 32 of the Government of India Act 1915 every person shall have the same remedies against the Secretary of State for India in Council as he might have had against the East India Company if the Government of India Act, 1858 had not been passed. Relying on this section, it was argued in *Dr R N Sughia v Secretary of State* 5 Rang 825 A I R. 1928 Rang 70, 2 I T C 462 that section 67 of the Income-tax Act was *ultra vires*. But the contention was not accepted. Before 1858 there was no such thing as income-tax, and unless it could be shown that a suit for the recovery of revenue of the nature of income tax wrongly assessed would have lain against the East India Company before 1858, no suit for the recovery of income tax wrongly assessed could be entertained. Section 176 of the Government of India Act 1935 takes the place of section 32 in the old Act, and under the former the right to sue the Federation or a Province is subject to any provisions that the Federal or the Provincial Legislature may enact within its powers under the Government of India Act.

Jurisdiction of High Courts—Under sub-section (2) of section 106 of the old Government of India Act, 1915 (see section 226 of the new 1935 Act) High Courts are prohibited from exercising

'any original jurisdiction in any matter concerning the revenue or concerning any act ordered or done in the collection thereof according to the usage and practice of the country or the law for the time being in force.

It was held in *Commissioner of Income tax v North Anantapur Gold Mines* 1 I T C. 133 44 Mad. 718, 41 M L J 177, that this section prevented the High Court from issuing a mandamus to the Income-tax Commissioner asking him to state a case for the decision of the High Court. In *In re Doraisamy Iyer & Co* 1 I T C. 93 45 Bom. 1064 and *In re the Bombay and Persia Steam Navigation Company* 1 I T C 97, 45 Bom. 881 the Bombay High Court held a different view. The Privy Council in the *Alcock Ashdown case*, 50 I A 227 A I R. 1923 P C. 138, overruled the view of the Madras High Court and confirmed that of the Bombay High Court, on the ground that the order of a High Court to a Revenue Officer to do his statutory duty did not constitute the exercise of 'original jurisdiction in any matter concerning the revenue' see also, *In re Ramjidas Mahaliram*, 1936 I T R 25 (Cal). Just as an order directing a revenue officer to do his statutory duty is not the exercise of original jurisdiction in any matter concerning the revenue (see *Alcock Ashdown's case*), an order directing him to refrain from doing something which he wrongly believes to be his statutory duty is

not an exercise of such jurisdiction, *Dayaldas Kushiram v Commissioner of Income tax, Bombay* 1940 ITR 134. On the other hand a suit to set aside an assessment on the ground that the relevant provision in the Income tax Act is *ultra vires* of the powers of legislature as laid down in the Government of India Act relates to revenue and a High Court has no original jurisdiction to entertain the suit *Governor General in Council v Raleigh Investments* 1944 ITR 265 (FC).

The above bar applies not only to the original side of the three Presidency High Courts but to all original suits such as for example under the Companies Act before all High Courts *Governor General in Council v Shiromani Sugar Mills* 1946 ITR 248 (FC). The initiation of a certificate under section 46 (2) of the Income tax Act is an act done in the collection of Revenue and it is not open to a High Court in its original jurisdiction to grant an injunction (*ibid*). The words according to the usage force qualify only the immediately preceding words and not the words original jurisdiction. Also the law for the time being in force refers not only to the law directly governing the revenue but all relevant laws. But the real point in such cases is whether the authority concerned *bona fide* believed that it was acting in accordance with law. If so the bar in section 226 of the Government of India Act will apply. *Governor General in Council v Shiromani Sugar Mills* 1946 ITR 248 (FC).

The words original jurisdiction in the above section are not confined to ordinary original civil jurisdiction and the acts protected are not only those in strict conformity with law but those done *bona fide* in the belief that they are in accordance with law. *K R M T T Thyagaraja Chettiar v Collector of Madura* 1936 ITR 56.

Writ of certiorari—The present High Courts have only such powers in this respect as the Supreme Courts had and the latter could not issue writs of certiorari regarding acts ordered or done in the collection of revenue in accordance with the usage and practice of the country or the regulations of the Governor General in Council. Income-tax is revenue and the Letters Patent have not enlarged the powers of High Courts. No writ therefore can issue against a Collector who *bona fide* took steps to collect arrears of income tax even though after the time for such action had expired. *K R M T T Thyagaraja Chettiar v Collector of Madura* 1936 ITR 56. *D D Shroff v Commissioner of Income tax Bombay* 1943 ITR 172.

Specific Relief Act—A right to be assessed by a particular officer in accordance with section 64 of the Income-tax Act is a personal right in respect of which an order under section 45 of the Specific Relief Act can be issued. *Dayaldas Kushiram v Commissioner of Income tax Bombay* 1940 ITR 139.

Excess of jurisdiction—The following details may be noted.

There must of course be certain conditions on which the right of every tribunal of limited jurisdiction to exercise that jurisdiction depends. But those conditions may be founded either on the character and constitution of the tribunal or upon the nature of the subject matter of the inquiry or upon certain proceedings which have been made essential preliminaries to the inquiry or upon facts or a fact to be adjudicated upon in the course of the inquiry. It is obvious that conditions of the last differ materially from those of the three other classes. Objections founded on the personal incompetency of the Judge or on the nature of the subject matter or on the absence of some essential preliminary

minary, must obviously, in most cases, depend upon matters which, whether apparent on the face of the proceedings or brought before the Superior Court by affidavit, are extrinsic to the adjudication impeached. But an objection that the Judge has erroneously found a fact which, though essential to the validity of his order, he was competent to try, assumes that having general jurisdiction over the subject matter, he properly entered upon the enquiry but miscarried in the course of it. The Superior Court cannot quash an adjudication upon such an objection without assuming the functions of a Court of appeal, and the power to re-try a question which the Judge was competent to decide," *Colonial Bank of Australasia v Willan*, 5 L.R.P.C. 417

Lord Esher (Master of the Rolls) considered the formula in *Reg v Commissioners for Special Purposes of Income-tax* (1888) 21 Q.B.D. 313, 319, and said

'When an inferior Court or tribunal or body, which has to exercise the power of deciding facts is first established by Act of Parliament, the Legislature has to consider what powers it will give that tribunal or body. It may in effect say that if a certain state of facts exists and is shown to such tribunal or body before it proceeds to do certain things it shall have jurisdiction to do such things but not otherwise. Then it is not for them conclusively to decide whether that state of facts exists and if they exercise the jurisdiction without its existence when they do may be questioned and it will be held that they have acted without jurisdiction. But there is another state of things which may exist. The Legislature may entrust the tribunal or body with a jurisdiction, which includes the jurisdiction to determine whether the preliminary state exists to proceed further or do something more. When the Legislature are establishing such a tribunal or body with limited jurisdiction, they also have to consider whatever jurisdiction they give them, whether there shall be any appeal from their decision, for otherwise there will be none. In the second of the two cases I have mentioned it is an erroneous application of the formula to say that the tribunal cannot give themselves jurisdiction by wrongly deciding certain facts to exist, because the Legislature gave them jurisdiction to determine all the facts, including the existence of the preliminary facts on which the further exercise of their jurisdiction depends and if they were given jurisdiction so to decide, without any appeal being given, there is no appeal from such exercise of their jurisdiction.'

An English Company acquired an English business which included the shares of two continental companies, it also included 98 per cent of the shares of an American company carrying on business in America with the result that, according to the prospectus, all the companies concerned came under one single general control. The General Commissioners found that the business of the American company was as a fact carried on by and was the business of the English company and taxed the profits accordingly. A rule nisi was granted against the General Commissioners by the Court of Appeal but was discharged on the ground that it was within the jurisdiction of the Commissioners to ascertain what was the connection between the English and American Companies and that if the Commissioners had gone wrong the remedy was by way of appeal and not by prohibition. The Commissioners had not gone wrong in the finding of any facts preliminary to giving themselves jurisdiction. The English company was engaged in trade

in the United Kingdom and the Commissioners had jurisdiction to find out the limits of the trade so carried on in order to fix the *quantum*. The only condition which was the essential preliminary to the Commissioners having jurisdiction was that the trader carried on the trade at least in part in the area of the Commissioners, *Ex parte Kodak, Ltd v Clark*, 4 Tax Cases 149 (1903) 1 K B 305.

In my judgment this dictum (of Lord Esher quoted above) states accurately the principle applicable to such cases. The last question is within which class should the present case be placed? *Allen v Sharp*, (1848) 2 Exch 352 is a decision which appears to me in point. Baron Parke, at page 363, draws the distinction between the case then under consideration and cases under the Statutes relating to poor rates: see *Waller v Price* 3 Barn & Ald 409 and his observations are so important and bear so immediately upon the present case that I quote them *in extenso*. On a careful consideration of these Acts of Parliament, they seem to me to differ from the Statute of Elizabeth as to poor rate, and that the Legislature intended that the assessment of the assessors appointed by the Commissioners should be final and conclusive unless appealed from, in the first place, to the Commissioners, and further if necessary, to the Judges of the superior Courts. It would be singular if there were no such provision for what a flood of litigation would follow, if every subject of the Crown, who was dissatisfied with the judgment of the assessors, had a right to dispute the propriety of their assessment in an action against the collectors

without referring to the Statutes. I should say, *a priori*, that the object of the Legislature was to make the decision of the assessor final and binding unless disputed in the manner pointed out. On reading the Statutes I come to the same conclusion. In my view an examination of the Income tax Acts shows that the scheme of the Legislature is to entrust the decision of the facts to a tribunal of persons specially selected for the locality, and who are often in a better position than the Courts to determine the questions of fact sometimes very complicated which may arise. The exigencies of the State require that there should be a tribunal to deal expeditiously, and at comparatively little expense with all such questions, and to decide them finally, reserving always to the individual the right to have the Commissioner's decisions on points of law reviewed by the Courts. The obligation is placed, for reasons of expediency, upon the person assessed to appeal to the Commissioners if he wishes to rid himself of an assessment which is in his view, based upon wrong conclusions of fact, and this obligation rests equally upon a person who contends that he is not chargeable as upon a person who admits that he is chargeable but not to the extent of the assessment made upon him, per Lord Reading, C J, in *Rev Commissioners of Taxes for Bloomsbury* 7 Tax Cases 59 (1915) 3 K B 768.

"In such a case it is an erroneous application of the formula to say that the tribunal cannot give themselves jurisdiction by wrongly deciding certain facts to exist because the Legislature gave them jurisdiction to determine all the facts including the existence of the preliminary facts of which the further exercise of their jurisdiction depends: see also *The Colonial Bank of Australasia v. Willan*, 5 L R P C 442 and the principle of law to be applied to this case is that laid down by Chief

Justice Tindall in Case v Mountain, 1 Macnaghten and Gordon page 257 (approved and adopted by Lord Denman in *Reg v Bolton*, 1 Queen's Bench page 75), where he says dealing with a question of the jurisdiction of Magistrates. If the charge be of an offence over which, if the offence charged be true in fact, the Magistrate has jurisdiction the Magistrate's jurisdiction cannot be made to depend upon the truth or falsity of the facts or upon the evidence sufficient or insufficient to establish the *corpus delicti* brought under investigation, and that the remedy for any person aggrieved by an assessment made under section 52 either by reason of his not being chargeable at all or by reason of its being excessive is by appeal to the General Commissioners and by special case—Per *Alory J* in *Rea v Commissioners of Taxes for Bloomsbury* 7 Tax Cases 59 (1915) 3 K B 768

No writ of prohibition can lie merely because the Revenue authorities come to a wrong finding of fact as to liability, e.g., as to income. Such a finding does not involve an excess of jurisdiction. *Rex v The Swansea Income Tax Commissioners* (Ex parte *The English Croft Spelter Co.*), 9 Tax Cases 437 (1925) 2 K B 250

If what happened before the inferior tribunal was a refusal to hear the case a *mandamus* would lie but if what had taken place was in fact that upon the materials before them they had come to a wrong decision that could not be made a ground for directing and rehearing. Procedure by way of *mandamus* is not procedure by way of appeal per Lord Alverstone in *R v General Income Tax Commissioners of Offlow*, 27 T L R 353 followed in *R v General Income Tax Commissioners of Winchester*

In England the Courts cannot interfere on the ground that the Commissioners should have heard the evidence tendered and should not have dispensed with it. In a case in which the Commissioners refused to hear an expert valuer whose evidence was tendered by the assessee the Court considered that as the Commissioners had been told the nature of the evidence and came to the conclusion that it would be of no help there was no refusal to hear the case which alone would justify the issue of a *mandamus* per Lord Alverstone in *R v Commissioners for the City of London* (Ex parte *Commissioners, I R*) (1904) 91 L T 94

If I was satisfied that the Commissioners had entertained a different question I should not have hesitated to make the rule absolute. It has long been recognised that when a tribunal of this kind acts within their jurisdiction on a matter properly before them although they have gone wrong in law in the way they have applied the rules of law to their judgment or have gone wrong in fact it is not for us to interfere per Lord Alverstone in *R v Commissioners for the City of London* (Ex parte *Commissioners I R*) (1904) 91 L T 94

but for myself I wish to express the opinion as at present advised that prohibition would not lie in this case at this stage, on the ground that the general principle is that the proceedings to be prohibited must be of a judicial character, and not belonging to the Executive Government. As Lord Denman said in the case of *Chabot v Lord Morpeth*, 15 Q B 457. Were we to grant prohibition in this case we should be interfering with proceedings not judicial but belonging to

the Executive Government of the country," per *Avory, J.*, in *The King v Kensington Commissioners*, 6 Tax Cases 279, (1913) 3 K B 870

"My view of the power of prohibition at the present day is that the Court should not be chary of exercising it and whenever the Legislature entrusts to any body of persons other than to the Superior Courts the power of imposing an obligation on individuals the Courts ought to exercise as widely as they can the power of controlling those bodies or persons if these persons admittedly attempt to exercise powers beyond the powers given to them by Act of Parliament," per *Brett, L J* (afterwards *Lord Esher*) in *R v Local Government Board*, (1882) 10 Q B D 309 quoted with approval by *Swinfen Eady, L J*, in *R v Kensington Income tax Commissioners* 6 Tax Cases 613, (1914) 3 K B 429 (1916) 1 A C 215

As a result of information disclosed in connection with a claim for relief, additional assessments were made in respect of under charged tax and at the same time relief was withheld by the Inspector of Taxes. Rules *non* were issued calling upon (1) the General Commissioners to show cause why a writ of prohibition should not issue prohibiting additional assessments and (2) the Inspector of Taxes to show cause why writs of *certiorari* and *mandamus* should not issue quashing his refusal to certify the claim for relief. *Held*, discharging the rules that both the General Commissioners and the Inspector acted within their jurisdiction

Per the Lord Chief Justice Hewart—The question whether there should be a writ of prohibition is a question whether that which is being done is or is not being done without jurisdiction. The Surveyor says that he discovers that a person chargeable has been allowed a reduction not authorised by this Act. Mr Montgomery concedes the question whether the deduction is or is not authorised by the Act is a question within the jurisdiction of the Surveyor to determine. In that part of the argument Mr Montgomery appeared to say—I do not know if he seriously meant it—that if the Surveyor decided the question correctly the matter was within his jurisdiction but if he decided it incorrectly the matter was not within his jurisdiction. If that be indeed the argument it appears to me to confuse two things an erroneous decision within the jurisdiction and a usurpation of a jurisdiction which does not exist. I think it is a fact that the question which had to be determined here was a question within the jurisdiction of the Surveyor and if there is exception taken to the additional assessment there is a clear right of appeal under the Act and that right of appeal is at this present moment being pursued. I think therefore that the application for the writ of prohibition manifestly fails.

I pass now to the rules for *mandamus* and *certiorari*, which relate really to two aspects of the same matter. The applicants went to the Surveyor and produced certain figures showing cost of maintenance repairs, insurance and management and it is said that so far as arithmetic is concerned those figures were beyond dispute and it is said that the Surveyor had no choice except to give a certificate. If that were the true interpretation it would follow that if the arithmetic were correct in the statement produced to the Surveyor then notwithstanding that upon a

review of all the relevant facts he was clearly and rightly of opinion that the owner was not entitled to any allowance at all, he must proceed to make a certificate of allowance based on the figures produced to him, and once the owner had got that document in his possession, it would be like a Bank of England note, he would immediately proceed to recover payment in accordance with that certificate. I cannot think that the Legislature intended to enact anything so grotesque. The Surveyor here having the figures before him came to the conclusion that the owners notwithstanding those figures were not entitled to any allowance.

He certified that the owners in question were not entitled to any repayment and he proceeded to give his reasons. There also, as it seems to me, the Surveyor was acting within his jurisdiction. It may well be that the applicants for these rules are not satisfied with the conclusion at which he arrived. But that being so, they have in this matter a right of appeal and that appeal they are pursuing. *R v Commissioners of Kingsland*, 8 Tax Cases 327.

You are entitled to say, as against certain Commissioners, that the order ought to go, if as Lord Reading says, there was no doubt as to the facts, and if you were convinced that by no possibility could it be held that there was a liability on the subject as for instance if the General Commissioners of Income tax had purported to make an assessment on a man in respect of super tax which is specially assigned to the Special Commissioners but applying the rule of Lord Reading in the *Singer* case, there is sufficient evidence here and (the General Commissioners) are entitled not merely to consider the matter geographically but also fundamentally as to whether there is a liability per *Haworth, M R*, in *R v General Commissioners, Marylebone* (Ex parte *Schlesinger*) 13 Tax Cases 746 7 1 T C 101.

Indian Rulings under the 1886 and 1918 Acts—Whether a particular person is in receipt of a particular income is a question to be primarily determined by the Income-tax Officer, that is to say, it is a question of fact entirely within his jurisdiction. The Civil Court cannot interfere and set aside the finding of the Income-tax Officer, see *Forbes v Secretary of State*, 11 T C 8, 42 Cal 151.

Where the assessee contended, unsuccessfully before the Taxing Officer that his income was below the taxable limit and filed a suit to recover the tax paid by him on the ground that he was not liable to be taxed under Act, section 39 of the Act of 1886 was held to be a bar to the suit, *Sawan mal's Case v Secretary of State*, 11 T C 25.

If he has assessed income, then even if his assessment is wrong, the Civil Court cannot interfere by reason of section 39 of the Act. If he has assessed something which is not income, then he has acted without jurisdiction. (But who is to decide what is income?) The plaintiff sets forth what the plaintiffs call net income. This is not an expression to be found in the Act. The Act defines income and deals with income. It cannot be denied that the total sum on which the plaintiff has been assessed is income. This is implied in the plaint itself. The Collector, therefore, had jurisdiction to assess tax on it. The plaintiff claims that he is entitled to deduct Government revenue from the income. The Collector decided that he was not so entitled but this again was a matter

within the jurisdiction of the Collector. If the Collector is to assess income tax at all he must decide how much comes in and what the outgoings to be legitimately deducted are. There is no dispute in this case as to what came in. The dispute is as to outgoings. This is for the Collector. I am wholly unable to see that anything has been done *ultra vires*, per *Ross, J* in *Secretary of State for India v Forbes* 1 I T C 23, A I R 1922 Pat 361.

On the general principle on which the Civil Court interferes in such cases there is no doubt. Where an authority is by Statute vested with exclusive powers over any subject matter then so long as these powers are exercised on that subject matter the Civil Court cannot interfere but if the authority purports to exercise these powers on what is not that subject matter then the Court will interfere, because the authority is not acting under the Statute and is not protected thereby. As was stated in *Chairman of Girdih Municipality v Srisih Chandra Mozoomdar* 30 Cal 859, The true test is whether there has been a substantial disregard of the provisions of the law which creates the authority

and regulates its powers and duties per *Ross J* in *Secretary of State for India v Forbes*, 1 I T C 23, A I R 1922 Pat 361.

On the other hand in *Haji Rehemtulla Haji Tar Mahomed v Secretary of State* 2 I T C 118, A I R 1926 Bom 50, in which the question arose where profits accrued or arose the Bombay High Court allowed a suit on the ground that the assessment was clearly *ultra vires*. The correctness of this ruling was, however, doubted by the same court in *Shroff v Commissioner of Income tax*, 1943 I T R 172.

In *Raja of Ramnad v Commissioner of Income tax, Madras* 3 I T C 263 52 Mad 12 the Madras High Court said that the bar against a civil suit imposed by section 52 of the 1918 Act, would not apply if the assessment was made in respect of an item of income clearly not assessable under the Act and that in cases in which the Income tax Officer had to decide whether a certain item of income was assessable or not his decision need not be *ultra vires* even if it was illegal.

These decisions and dicta are obsolete since the present Act provides the assessee with the right to demand a reference to the High Court on questions of law.

Position under present Act—It was suggested in passing in the judgment in *Dunchand v Commissioner of Income tax Punjab* 4 I T C 33 10 Lah 596 that even under the present Act a suit may lie if the assessment is *ultra vires*. For the contrary view, see *R N Singha v Secretary of State in Council* 2 I T C 462 5 Rang 825, A I R 1928 Rang 70 and the case noted below.

The relevant authorities were closely reviewed by the Madras High Court in *Secretary of State v V M Meiyappa Chettiar*, 1936 I T R 341, I I R (1937) Mad 211, A I R 1937 Mad 241 where it was held that in respect of matters which the Income tax Act has left to be determined by the Income tax authorities their decision cannot be questioned by a suit in a Civil Court. Accordingly, if the Income-tax authorities find after due enquiry that the assessee is a resident of British India the Civil Court has no jurisdiction to entertain a suit for a declaration that the assessee is not resident and that he is consequently not assessable as a resident. Also the

fact that the assessee had defaulted and brought himself within the mischief of section 23 (4) and been thus deprived of the remedies provided by the Income-tax Act cannot give him a right to sue for a declaration of his non-assessability.

Illegal composition of tax—Not binding. A proprietary life assurance company established in the United Kingdom had for some years been assessed to income-tax on the income basis of its untaxed income received in the United Kingdom. The basis of assessment was altered to a profits basis liability being calculated by reference to the surplus shown as the result of the last quinquennial valuation. For the next few years the Society was assessed on the new basis but afterwards in consequence of legislation altering the basis of taxation of income arising from foreign property the company was assessed on an income basis. The company produced correspondence with the Surveyor of Taxes which they averred amounted to an agreement that the Crown was bound for five years to assess the company on the profits basis and asked for a declaration that the said agreement was valid and binding and for an injunction restraining the Commissioners of Inland Revenue from enforcing or in any way acting upon the assessment made on the income basis. *Held* that the construction which the Society sought to put on the agreement was not a true one and that if it were true such an agreement would be invalid and *ultra vires* both as regards the Surveyor of Taxes and the Commissioners of Inland Revenue. The question whether having regard to the right of appeal allowed under section 57 of the Taxes Management Act 1880 it was a proper case for a declaratory order against the Attorney General was raised but not determined. *Gresham Life Assurance Society Limited v. Attorney General* 7 Tax Cases 36 (1916) 1 Ch. 228.

I can find nothing in these (departmental) instructions to suggest that the Inland Revenue had any intention of giving any concession to persons who are not entitled to any concession or exemption under the Act. Indeed had the Inland Revenue attempted to do so by an agreement the agreement, in my opinion, an opinion in which I think the Solicitor General concurred on behalf of the Crown, would have been *ultra vires* per Lord Blackburn in *Inland Revenue v. Peter McIntyre Ltd* 12 Tax Cases 1006.

In *Liberty & Co. v. Inland Revenue* 12 Tax Cases 650 it did not avail the assessee to rely on a circular of the Board of Inland Revenue announcing a certain extra legal concession in respect of investment in War Bonds.

On the other hand when the Board of Inland Revenue broadcast a form calling for information which they had no right to call for from any one and the collection and supply of which might involve heavy expenditure and also required a person (plaintiff) to submit his return before the expiry of the statutory period the Court interfered. *Dyson v. Att. General* (1911) 1 K.B. 410 and (1912) 1 Ch. 158. So also *Burgh's case* (1911) 2 Ch. 139 and (1912) 1 Ch. 173 in which the Inland Revenue issued an unauthorised form threatening with penalties failure of compliance and the only way of contesting the action of the Inland Revenue was by way of declaration or defending proceedings for enforcement of penalties.

Remedy under Income tax law not exhausted.—A company had been wrongly assessed on the basis of its own returns twice over in respect

of a certain portion of its income for a series of years. A claim for refund was made on the Commissioners of Inland Revenue who were prepared to agree to a compromise on equitable lines. The Company did not accept the compromise and then brought in a petition of right. Held, (by Stephen J.), that no petition of right lay, the grounds for the decision being (1) if the case was one of double assessment, a remedy was prescribed by the Income tax Act under which the Commissioners of Inland Revenue were the sole judges of whether a double assessment had been made, (2) if the case was one of overcharge the remedy was by way of appeal and (3) in any case the claim for refund was time barred being more than three years old. *Holborn Viaduct Co. v. R.*, 2 Tax Cases 228.

An individual an advisory engineer by profession refused to make a return for Excess Profits Duty on the ground that he was exempt and sought a declaration to that effect. The High Court without going into the merits of the case declined to make a declaration because there was an appropriate remedy way of appeal prescribed. *Smecton v. Attorney General* (1920) 1 Ch. 85, 12 Tax Cases 166, see also *R. N. Singha v. Secretary of State in Council* 2 I T C 462 A I R 1928 Rang 70 5 Rang 825 and *In re Ramjidas Mahaliram* 1936 I T R 25 (Cal.).

Tax—Paid under Coercion—To succeed in a suit for refund of tax paid it is incumbent on the plaintiff to show that the payment has been made under coercion but it may be assumed for the purposes of this case that there was coercion within the meaning of section 72 of the Contract Act as interpreted by the Privy Council in *Kanhya Ial v. National Bank of India* 40 Cal 598 per Jenkins C J in *Forbes v. Secretary of State* 1 I T C 8 42 Cal 151.

In *Raja of Ramnad v. Commissioner of Income tax, Madras* 3 I T C 264 52 Mad 12, in which the assessee had included in his return of income non taxable income and was taxed thereon it was held that the payment having been made voluntarily by mistake, and not by duress or coercion, no suit for recovery of tax lay in any circumstances.

67-A In computing the period of limitation prescribed for an appeal under this Act or for an application under section 66, the day on which the order complained of was made, and the time requisite for obtaining a copy of such order, shall be excluded.

Computat on of periods of
lim tation

History—This section was inserted by Act XXII of 1930 and removes doubts that had been felt as to the applicability of section 12 of the Indian Limitation Act to income tax proceedings. See *Muhammad Hayat Haj Muhammad v. Commissioner of Income tax, Punjab* 3 I T C 319, A I R 1929 Lah 170 also *Ramanatha Reddiar's case*, 3 I T C 10 6 Rang 175 and *Mohanlal Hardecodas's case* 4 I T C 90 9 Pat 172.

Scope—The section applies only to appeals under this Act (see sections 30 and 32) and to applications under section 66. The section follows section 12 of the Indian Limitation Act. Note that section 5 of the latter Act has been specially extended by section 66 (7 A) of the Income tax Act to applications to the High Court made under sub section (3) or (3 A) of section 66.

Copies of orders of Income tax Officer and Assistant Commissioner—Even though under the rules framed by a High Court it may be necessary to get copies of the Income-tax Officer's order and the Assistant Commissioner's order in addition to those of the Commissioner of Income-tax the assessee gets no right thereby to extend the period of limitation by the time required to get copies of orders other than those of the Commissioner *Gulabchand Chotalal v Commissioner of Income tax* 11 P 5 I T C 273 53 All 684 A I R 1931 All 673

Invalid applications—No time can be allowed in respect of an invalid application for copies of orders being corrected afterwards, *Basantlal Ramjidas v Commissioner of Income-tax Bihar and Orissa* 5 I T C 383, 11 Pat 40 A I R 1932 Pat 103

Inapplicability of Limitation Act—Since the Indian Income-tax Act specifically provides for the computation of periods of limitation [sections 66 (7 A) and 67 A] the provisions of the Indian Limitation Act do not apply to proceedings under the Income-tax Act See section 29 of the Limitation Act, *Lakshmi Sivalu Sahu v Commissioner of Income tax*, U P, 6 I T C 142

67-B If on the first day of April in any year provision has not yet been made by an Act of the Indian Legislature for the charging of Income-tax for that year, this Act shall nevertheless have effect until such provision is so made as if the provision in force in the preceding year or the provision preferred in the Bill then before the Legislature, whichever is more favourable to the assessee, were actually in force

History—This section was added in 1940 to fill a lacuna in the Act See notes under section 3

Year—The word as used in this section clearly refers to the financial year for tax is levied in respect of financial years

Readjustment—The section does not provide for the readjustment of tax in the light of the new finance Act Can a supplementary assessment be made?

68 [* * * * *]

Repeals—Section 68 along with the schedule of repealed enactments has been deleted by the Repealing and Amending Act 1927 (XII of 1927)

Transitional provisions—When the Appellate Tribunal was set up section 14 of the Income-tax Amendment Act of 1940 made special provisions in respect of jurisdiction over various appellate revisional and reference proceedings then pending These provisions were only of temporary interest

SCHEDULE.

See Section 10 (7) This schedule contains special rules regarding the computation of the profits and gains of Insurance business see notes under section 10 (7) where these rules have been set out and commented upon.

68 [* * * * *]

THE GOVERNMENT TRADING TAXATION ACT, ACT III OF 1926.

An Act to determine the liability of certain Government to taxation in British India in respect of trading operations.

WHEREAS it is expedient to determine the liability to taxation for the time being in force in British India of the Government of any part of His Majesty's Dominions, exclusive of British India in respect of any trade or business carried on by or on behalf of such Government ; it is hereby enacted as follows :—

Short title and commencement.

1. (1) This Act may be called THE GOVERNMENT TRADING TAXATION ACT, 1926.

(2) It shall come into force on such date¹ as the Central Government may by notification in the Gazette of India, appoint.

2. (1) Where a trade or business of any kind is carried on by or on behalf of the Government of any part of His Majesty's Dominions, exclusive of British India, that Government shall, in respect of the trade or business and of all operations connected therewith, all property occupied in British India and all goods owned in British India for the purposes thereof, and all income arising in connection therewith, be liable—

Liability of certain Governments to taxation in respect of trading operations.

(a) to taxation under the Indian Income-tax Act, 1922, in the same manner and to the same extent as in the like case a company would be liable ;

(b) to all other taxation for the time being in force in British India in the same manner as in the like case any other person would be liable.

(2) For the purposes of the levy and collection of income-tax under the Indian Income-tax Act, 1922, in accordance with the provisions of sub-section (1), any Government to which that sub-section applies shall be deemed to be a company within the meaning of that Act, and the provision of that Act shall apply accordingly.

(3) In this section the expression " His Majesty's Dominions " includes any territory which is under His Majesty's protection or in respect of which a mandate is being exercised by the Government of any part of His Majesty's Dominions.

¹ The Act came into force with effect from the 1st April, 1926

History—This Act is the outcome of a resolution of the Imperial Economic Conference in 1923 at which the Dominions of the British Empire decided to waive *inter se* their immunity from taxation under the laws of other dominions. This question of immunity is a much discussed one under international law, and the present Act places the position beyond doubt so far as Dominions of the British Empire are concerned.

Foreign countries—The Act does not apply to countries outside the British Empire. The liability of such countries to British Indian tax and that of British India to tax in such countries depends on international law.

His Majesty's Dominions This is a special definition and cannot be extended to other purposes. It was ruled by the Allahabad High Court that the Tehri State, in which the British Government under a treaty, guarantee the Rajah and his posterity in the secure possession of the country and defend him against his enemies is a territory which is under His Majesty's protection within the meaning of the Government Trading Taxation Act. *The Tehri State case*. In re Ram Prasad 52 All 419 AIR 1930 All 389. A ruling chief not being an independent sovereign ruler is not *ipso facto* exempt from tax on property owned by him in British India, *Kumar Vishw Nath Singh v Commissioner of Income tax* 1942 I T R. 322 (All).

It was argued in the *Tehri State case* 52 All 419 that under section 63 of the Government of India Act which confines the jurisdiction of the legislature to persons within British India, the Government Trading Taxation Act is *ultra vires* since Indian States are not persons within British India. Following section 19 of the English Interpretation Act 1889 the Allahabad High Court held that the persons governing a State—whether individuals or bodies carrying on business in British India came within the scope of the Indian legislature's law making powers. Further the object of the Act is to tax income acquired in British India (i.e. a thing in British India) and not to tax anything earned by a Government in its own territory. See also *In re Patiala State Bank*, 1943 I T R. 617 (P C).

Income from trading—This Act applies only to profits from trading. The business need not be carried on in British India; it is enough if income accrues or arises or is received in British India, no matter where the business is carried on and even if the entire business is carried on outside British India. In re *Patiala State Bank* 1943 I T R. 61 (P C). Income from Government of India securities forming investments of the Patiala State Bank was held to be part of the profits of the Bank received in British India and therefore taxable, so also income from house property in British India taken over in settlement of bad debts for even though the property may not be occupied for the purpose of the business the income arose from the business.

Income from securities is taxed at source and is exempt to the extent allowed under section 60—see Notifications under section 60. See also Introduction as to the liability of States to tax generally.

Trade or business—As to what constitutes trade or business see notes under section 2 (4) of the Income-tax Act.

And of all operations connected therewith—This expression corresponds in a measure to the words 'business connection' used in section 42 (1) of the Income-tax Act. The idea is to widen the connotation of the words 'trade and business'.

Property occupied in British India—This applies only to property used for trade or business or operations connected therewith. This Act does not determine the liability of property occupied otherwise than for purposes of trade.

Notice—Under section 2 (2) it will be necessary for the Income tax Officer to serve a notice on some person connected with the dominion or state and treat him as principal officer.

Provincial Governments—The proviso to section 155 of the Government of India Act 1935 permits taxation by the Federal (Central) Government of Provinces in respect of trade or business carried on outside the province.

EXTRACTS FROM THE INDIAN FINANCE ACT, 1946.

11 Short Title and Extent—(1) This Act may be called the Indian Finance Act, 1946

(2) It extends to the whole of British India

9 INCOME-TAX AND SUPER-TAX —(1) Subject to the provisions of sub sections (3), (4), (5), (6) and (7),—

(a) income-tax for the year beginning on the 1st day of April 1946 shall be charged at the rates specified in Part I of the Schedule and

(b) rates of super tax for the year beginning on the 1st day of April 1946 shall, for the purposes of section 55 of the Indian Income tax Act 1922 (XI of 1922), be those specified in Part II of the Schedule

(2) In making any assessment for the year ending on the 31st day of March, 1947, there shall be deducted from the total income of an assessee, in accordance with the provisions of section 15-A of the Indian Income-tax, Act, 1922, an amount equal to—

(i) one tenth of the earned income chargeable under the head "Salaries" which is included in his total income, subject to a maximum of two thousand rupees, plus

(ii) one-fifth of the earned income other than the income chargeable under the head "Salaries" which is included in his total income

Provided that the aggregate amount to be deducted under this sub-section shall not in any case exceed four thousand rupees

(3) In making any assessment for the year ending on the 31st day of March, 1947—

(a) where the total income of an assessee, not being a company, includes any income chargeable under the head "Salaries" as reduced by the deduction for earned income appropriate thereto, or any income chargeable under the head "Interest on Securities", or any income from dividends in respect of which he is deemed under section 49-B of the Indian Income-tax Act, 1922, to have paid income-tax imposed in British India, the income tax payable by the assessee on that part of his total income which consists of such inclusions shall be an amount bearing to the total amount of income-tax payable according to the rates applicable under the operation of the Indian Finance Act, 1945, on his total income the same proportion as the amount of such inclusions bears to his total income,

(b) where the total income of an assessee not being a company, includes any income chargeable under the head "Salaries" on which super tax has been or might have been deducted under the provisions of sub-section (2) of section 18 of the Indian Income tax Act, 1922, the super-tax payable by the assessee on that portion of his total income which consists of such inclusion shall be an amount bearing to the total amount of super tax payable according to the rates applicable under the operation of the Indian Finance Act, 1945, on his total income the same proportion as the amount of such inclusion bears to his income.

(4) In making any assessment for the year ending on the 31st day of March 1947, where the total income of an assessee consists partly of earned income and partly of unearned income, the super tax payable by him shall be—

(i) on that part of the earned income chargeable under the head "Salaries" to which clause (b) of sub-section (3) applies, the amount of super tax computed in accordance with the provisions of that clause, plus

(ii) on the remainder of the earned income the amount which bears to the total amount of super tax which would have been payable on his total income had it consisted wholly of earned income the same proportion as such remainder bears to his total income, plus

(iii) on the unearned income the amount which bears to the total amount of super tax which would have been payable on his total income had it consisted wholly of unearned income the same proportion as the unearned income bears to his total income

(5) Where the total income of an assessee referred to in paragraph A or Part I of the Schedule does not exceed six thousand rupees and includes any income to which clause (a) of sub section (3) applies the income tax payable by the assessee on such inclusion as computed in accordance with the provisions of that clause shall be reduced by an amount representing one rupee for every complete unit of two hundred rupees of such inclusion as reduced by the amount of income, if any, exempt under the second proviso to sub section (1) of section 7, section 7, section 15, and sub section (1) of section 58 F, of the Indian Income-tax Act 1922

Provided that the reduction to be made under this sub section shall not in any case exceed two fifths of the income tax otherwise payable on such inclusion

Provided further that if there is an incomplete unit of such inclusion amounting to one hundred rupees or more, it shall for the purposes of this sub section be reckoned as a complete unit of two hundred rupees

(6) In making any assessment for the year ending on the 31st day of March, 1947—

(a) where the total income of a company includes any profits and gains from life insurance business the super tax payable by the company shall be reduced by an amount computed at the rate of one anna in the rupee on that part of its total income which consists of such inclusion,

(b) where the total income of an assessee not being a company includes any profits and gains from life insurance business the income tax and super tax payable by the assessee on that part of his total income which consists of such inclusion shall be an amount bearing to the total amount of such taxes payable according to the rates applicable under the operation of the Indian Finance Act 1942 (VII of 1942) on his total income the same proportion as the amount of such inclusion bears to his total income, so however that the aggregate of the taxes so computed in respect of such inclusion shall not in any case exceed the amount of tax payable on such inclusion at the rate of five annas in the rupee

(7) In cases to which section 17 of the Indian Income tax Act, 1922 applies, the tax chargeable shall be determined as provided in that section but with reference to the rates imposed by sub section (1) of this section and in accordance where applicable, with the provisions of sub-sections (3) (4) (5) and (6) of this section

(8) For the purposes of making any deduction of income tax in the year beginning on the 1st day of April, 1946 under sub-section (2) or sub-section (2 B) of section 18 of the Indian Income tax Act 1922, from any earned income chargeable under the head 'Salaries' the estimated total income of the assessee under this head shall, in computing the income tax to be deducted be reduced by an amount equal to one fifth of such earned income but not exceeding in any case four thousand rupees

(9) For the purposes of this section and of the rates of tax imposed thereby, the expression 'total income' means total income as determined for the purposes of income tax or super tax, as the case may be, in accordance with the provisions of the Indian Income tax Act 1922 and the expression 'earned income' has the meaning assigned to it in clause (6-A) of section 2 of that Act

(10) If any provision is made in the Indian Income tax Act 1922 for the allowance of expenditure on scientific research related to the business carried on by an assessee, then any such expenditure incurred by him in the previous year for the assessment for the year ending on the 31st day of March, 1946 shall for the purposes of that provision and in accordance therewith, be deemed to be expenditure

ture incurred in the previous year for the assessment for the year ending on the 31st day of March 1947 and shall be added to the amount of such expenditure, if any in that previous year

(11) Any sum being excess profits tax repaid in respect of any chargeable accounting period under the provisions of section 10 of the Indian Finance Act 1942 or of S 2 of the Excess Profits Tax Ordinance, 1943 (XVI of 1943) shall be deemed to be income for the purposes of the Indian Income tax Act, 1922 and shall notwithstanding the provisions of S 34 of that Act, be treated as income of the previous year which constitutes or includes the chargeable accounting period in respect of which the said sum is repayable

Provided that any such sum repaid in respect of any profits which are also assessable to excess profits tax under the law in force in the United Kingdom shall be treated for the purpose of assessment to income tax and super tax, as income of the previous year during which the repayment is made

(12) The Income tax Officer shall calculate the amount of income tax and super tax payable in respect of each sum referred to in sub S (11), and such amount shall be deducted from the said sum at the time that it is repaid and where the regular assessment proceedings for the appropriate assessment year are not complete the tax so deducted shall be treated as a payment of income tax or super tax, as the case may be for the purposes of sub-section (5) of section 18, of the Indian Income tax Act 1922

(13) Any person objecting to the amount of a deduction made under sub-S (12) may appeal to the Appellate Assistant Commissioner within thirty days of the receipt of the repayment order and the provisions of Ss 30 31 and 33 of the Indian Income tax Act, 1922, shall apply as if such appeal were an appeal under the first mentioned section.

(14) Where under the provisions of sub S (2) of S 12 of the Excess Profits Tax Act, 1940 (XV of 1940), excess profits tax payable under the law in force in the United Kingdom has been deducted in computing for the purposes of income tax and super tax the profits and gains of any business the amount of any repayment under sub-S (1) of S 28 of the Finance Act 1941 (4 and 5 Geo 6 c 30) as amended by S 37 of the Finance Act, 1942 (5 and 6 Geo 6 c 21) in respect of those profits shall be deemed to be income for the purposes of the Indian Income tax Act, 1922 and shall for the purpose of assessment to income tax and super tax be treated as income of the previous year during which the repayment is made

12 EXCESS PROFITS TAX—If any provision is made in clause (vi) of sub-S (2) of S 10 of the Indian Income tax Act 1922 (XI of 1922), to allow in respect of depreciation a further sum which is not deductible in determining the written down value then such sum shall not be included in the allowances made in computing profits for the purposes of the Excess Profits Tax Act 1940 (XV of 1940)

13 AMENDMENT OF S 10 ACT XII OF 1942—(1) To sub-S (1) of S 10 of the Indian Finance Act 1942 the following further proviso shall be added namely—

‘Provided further that no such further sum herein referred to shall be deposited with the Central Government after the 28th of February, 1946’

(2) The provisions of this section shall be deemed to have come into force on the 28th day of February 1946

THE SCHEDULE

(See section 11)

PART I—Rates of Income-tax

A—In the case of every individual, Hindu undivided family unregistered firm and other association of persons not being a case to which paragraph B of this Part applies—

Rate

1	On the first Rs 1 500 of total income	Nil
2	On the next Rs 3 500 of total income	One anna in the rupee
3	On the next Rs 5 000 of total income	Two annas in the rupee

- | | | |
|---|--|-------------------------------------|
| 4 | On the next Rs 5000 of total income | Three and a half annas in the rupee |
| 5 | On the balance of total income
Provided that— | Five annas in the rupee |

(i) no income-tax shall be payable on a total income which before deduction of the allowance if any for earned income does not exceed Rs 2000

(ii) the income tax payable shall in no case exceed half the amount by which the total income (before deduction of the said allowance if any for earned income) exceeds Rs 2000

(iii) the income tax payable on the total income as reduced by the allowance for earned income shall not exceed either—

(a) a sum bearing to half the amount by which the total income (before deduction of the allowance for earned income) exceeds Rs 2000 the same proportion as such reduced total income bears to the unreduced total income, or

(b) the income tax payable on the income so reduced at the rates specified in this Schedule
whichever is less

B —In the case of every company and local authority and in every case in which under the provisions of the Indian Income tax Act, 1922, income tax is to be charged at the maximum rate—

	Rate
On the whole of total income	Five annas in the rupee

PART II —Rates of Super tax

A —In the case of every individual, Hindu undivided family, unregistered firm and other association of persons not being a case to which paragraph B or paragraph C or paragraph D of this Part applies—

	Rate if income wholly earned.	Rate, if income wholly unearned
1 On the first Rs 25,000 of total income	Nil	Nil
2 On the next Rs. 10,000 of total income	Two annas in the rupee	Three annas in the rupee.
3 On the next Rs 10,000 of total income.	Three annas in the rupee	Four annas in the rupee
4. On the next Rs 15,000 of total income.	Four annas in the rupee	Five annas in the rupee.
5 On the next Rs. 20,000 of total income	Five annas in the rupee	Six annas in the rupee
6 On the next Rs 30,000 of total income	Six annas in the rupee	Seven annas in the rupee.
7 On the next Rs 40,000 of total income	Seven annas in the rupee	Eight annas in the rupee.
8 On the next Rs. 50,000 of total income	Eight annas in the rupee	Nine annas in the rupee
9 On the next Rs 50,000 of total income	Nine annas in the rupee.	Nine and a half annas in the rupee
10 On the next Rs 1,00,000 of total income	Nine and a half annas in the rupee.	Ten annas in the rupee.
11 On the next Rs 1,50,000 of total income	Ten annas in the rupee	Ten and a half annas in the rupee
12 On the balance of total income	Ten and a half annas in the rupee.	Ten and a half annas in the rupee.

B —In the case of every local authority—

	Rate
On the whole of total income	One anna in the rupee

C—In the case of an association of persons being a co-operative society other than the Sanikatta Saltowners Society in the Bombay Presidency for the time being registered under the Co-operative Societies Act 1912, or under an Act of the Provincial Legislature governing the registration of co-operative societies—

Rate

- | | |
|--|-----------------------|
| 1 On the first Rs 20 000 of total income | Nil |
| 2 On the balance of total income | One anna in the rupee |

D—In the case of every company—

Rate

On the whole of total income One anna in the rupee

and in addition in respect of that part of the total income (as reduced by the amount of dividends payable at a fixed rate) which does not exceed the amount of dividends not being dividends payable at a fixed rate declared in British India in respect of the whole or part of the previous year for the assessment for the year ending on the 31st day of March 1947—
on the amount by which such part—

Rate

- | | |
|---|--------------------------|
| (a) exceeds 30 per cent but does not exceed 40 per cent. of the total income as so reduced | Two annas in the rupee |
| (b) exceeds 40 per cent. but does not exceed 45 per cent. of the total income as so reduced | Three annas in the rupee |
| (c) exceeds 45 per cent. but does not exceed 50 per cent. of the total income as so reduced | Four annas in the rupee |
| (d) exceeds 50 per cent but does not exceed 55 per cent. of the total income as so reduced | Five annas in the rupee |
| (e) exceeds 55 per cent but does not exceed 60 per cent. of the total income as so reduced | Six annas in the rupee |
| (f) exceeds 60 per cent. of the total income as so reduced | Seven annas in the rupee |

Provided that—

(i) no additional super tax shall be payable where such part is less than, or equal to five per cent on the capital of the company,

(ii) where such part is more than five per cent on the capital of the company the additional super tax payable shall be reduced by the amount of additional super-tax which would but for the provisions of clause (i) of this proviso have been payable had such part been equal to five per cent on the capital of the company

(iii) where any dividends (not being dividends payable at a fixed rate) have been declared before the 1st day of March, 1946, in respect of the whole or part of the previous year for the assessment for the year ending on the 31st day of March 1947 and the amount of super tax computed at the rates set out in this paragraph exceeds the amount of super tax which would be payable by the company at the rate specified in the Indian Finance Act, 1945 such proportion of the amount of super-tax computed under this paragraph as the amount of dividends declared before the 1st day of March 1946, bears to the total amount of dividends declared in respect of the said previous year (not being dividends payable at a fixed rate) shall be so reduced as not exceed the same proportion of the super tax computed at the rate specified in the Indian Finance Act, 1945

(iv) the additional super tax shall be payable only by a company in which the public are substantially interested within the meaning of the Explanation to sub-section (1) of section 23-A of the Indian Income tax Act, 1922, or a subsidiary company of such a company where the whole of the share capital of such subsidiary company is held by the parent company or the nominees thereof

Explanation —For the purposes of this paragraph—

(a) the expression 'capital of the company' shall be deemed to mean the paid up share capital at the beginning of the previous year for the assessment for the year ending on the 31st day of March 1947 (other than capital entitled to a dividend at a fixed rate) plus any reserves other than depreciation reserves and reserves for bad or doubtful debts at the same date as diminished by the amount on deposit on the same date with the Central Government under section 10 of the Indian Finance Act 1942 or section 2 of the Excess Profits Tax Ordinance 1943

(b) the expression *dividend* shall be deemed to include any distribution included in the expression *dividend* as defined in clause (6 A) of section 2 of the Indian Income tax Act 1922 and any such distribution made during the year ending on the 31st day of March 1947 shall be deemed to have been made in respect of the whole or part of the previous year

(c) where any portion of the profits and gains of a company is not included in its total income by reason of such portion being exempt from tax under any provisions of the Indian Income tax Act 1922 the capital of the company the total amount of dividends and the amount of dividends payable at a fixed rate shall each be deemed to be the proportion thereof that the total income of the company bears to its total profits and gains

NOTES ON THE INDIAN FINANCE ACT 1946

History—Since 1922 the rates of tax are levied from year to year by the Annual Finance Acts and the Income tax Act remains an act regulating only machinery and procedure

Total Income—Note that the Finance Act, see sub S (9) of S 11 defines this expression differently from S 2 (15) of the Income tax Act

Rates of tax—Note that companies and local authorities certain trustees (See S 41 of the Income tax Act) and non British non residents (see S 13) of the Income tax Act have to pay income tax at the maximum rate

See also notes under S 3 of the Income tax Act as to the basis of assessment of different classes of assessee

Surcharge—In the 1946 Finance Act, the surcharges levied separately in the preceding years have been merged in the regular rates of tax

Provisional collection of taxes—See S 67 B of the Income tax Act which deals with the situation when a Finance Act has not been passed by the 31st of March

Earned Income allowance—For the assessment year 1946-47 this allowance was increased from 1/10th of the earned income subject to a maximum of Rs. 2000 to 1/5th of earned income subject to a maximum of Rs. 4000. But since salaries of 1945-46 are finally assessable only in 1946-47 but at the rates of the 1945 Finance Act, the earned income allowance for salaries remains at 1/10th of earned income subject to a limit of Rs. 2000 as fixed by the Finance Act of 1945

In the 1946 Act, different rates of super tax apply to earned and to other income though there is no earned income allowance as in the case of income tax

Salaries and Interest on Securities and Dividends—According to Clause (a) of sub S (3) of S 11 in the case of an assessee other than a company since these items are taxed at source tax is levied on them on a proportionate basis with reference to the rate of the preceding year

A deliberate exception has been made in the case of a Company evidently because if a Company were to pay tax at different rates on different parts of its income there would be difficulty in 'grossing up' dividends in the hands of shareholders with reference to S 16 (2) of the Income tax Act

In the case of salaries super tax also is levied on a proportionate basis with reference to the rates of the preceding year because super tax also is deducted at source. But if super tax was not deductible at source, the salary being below the super taxable limit it is liable at the rate of the assessment year and not at that of the year in which the salary was drawn thus if a total income of (say) Rs. 80000 is composed of

	Rs
Salary	30 000
Profits	10 000
Business	40 000
Total	80 000

(1) Super tax on salary will be $\frac{3}{8}$ ths of the super tax on Rs 80,000 at 1945-46 rates (which did not differentiate between earned and unearned income for super tax)

(2) Super tax on property will be $\frac{1}{8}$ th of super tax on Rs 80,000 at the 1946-47, rates for unearned income

(3) Super tax on business will be $\frac{1}{2}$ of super tax on Rs 80,000 at the 1946-47 rates for earned income

The super tax payable will be the sum of the three items above

Income tax will be as follows

(a) On salary at 28.80 of the tax on Rs 80,000 of 1945-46 rates (28=30-2 for earned income)

(b) On other items at 48.80 of the tax on Rs 80,000* at 1946-47 rates (48=50-2 earned income in business)

The income tax payable is the sum of the above two items

Sub-section (5)—The 'funding' scheme, for the lower brackets introduced by the Finance Acts of the preceding years having been given up by this Finance Act of 1946 this sub-section gives relief in cases with a total income below Rs 6,000. The relief as in the 'funding' is $\frac{1}{2}$ % of the taxable income, i.e., income less exempt blocks

All salaried assesseees whose total income does not exceed Rs 6,000 are eligible for the relief which however will not exceed $\frac{2}{5}$ th of the tax on the total income at 1945 rates, this two fifths is the equivalent of the surcharge in the second and third slabs

In fact the whole of this sub-section is consequential on the reduction of income tax in the second and third slabs

Sub-section (6)—A company is not liable to ordinary super tax on its income from life insurance business but it is liable to additional tax, e.g. dividend tax. An assessee other than a Company with profits from life insurance business will pay tax at the 1942 Finance Act rates but subject to a maximum of 5 annas in the rupee

Sub-section (10)—This is consequential on the fact that the Income-tax Amendment Bill 1945 had to be withdrawn owing to disagreement in the legislature and had to be reintroduced in 1946

Sub-section (11)—Excess Profits Tax having been allowed as a deduction for the purpose of income tax, the refund of Excess Profits Tax is related back to the previous year which constitutes or includes the chargeable accounting period to which the refund relates and section 34 of the Income tax Act is accordingly relaxed for this purpose

The exception in respect of doubly taxed income is obviously made in order to simplify double income tax relief

Sub-section (12)—The Income tax Officer will deduct at source the income-tax and super tax payable in respect of refund of excess profits tax

SCHEDULE

PART I

Proviso to paragraph A—If total income is wholly earned income tax under clause (i) (a) is lower on incomes up to Rs 2,017 above that limit clause (ii) (b) will give lower results. If the income is wholly unearned clause (iii) (a) will benefit the assessee up to Rs 2,071. If income is partly earned and partly unearned and lies between Rs 2,017 and Rs 2,071 both the methods should be worked out to see which benefits the assessee

PART II

Companies

Public Companies—Note that the additional super tax is payable only by a public company i.e., in which the public are substantially interested [vide Explanation to section 23 A (1)]

Declared in British India—Note the words 'declared in British India'. The tax therefore is not payable by a company with its registered office abroad which declares dividends abroad even though its income may accrue in British India

Capital—See clause (a) of the explanation

'Paid up share capital' must obviously include all such capital irrespective of its origin i.e., whether paid for in cash or not and whether taken from reserves or by otherwise writing up capital

* Depreciation reserve should be excluded even if capitalized and distributed as bonus shares

Reserves mean real reserves and not provisions for contingencies which are similar to Depreciation and Bad Debts Reserves

Example—The example below illustrates how the additional super tax or Dividend tax is to be calculated

EXAMPLE

Paid up capital on ordinary shares	10,00,000
On Preference shares (5 per cent)	2,00,000
General Reserves (other than depreciation)	5,00,000
Total Income	2,10,000
Dividends declared on ordinary shares	1,50,000
Dividends declared on Preference shares	10,000

Additional super tax is payable on that part of the total income which does not exceed the amount of dividends on ordinary shares i.e. which does not exceed Rs. 1,50,000

The slabs of 1,50,000 are to be determined, with reference to percentages of the total income as reduced by the amount of dividends payable at a fixed rate i.e. 2,10,000 minus 10,000 or 2 lakhs

On 30 per cent of 2 lakhs i.e., 60,000	Nil
On the excess over 30 per cent but not over 40 per cent, i.e. 10 per cent of 2 lakhs 20,000 at 2 annas	2,500
On the excess over 40 per cent but not over 45 per cent i.e. 5 per cent of 2 lakhs 10,000 at 3 annas	1,875
On the excess over 45 per cent but not over 50 per cent i.e. 5 per cent of 2 lakhs 10,000 at 4 annas	2,500
On the excess over 50 per cent but not over 55 per cent i.e. 5 per cent of 2 lakhs 10,000 at 5 annas	3,125
On the excess over 55 per cent but not over 60 per cent i.e. 5 per cent of 2 lakhs 10,000 at 6 annas	3,750
On the excess over 60 per cent 30,000 at 7 annas	13,125
1,50,000	26,875

Now 5 per cent on the capital of the company is 5 per cent on 10 lakhs plus 5 lakhs i.e. 75,000

Under clause (ii) of the proviso the above amount is to be reduced by the additional super tax payable if the dividends amounted to 75,000 i.e. by

1,875

25,000

Ordinary super tax at As 1 on 2,10,000

13,125

38,125

Now if this company had declared interim dividend on ordinary shares at 10 per cent before the 1st March 1946 and declared the balance of 5 per cent on or after that date the calculations according to clause (iii) of the proviso would be as follows—

Proportion of dividends declared before	
1 3-46 to total dividends	2 3
2/3rd of the super tax calculated as above	25 417
Super tax payable at the 1945 rates	
on 2,10,000 at 3 annas	39 375
Less rebate at As 1 on 2 10 000	
minus 1,50,000 i e on 60 000	3 750
	<u>35 625</u>
2/3rd of the super tax calculated	
at 1945 rates	23,750
Reduction to be made under clause (iii) of	
the proviso	1 667
The super-tax payable is thus Rs. 18,125-1 667	36,458

Dividend—Clause (b) of explanation to the paragraph about additional super-tax lays down that the expression dividend includes any distribution contemplated in section 2 (6-A) of the Income tax Act. Thus if a company issues any debentures or there is a distribution on its liquidation or on reduction of its capital during the financial year 1946-47 such distribution though it is not dividend for any specified period is to be deemed to be dividend for the previous year for 1946-47 assessment. This clause applies only to the kind of distribution contemplated in section 2 (6-A) and not to the normal dividend.

Partly exempt dividends—Clause (c) of the Explanation lays down that where any portion of the profits and gains of a company is not included in its total income, the factors entering into the computation of additional super tax (viz., the capital, total amount of dividends and dividends payable at fixed rate) are each to be taken in the proportion that the total income of the company bears to its total profits and gains. Thus in the case of a tea company which is liable to tax on 40 per cent of its profits the other 60 per cent being agricultural income, the material figures for computing additional super tax in the example set out above would be as follows

Paid Up Capital

On ordinary shares	4 lakhs, i e 40 per cent of 10 lakhs
On preference shares	8 lakhs
Reserves	2 lakhs
Total Income	84 000
Dividends declared on ordinary shares	60 000
Dividends declared on preference shares	4 000

and the calculations will be made accordingly

Private Companies—Additional super tax is not payable by private companies as they fall within section 23 A of the Income tax Act which came into force again from 1st April, 1947, and is applicable to the profits and gains for the previous year for the 1946-47 assessment. In the case of companies which under the first proviso to section 23 A are required to distribute 100 per cent of the net profits after payment of taxes as dividends there is no hardship as whether they distribute any dividends or not the full 100 per cent is treated as dividends in the assessment of shareholders under section 23-A. Other private companies could have avoided the application of section 23 A by distributing 60 per cent as dividends but might not have declared sufficient dividends since at the relevant time section 23 A was in abeyance. There would have been some hardship in such cases if they were not allowed to declare and distribute sufficient dividends to escape the application of section 23-A. They were therefore allowed as a concession by executive orders to make up the deficiency if any and to distribute additional dividends up to the required percentage by the 30th June, 1946 or if all the shareholders of the company consented to the inclusion of their share of the dividend in their assessments the company was to be treated as having declared a 60 per cent dividend.

EXTRACTS FROM THE INDIAN FINANCE ACT, 1942

1 (1) This Act may be called the Indian Finance Act, 1942

(2) It extends to the whole of British India

* * * * *

8 (1) Subject to the provisions of sub section (2) and (3),—

(a) income tax for the year beginning on the 1st day of April, 1942, shall be charged at the rates specified in Part I Schedule II increased in the cases to which sub paragraph (b) of paragraph A and paragraph B of that Part apply by a surcharge for the purposes of the Central Government at the rate specified therein in respect of each such rate of income-tax, and

(b) rates of super tax for the year beginning on the 1st day of April 1942, shall for the purposes of section 55 of the Indian Income-tax Act, 1922 (XI of 1922), be those specified in Part II of Schedule II increased in the cases to which paragraphs A B and C of that Part apply by a surcharge for the purposes of the Central Government at the rate specified therein in respect of each such rate of super tax.

(2) In making any assessment for the year ending on the 31st day of March, 1943—

(a) where the total income of an assessee not being a company includes any income chargeable under the head 'Salaries' or under the head 'Interest on Securities' or any income from dividends in respect of which he is deemed under section 49 B of the Indian Income tax Act 1922, to have paid income tax imposed in British India, the income-tax payable by the assessee on that part of his total income which consists of such inclusions shall be an amount bearing to the total amount of income tax payable according to the rates applicable under the operation of the Indian Finance Act, 1941, on his total income the same proportion as the amount of such inclusions bears to his total income,

(b) where the total income of an assessee not being a company includes any income chargeable under the head 'Salaries' on which super tax has been or might have been deducted under the provisions of sub section (2) of section 18 of the Indian Income tax Act, 1922 the super tax payable by the assessee on that portion of his total income which consists of such inclusions shall be an amount bearing to the total amount of super tax payable according to the rates applicable under the operation of the Indian Finance Act, 1941, on his total income the same proportion as the amount of such inclusion bears to his total income

(3) In cases to which section 17 of the Indian Income tax Act 1922, applies, the tax chargeable shall be determined as provided in that section but with reference to the rates imposed by sub section (1) of this section and in accordance with the provisions of sub section (2) of this section where applicable

(4) For the purposes of this section and of the rates of tax imposed thereby the expression 'total income' means total income as determined for the purposes of income tax or super tax, as the case may be, in accordance with the provisions of the Indian Income tax Act, 1922

(5) Notwithstanding anything contained in sub section (1) or sub section (2) no tax shall be payable in cases to which sub paragraph (a) of paragraph A of Part I of Schedule II applies where the assessee deposits with the Central Government in such manner and in accordance with such conditions as the Central Government may by rule prescribe for the purposes of this sub section an amount representing not less than one rupee for every complete unit of twenty five rupees by which his total income exceeds seven hundred and fifty rupees

Provided that where the total income includes any income chargeable under the head 'Salaries' or under the head 'Interest on Securities' or any income from dividends in respect of which he is deemed under section 49 B of the Indian Income tax Act 1922, to have paid income-tax imposed in British India, the amount to be deposited by the assessee in order to obtain the exemption conferred by this sub section shall be an amount bearing to the minimum required to be deposited under the foregoing provisions of this sub section the same proportion as the amount of his total income diminished by the amount of such inclusions bears to the amount of his total income

(6) A deposit made in accordance with the provisions of sub-section (5) shall not in any way be capable of being charged and shall not be liable to attachment under any decree or order of any Civil Revenue or Criminal Court in respect of any debt or liability incurred by the depositor and neither the Official Assignee nor any receiver appointed under the Provincial Insolvency Act, 1920, shall be entitled to or have any claim on any such deposit

(7) Where the total income of an assessee referred to in sub paragraph (b) of paragraph A of Part I of Schedule II does not exceed six thousand rupees, an amount representing one rupee for every complete unit of two hundred rupees of his total income as reduced by the deductions if any allowed under the second proviso to sub section (1) of section 7 section 15 and sub section (1) of section 58 I of the Indian Income tax Act 1922 shall be funded for the assessee's benefit and shall be paid to him on such date not more than twelve months after the termination of the present hostilities as the Central Government may fix

Provided that nothing in this sub section shall apply to any part of total income to which clause (a) of sub section (2) applies

Explanation—In computing the amount to be funded under this sub section if there is an incomplete unit amounting to one hundred rupees or more it shall be reckoned as a complete unit of two hundred rupees

SCHEDULE II

(See section 8)

PART I—Rates of Income-tax

A—In the case of every individual Hindu undivided family unregistered firm and other association of persons not being a case to which paragraph B of this Part applies—

(a) Where the total income does not exceed Rs 2000—

	Rate
1 On the first Rs 750 of total income	<i>Nil</i>
2 On the next Rs 1250 of total income	Six p es in the rupee
Provided that no tax shall be payable on a total income which does not exceed Rs 1500	

(b) Where the total income exceeds Rs 2,000—

	Rate	Surcharge
1 On the first Rs 1500 of total income	<i>Nil</i>	<i>Nil</i>
2 On the next Rs 3500 of total income	Nine pies in the rupee	Six pies in the rupee
3 On the next Rs 5000 of total income	One anna and three pies in the rupee	Five p es in the rupee
4 On the next Rs 5000 of total income	Two annas in the rupee	One anna and two pies in the rupee.
5 On the balance of total income	Two annas and six pies in the rupee	One anna and three pies in the rupee.

B—In the case of every company and local authority and in every case in which under the provisions of the Indian Income tax Act 1912, income tax is to be charged at the maximum rate—

	Rate	Surcharge
On the whole of total income	Two annas and six pies in the rupee	One anna and three pies in the rupee

PART II—Rates of Super tax

A—In the case of every individual Hindu undivided family unregistered and other association of persons not being a case to which paragraphs B and C of this Part apply—

	Rate	Surcharge
1 On the first Rs. 25 000 of total income	<i>Nil</i>	<i>Nil</i>
2 On the next Rs. 10 000 of total income	One anna in the rupee	Six pies in the rupee
3 On the next Rs. 20 000 of total income	Two annas in the rupee	One anna in the rupee.
4 On the next Rs. 70 000 of total income	Three annas in the rupee	One anna and six pies in the rupee
5 On the next Rs. 75 000 of total income	Four annas in the rupee	Two annas in the rupee
6 On the next Rs. 1 50 000 of total income	Five annas in the rupee	Two annas and six pies in the rupee
7 On the next Rs. 1 50 000 of total income	Six annas in the rupee	Three annas in the rupee
8 On the balance of total income	Seven annas in the rupee	Three annas and six pies in the rupee

B—In the case of local authority—

	Rate	Surcharge
On the whole of total income	One anna in the rupee	Six pies in the rupee

C—In the case of an association of persons being a co-operative society, other than the Sanikatta Saltowners' Society in the Bombay Presidency for the time being registered under the Co-operative Societies Act 1912 or under an Act of the Provincial Legislature governing the registration of Co-operative Societies—

	Rate	Surcharge
1 On the first Rs. 25 000 of total income	<i>Nil</i>	<i>Nil</i>
2 On the balance of total income	One anna in the rupee	Six pies in the rupee.

D—In the case of every company—

	Rate
On the whole of total income	One anna and six pies in the rupee

EXTRACTS FROM THE INDIAN FINANCE ACT 1943

(1) This Act may be called the Indian Finance Act, 1943

(2) It extends to the whole of British India

* * * * *

5 (1) Subject to the provisions of sub sections (2) and (3) —

(a) income tax for the year beginning on the 1st day of April 1943 shall be charged at the rates specified in Part I of Schedule II increased in the cases to which sub paragraph (b) of paragraph A and paragraph B of that Part apply by a surcharge for the purposes of the Central Government at the rate specified therein in respect of each such rate of income tax and

(b) rates of super tax for the year beginning on the 1st day of April, 1943 shall for the purposes of section 55 of the Indian Income tax Act 1922, (XI of 1922) be those specified in Part II of Schedule II increased in the cases to which paragraphs A, B and C of that Part apply by a surcharge for the purposes of the Central Government at the rate specified therein in respect of each such rate of super tax

(2) In making any assessment for the year ending on the 31st day of March 1944—

(a) where the total income of an assessee not being a company includes any income chargeable under the head "Salaries" or under the head "Interest on Securities" or any income from dividends in respect of which he is deemed under section 49-B of the Indian Income tax Act, 1922 (XI of 1922) to have paid income-tax imposed in British India, the income tax payable by the assessee on that part of his total income which consists of such inclusions shall be an amount bearing to the amount of income tax payable according to the rates applicable under the operation of the Indian Finance Act, 1942 (XII of 1942), on his total income the same proportion as the amount of such inclusions bears to his total income

(b) where the total income of an assessee not being a company includes any income chargeable under the head Salaries on which super tax has been or might have been deducted under the provisions of sub section (2) of section 18 of the Indian Income tax Act, 1922 (XI of 1922) the super tax payable by the assessee on that portion of his total income which consists of such inclusions shall be an amount bearing, to the total amount of super tax payable according to the rates applicable under the operation of the Indian Finance Act, 1942 (XII of 1942) on his total income the same proportion as the amount of such inclusions bears to his total income

(3) In cases to which section 17 of the Indian Income tax Act 1922 (XI of 1922) applies, the tax chargeable shall be determined as provided in that section but with reference to the rates imposed by sub-section (1) of this section and in accordance with the provisions of sub section (2) of this section where applicable

* * * * *

(4) For the purposes of this section and of the rates of tax imposed thereby, the expression total income means total income as determined for the purposes of Income tax or super tax, as the case may be, in accordance with the provisions of the Indian Income tax Act 1922 (XI of 1922)

(5) Notwithstanding anything contained in sub-section (1) or sub-section (2) no tax shall be payable in cases to which sub-paragraph (a) of paragraph A of Part I of Schedule II applies where the assessee deposits with the Central Government in such manner and in accordance with such conditions as the Central Government may by rule prescribe for the purposes of this sub section an amount representing not less than one rupee for every complete unit of twenty five rupees by which his total income exceeds seven hundred and fifty rupees

(6) A deposit made in accordance with the provisions of sub section (5) shall not in any way be capable of being charged and shall not be liable to attachment under any decree or order of any Civil, Revenue or Criminal Court in respect of any debt or liability incurred by the depositor and neither the Official Assignee nor any receiver appointed under the Provincial Insolvency Act, 1920 (V of 1920) shall be entitled to or have any claim on any such deposit

(7) Where the total income of an assessee referred to in sub-paragraph (b) of paragraph A of Part I of Schedule II does not exceed six thousand rupees, an amount representing one rupee for every complete unit of two hundred rupees of his total income as reduced by the income, if any exempt from tax under any provision of the Indian Income tax Act, 1922 (XI of 1922) or any notification issued thereunder shall be funded for the assessee's benefit and shall be paid to him on such date not more than twelve months after the termination of the present hostilities as the Central Government may fix

Explanation—In computing the amount to be funded under this sub section if there is an incomplete unit amounting to one hundred rupees or more it shall be reckoned as a complete unit of two hundred rupees

(8) Notwithstanding anything contained in sub section (7) of section 8 of the Indian Finance Act 1942 (XII of 1942) the amount to be funded under that sub-section for the assessee's benefit in respect of any assessment for the year ending on the 31st day of March 1943 shall be calculated on his total income as reduced by the income if any exempt from tax under any provision of the Indian Income tax Act, 1922 (XI of 1922) or any notification issued thereunder

(9) The Central Government may by notification in the Official Gazette, make rules prescribing the manner and conditions referred to in sub section (5)

SCHEDULE II

(See section 5)

PART I—Rates of Income-tax

A—In the case of every individual Hindu undivided family unregistered firm and other association of persons not being a case to which paragraph B of this Part applies—

(a) Where the total income does not exceed Rs. 2000—

	Rate
1 On the first Rs 750 of total income	<i>Nil</i>
2 On the next Rs 1,250 of that income	Six pies in the rupee

Provided that no tax shall be payable on a total income which does not exceed Rs. 1,500

(b) Where the total income exceeds Rs 2000—

	Rate	Surcharge
1 On the first Rs 1500 of total income	<i>Nil</i>	<i>Nil</i>
2 On the next Rs 3,500 of total income	Nine pies in the rupee	Six pies in the rupee
3 On the next Rs 5000 of total income	One anna and three pies in the rupee	Ten pies in the rupee
4 On the next Rs 5000 of total income	Two annas in the rupee	One anna and four pies in the rupee.
5 On the balance of total income	Two annas and six pies in the rupee	One anna and eight pies in the rupee

B —In the case of every company and local authority, and in every case in which under the provisions of the Indian Income tax Act, 1922, income tax is to be charged at the maximum rate—

	Rate	Surcharge
On the whole of total income	Two annas and six pies in the rupee	One anna and eight pies in the rupee.

PART II —Rates of Super-tax.

A —In the case of every individual Hindu undivided family, unregistered firm and other association of persons, not being a case to which paragraphs B and C of this Part apply—

	Rate	Surcharge
1 On the first Rs. 25,000 of total income	<i>Nil</i>	<i>Nil</i>
2 On the next Rs 10,000 of total income	One anna in the rupee.	One anna in the rupee
3 On the next Rs 20,000 of total income	Two annas in the rupee	One anna and six pies in the rupee
4 On the next Rs 70,000 of total income	Three annas in the rupee	Two annas in the rupee.
5 On the next Rs 75,000 of total income	Four annas in the rupee	Two annas and six pies in the rupee
6 On the next Rs 150,000 of total income	Five annas in the rupee	Three annas in the rupee
7 On the next Rs 150,000 of total income	Six annas in the rupee	Three annas in the rupee
8 On the balance of total income	Seven annas in the rupee	Three annas and six pies in the rupee

B —In the case of every local authority—

	Rate	Surcharge
On the whole of total income	One anna in the rupee	One anna in the rupee

C —In the case of an association of persons being a co-operative society other than the Sanikatta Saltowners' Society in the Bombay Presidency, for the time being registered under the Co-operative Societies Act, 1912, or under an Act of the Provincial Legislature governing the registration of Co-operative Societies—

	Rate	Surcharge
1. On the first Rs 25,000 of total income	<i>Nil</i>	<i>Nil</i>
2 On the balance of total income	One anna in the rupee	One anna in the rupee

D —In the case of every company—

	Rate
On the whole of total income	Two annas in the rupee

EXTRACT FROM THE INDIAN FINANCE ACT, 1944

(1) This Act may be called the Indian Finance Act, 1944

(2) It extends to the whole of British India

* * * * *

6 Income-tax and super tax —(1) Subject to the provisions of sub-sections (2), (3) and (5),—

(6) income tax for the year beginning on the 1st day of April 1944 shall be charged at the rates specified in Part I of the Second Schedule increased in each case by a surcharge for the purposes of the Central Government at the rate specified therein in respect of each such rate of income tax, and

(b) rates of super tax for the year beginning on the 1st day of April, 1944, shall, for the purposes of section 55 of the Indian Income tax Act, 1922 (XI of 1922,) be those specified in Part II of the Second Schedule increased in the cases to which paragraphs A, B and C of that Part apply by a surcharge for the purposes of the Central Government at the rate specified therein in respect of each such rate of super tax

(2) In making any assessment for the year ending on the 31st day of March 1945—

(a) where the total income of an assessee not being a company, includes any income chargeable under the head "Salaries" or under the head "Interest on Securities" or any income from dividends in respect of which he is deemed under section 49 B of the Indian Income tax Act, 1922 (XI of 1922) to have paid income tax imposed in British India, the income tax payable by the assessee on that part of his total income which consists of such inclusions shall be an amount bearing to the total amount of income tax payable according to the rates applicable under the operation of the Indian Finance Act, 1943 (VIII of 1943) on his total income the same proportion as the amount of such inclusions bears to his total income,

(b) where the total income of an assessee not being a company, includes any income chargeable under the head "Salaries" on which super tax has been or might have been deducted under the provisions of sub-section (2) of section 18 of the Indian Income tax Act, 1922 (XI of 1922), the super tax payable by the assessee on that portion of his total income which consists of such inclusions shall be an amount bearing to the total amount of super tax payable according to the rates applicable under the operation of the Indian Finance Act, 1943 (VIII of 1943) on his total income the same proportion as the amount of such inclusions bears to his total income

(3) In making any assessment for the year ending on the 31st day of March, 1944 or the year ending on the 31st day of March, 1945—

(a) where the total income of a company includes any profits and gains from life insurance business the super tax payable by the company on that part of its total income which consists of such inclusion shall be in the case of an assessment for the first mentioned year at the rate of one anna and one pie in the rupee and in the case of an assessment for the second mentioned year at the rate of nine pies in the rupee,

(b) where the total income of an assessee, not being a company, includes any profits and gains from life insurance business the income tax and super tax inclusion shall be an amount bearing to the total amount of such taxes payable by the assessee on that part of his total income which consists of such inclusion shall be an amount bearing to the total amount of such taxes payable according to the rates applicable under the operation of the Indian Finance Act, 1942 (XII of 1942) on his total income the same proportion as the amount of such inclusion bears to his total income so however, that if the aggregate of the taxes so computed in respect of such inclusion exceeds the aggregate of the taxes on the same income payable by a company under the operation of the Indian Finance Act, 1942 (XII of 1942) the taxes payable on such inclusion shall be computed at the rates applicable to a company under the operation of the said Act

(4) Where any assessment for the year ending on the 31st day of March, 1944 to which clause (a) or (b) of sub-section (3) is applicable has been completed at the rates of tax in operation under the Indian Finance Act, 1943 (VIII of 1943),

it shall be revised by the Income tax Officer in accordance with the provisions of clause (a) or (b) as the case may be of sub section (3) and the excess tax paid if any shall be refunded

(5) In cases to which section 17 of the Indian Income tax Act 1922 (XI of 1922) applies the tax chargeable shall be determined as provided in that section but with reference to the rates imposed by sub section (1) of this section and in accordance with the provisions of sub sections (2) and (3) of this section where applicable

(6) For the purposes of this section and of the rates of tax imposed thereby the expression "total income" means total income as determined for the purposes of income-tax or super tax, as the case may be, in accordance with the provisions of the Indian Income tax Act, 1922 (XI of 1922)

(7) Where the total income of an assessee referred to in paragraph A of Part I of the Second Schedule does not exceed six thousand rupees an amount representing one rupee for every complete unit of two hundred rupees of his total income as reduced by the income if any exempt from tax under any provision of the Indian Income tax Act 1922 (XI of 1922) or any notification issued thereunder shall be funded for the assessee's benefit and shall be paid to him on such date not more than twelve months after the termination of the present hostilities as the Central Government may fix

Explanation—In computing the amount to be funded under this sub section if there is an incomplete unit amounting to one hundred rupees or more it shall be reckoned as a complete unit of two hundred rupees

(8) The provisions of section 23 A of the Indian Income-tax Act, 1922 (XI of 1922) shall not apply in respect of profits and gains of the previous year for the assessment for the year ending on the 31st day of March, 1945

THE SECOND SCHEDULE

(See section 6)

PART I —Rates of Income tax

A —In the case of every individual Hindu undivided family unregistered firm and other association of persons not being a case to which paragraph B of this Part applies —

	Rate	Surcharge
1 On the first Rs 1 500 of total income	<i>Nil</i>	<i>Nil</i>
2 On the next Rs 3 500 of total income	Nine pies in the rupee	Six pies in the rupee
3 On the next Rs 5 000 of total income	One anna and three pies in the rupee	Ten pies in the rupee
4 On the next Rs 5 000 of total income	Two annas in the rupee	One anna and six pies in the rupee
5 On the balance of total income	Two annas and six pies in the rupee	Two annas in the rupee

Provided that—

(i) no income tax shall be payable on a total income which does not exceed Rs 2 000

(ii) the income-tax payable shall in no case exceed half the amount by which the total income exceeds Rs 2 000

B —In the case of every company and local authority and in every case in which under the provisions of the Indian Income tax Act, 1922 income-tax is to be charged at the maximum rate—

	Rate	Surcharge
On the whole of total income	Two annas and six pies in the rupee	Two annas in the rupee

PART II —Rates of Super tax

A —In the case of every individual, Hindu undivided family unregistered firm and other association of persons not being a case to which paragraphs B and C of this Part apply—

		Rate Nil	Surcharge Nil
1	On the first Rs 25 000 of total income		
2	On the next Rs 10 000 of total income	One anna in the rupee	One anna in the rupee
3	On the next Rs 20 000 of total income	Two annas in the rupee	Two annas in the rupee
4	On the next Rs 70 000 of total income.	Three annas in the rupee	Two annas and six pies in the rupee
5	On the next Rs 75 000 of total income	Four annas in the rupee	Three annas in the rupee.
6	On the next Rs. 1 50 000 of total income	Five annas in the rupee	Three annas in the rupee
7	On the next Rs 1,50 000 of total income	Six annas in the rupee	Three annas in the rupee.
8	On the balance of total income	Seven annas in the rupee	Three annas and six pies in the rupee.

B —In the case of every local authority—

	Rate	Surcharge
On the whole of total income	One anna in the rupee.	One anna in the rupee

C —In the case of an association of persons being a co-operative society, other than the Sanikatta Salt-owners Society in the Bombay Presidency for the time being registered under the Co-operative Societies Act 1912 or under an Act of the Provincial Legislature governing the registration of Co-operative Societies—

	Rate Nil	Surcharge Nil
1	On the first Rs 25,000 of total income	
2	On the balance of total income	One anna in the rupee.

On the whole of total income

Rate	Three annas in the rupee
------	--------------------------

Provided that a rebate of one anna in the rupee shall be allowed on the total income as reduced by the amount of any dividend declared in British India in respect of the whole or part of the previous year for the assessment for the year ending on the 31st day of March, 1945 not being a dividend payable at a fixed rate or a dividend declared on or before the 29th day of February 1944 by a company to which but for sub section (8) of section 6 of this Act, section 23-A of the Indian Income tax Act, 1922 (XI of 1922) would be applicable

Explanation —For the purposes of this proviso, the expression "dividend" shall be deemed to include any distribution included in the expression "dividend" as defined in clause (6-A) of section 2 of the Indian Income tax Act, 1922, and any such distribution made during the year ending on the 31st day of March, 1945 shall be deemed to have been made in respect of the whole or part of the previous year

EXTRACT FROM THE INDIAN FINANCE ACT, 1945

- (1) This Act may be called the Indian Finance Act 1945
(2) It extends to the whole of British India

7 Income-tax and super tax —(1) Subject to the provisions of sub-sections (3) (4) and (5) —

(a) income tax for the year beginning on the 1st day of April, 1945 shall be charged at the rates specified in Part I of the Second Schedule increased —

"The "Explanation" was inserted by Ordinance XXVIII of 1944

each case by a surcharge for the purposes of the Central Government at the rate specified therein in respect of each such rate of income tax and

(b) rates of super tax for the year beginning on the 1st day of April 1945, shall for the purposes of section 55 of the Indian Income tax Act, 1922 (XI of 1922) be those specified in Part II of the Second Schedule increased in the cases to which paragraphs A B and C of that Part apply by a surcharge for the purposes of the Central Government at the rate specified therein in respect of each such rate of super tax

(2) If any provision is made in the Indian Income tax Act, 1922 (XI of 1922) for the exemption from income tax of a portion of the earned income included in the total income of an assessee then in making any assessment for the year ending on the 31st day of March 1946 there shall be deducted from the total income of an assessee in accordance with such provision an amount equal to one tenth of such earned income exclusive of any income chargeable under the head Salaries but not exceeding in any case two thousand rupees

(3) In making any assessment for the year ending on the 31st day of March, 1946 where the total income of an assessee, not being a company includes any income chargeable under the head "Salaries" or under the head "Interest on Securities" or any income from dividends in respect of which he is deemed under section 49-B of the Indian Income tax Act, 1922 (XI of 1922) to have paid Income-tax imposed in British India, the income-tax payable by the assessee on that part of his total income which consists of such inclusions shall be an amount bearing to the total amount of income tax payable according to the rates applicable under the operation of the Indian Finance Act, 1944 on his total income the same proportion as the amount of such inclusions bears to his total income

(4) In making any assessment for the year ending on the 31st day of March 1946—

(a) where the total income of a company includes any profits and gains from life insurance business the super tax payable by the company on that part of its total income which consists of such inclusion shall be at the rate of six pias in the rupee

(b) where the total income of an assessee, not being a company, includes any profits and gains from life insurance business the income tax and super tax payable by the assessee on that part of his total income which consists of such inclusion shall be an amount bearing to the total amount of such taxes payable according to the rates applicable under the operation of the Indian Finance Act, 1942 (XII of 1942) on his total income the same proportion as the amount of such inclusion bears to his total income so however that if the aggregate of the taxes so computed in respect of such inclusion exceeds the aggregate of the taxes on the same income payable by a company under the operation of the Indian Finance Act 1942 (XII of 1942) the taxes payable on such inclusion shall be computed at the rates applicable to a company under the operation of the said Act

(5) In cases to which section 17 of the Indian Income tax Act 1922 (XI of 1922) applies the tax chargeable shall be determined as provided in that section but with reference to the rates imposed by sub section (1) of this section and in accordance with the provisions of sub sections (3) and (4) of this section where applicable

(6) For the purposes of this section and of the rates of tax imposed thereby the expression 'total income' means total income as determined for the purposes of income tax or super tax, as the case may be in accordance with the provisions of the Indian Income tax Act 1922 (XI of 1922) and the expression 'earned income' means earned income as defined for the purposes of the said Act

(7) Where the total income of an assessee referred to in paragraph A of Part I of the Second Schedule does not exceed six thousand rupees an amount representing one rupee for every complete unit of two hundred rupees of his total income as reduced by the income if any exempt from tax under any provision of the Indian Income tax Act, 1922 (XI of 1922), or any notification issued thereunder shall be funded for the assessee's benefit and shall be paid to him on such date not more than twelve months after a termination of the present hostilities, as the Central Government may fix

Provided that the amount to be funded for the assessee's benefit shall in no case exceed two fifths of the tax payable by him

Explanation—In computing the amount to be funded under this sub-section if there is an incomplete unit amounting to one hundred rupees or more it shall be reckoned as a complete unit two hundred rupees

(8) Notwithstanding anything contained in sub section (7) of section 6 of the Indian Finance Act 1944 the amount to be funded for the assessee's benefit under the provisions of that sub section shall in no case exceed two-fifths of the amount of tax payable by him in respect of his assessment for the year ending on the 31st day of March 1945

(9) The provisions of section 23 A of the Indian Income tax Act, 1922 (XI of 1922) shall not apply in respect of profits and gains of the previous year for the assessment for the year ending on the 31st day of March, 1946

8 Continuance of and rate of excess profits tax—(1) In sub clause (a) of clause (6) of section 2 of the Excess Profits Tax Act, 1940 (XV of 1940), for the words and figures 31st day of March 1945, the words and figures 31st day of March 1946" shall be substituted

(2) The excess profits tax imposed by section 4 of the Excess Profits Tax Act, 1940 (XV of 1940) shall in respect of any chargeable accounting period beginning after the 31st day of March 1945 be an amount equal to sixty six and two thirds per cent of the amount by which the profits of the business during that chargeable accounting period exceed the standard profits

THE SECOND SCHEDULE

(Section 7)

Part I

Rates of Income tax

A—In the case of every individual Hindu undivided family, unregistered firm and other association of persons not being a case to which paragraph B of this Part applies—

	Rate Nil	Surcharge Nil
1 On the first Rs. 1,500 of total income		
2 On the next Rs. 3,500 of total income	Nine pies in the rupee	Six pies in the rupee
3 On the next Rs. 5,000 of total income	One anna and three pies in the rupee	Ten pies in the rupee
4 On the next Rs. 5,000 of total income	Two annas in the rupee	One anna and six pies in the rupee
5 On the balance of total income,	Two annas and six pies in the rupee.	Two annas and three pies in the rupee.

Provided that—

(i) no income tax shall be payable on a total income which, before deduction of the allowance if any, for earned income, does not exceed Rs. 2,000,

(ii) the income-tax payable shall in no case exceed half the amount by which the total income (before deduction of the said allowance, if any for earned income) exceeds Rs. 2,000,

(iii) the income tax payable on the total income as reduced by the allowance for earned income shall not exceed either—

(a) a sum bearing to half the amount by which the total income (before deduction of the allowance for earned income) exceeds Rs. 2,000 the same proportion as such reduced total income bears to the unrelucted total income or

(b) the income-tax payable on the income so reduced at the rates specified in this Schedule whichever is less

B—In the case of every company and local authority, and in every case in which under the provisions of the Indian Income tax Act 1922 income tax is to be charged at the maximum rate—

On the whole of total income	Rate Two annas and six pies in the rupee	Surcharge Two annas and three pies in the rupee
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Part II

Rates of Super tax

A—In the case of every individual Hindu undivided family, unregistered firm and other association of persons, not being a case to which paragraphs B and C of this Part apply—

	Rate Nil	Surcharge Nil
1 On the first Rs 25 000 of total income		
2 On the next Rs 10,000 of total income	One anna in the rupee	One anna in the rupee
3 On the next Rs 20 000 of total income	Two annas in the rupee	Two annas in the rupee
4 On the next Rs 70 000 of total income	Three annas in the rupee	Two annas and six pies in the rupee
5 On the next Rs 75 000 of total income	Four annas in the rupee	Three annas in the rupee
6 On the next Rs 1,50 000 of total income	Five annas in the rupee	Three annas in the rupee
7 On the next Rs 1 50 000 of total income	Six annas in the rupee	Three annas in the rupee
8 On the balance of total income	Seven annas in the rupee	Three annas and six pies in the rupee.

B.—In the case of every local authority—

On the whole of total income	One anna in the rupee	One anna in the rupee
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C—In the case of an association of persons being a co-operative society, other than the *Sanikatta Saltowners' Society in the Bombay Presidency*, for the time being registered under the Co-operative Societies Act 1912, or under an Act of the Provincial Legislature governing the registration of Co-operative Societies—

	Rate Nil	Surcharge Nil
1. On the first Rs 25,000 of total income		
2 On the balance of total income	One anna in the rupee	One anna in the rupee

D—In the case of every Company—

On the whole of total income	Three annas in the rupee
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Provided that a rebate of one anna in the rupee shall be allowed on the total income as reduced by the amount of any dividend declared in British India in respect of the whole or part of the previous year for the assessment for the year ending on the 31st day of March, 1946, not being a dividend payable at a fixed rate

Explanation—For the purposes of this proviso the expression 'dividend' shall be deemed to include any distribution included in the expression 'dividend' as defined in clause (6-A) of section 2 of the Indian Income tax Act, 1922 and any such distribution made during the year ending on the 31st day of March, 1946 shall be deemed to have been made in respect of the whole or part of the previous year

INDIAN FINANCE (INCOME TAX) RULES 1942

FINANCE DEPARTMENT (CENTRAL REVENUES) NOTIFICATION
No 27 INCOME TAX DATED THE 4th APRIL, 1942

No 27 —In exercise of the powers conferred by sub section (3) of section 10 of the Indian Finance Act, 1942 (XII of 1942) the Central Government is pleased to make the following rules for prescribing the manner and conditions referred to in sub section (3) of section 8 of the said Act, namely —

1 (1) These rules may be called the Indian Finance (Income tax) Rules 1942

(2) They apply to the whole of British India including British Baluchistan and those excluded and partially excluded areas to which the Indian Finance Act, 1942 has been or may hereafter be applied by notification under sub-section (1) of section 92 of the Government of India Act, 1935

2 In these rules the expression "total income" means total income as defined in sub section (15) of section 2 of the Indian Income tax Act, 1922 (XI of 1922)

3 Within 60 days of the publication of the notice under sub-section (1) of section 22 of the Indian Income-tax Act, 1922 (or such longer period as may be specified in the notice) any person not being a company, a local authority or a person not resident in British India whose total income during the previous year exceeded Rs 1500 but did not exceed Rs 2000 may instead of making the return prescribed under rule 19 of the Indian Income tax Rules 1922, furnish to the Income tax Officer a verified return of his total income in Form A annexed to these rules together with a certificate furnished by the Post Master under rule 7 showing that he has deposited in the Indian Post Office Defence Savings Bank an amount not less than the amount prescribed in sub section (5) of section 8 of the Indian Finance Act, 1942

Provided that where a person claims a refund of tax deducted or paid at source such claim shall be made separately in accordance with rules 36 and 37 of the Indian Income tax Rules 1922

Provided further that the return in Form A of the total income for the previous year and the certificate may be furnished not later than the 31st August in the year 1942

4 On receipt of the return made under rule 3, if the Income tax Officer is satisfied that the return made and the amount deposited are correct, he shall not take any further proceedings but if the amount deposited is found to be less than the minimum amount that should have been deposited on a correct computation on the basis of the return made, he shall call upon the person to make good the deficiency within one month of such intimation. If such person deposits the amount within the said time he shall forthwith send to the Income tax Officer the certificate of deposit furnished under rule 7 by the Post Master. If he does not deposit the amount, or fails to send the certificate to the Income tax Officer he shall be liable to assessment under the provisions of the Indian Income-tax Act, 1922, and in that case the amount deposited by him shall, notwithstanding anything contained in the Indian Post Office Defence Savings Bank Rules, be paid back to him or at his option transferred to the credit of income-tax revenue, on a direction issued by the Income-tax Officer to the Post Master

5 If the Income tax Officer is not satisfied as to the correctness of the return made under rule 3 or the person fails to make good the deficiency in deposit as required by rule 4 the Income tax Officer shall serve upon him a notice under sub-section (2) of section 22 of the Indian Income-tax Act, 1922, and determine the total income and the tax payable thereon under the provisions of the said Act, provided that if the proceedings for assessment are started not in consequence of any deficiency in the amount deposited and if the income determined on assessment is still found to be below Rs 2000 the Income-tax Officer shall allow the assessee the option of depositing within one month the further amount due, if any, on such determination or of paying the income-tax due. If the assessee exercises the former option no appeal shall be against such determination. If he exercises the latter option, the Income-tax Officer shall serve upon him the notice of demand under section 29 of the Indian Income-tax Act,

1922, and the amount deposited in respect of the income which has been subjected to assessment shall, notwithstanding anything containing in the Indian Post Office Defence Savings Bank Rules be paid back to the assessee, or at his option transferred to the credit of income tax revenue on a direction issued by the Income tax Officer to the Post Master

Provided that where the assessee fails to exercise any option, or fails to deposit the amount due, if any, or having deposited the amount, fails to forward to the Income tax Officer the certificate of deposit furnished under rule 7 by the Post Master he shall be deemed to have exercised the latter option

6 Where an assessee does not make a return as required by rule 3 and is not a person from whose salary a deposit has been deducted under rule 8, he shall not be allowed to discharge his liability to tax by making a deposit after the expiry of the date fixed for making the return

7 Where a person makes a deposit in the Indian Post Office Defence Savings Bank for the purposes of rule 3 4 or 5 the Post Master shall furnish to the person a certificate stating the name and address of the depositor the amount deposited, the date of deposit and the number of his account in the Bank

8 Where the estimated total income chargeable under the head 'salaries' exceeds Rs 1,500 but does not exceed Rs 2,000, the person responsible for paying the income shall before deducting income tax as required by sub section (2) of section 18 of the Indian Income-tax Act, 1922, allow the payee to exercise the option of depositing with the Central Government the amount specified in sub-section (5) of section 8 of the Indian Finance Act, 1942 and where such option has been exercised the person responsible for paying the income shall deduct from the amount of each payment, such portion of the amount to be deposited in respect of the estimated total income of the payee under the head 'salaries' as each such payment bears to such total income

Provided that such person may at the time of making any deduction, increase or reduce the amount to be deducted for the purpose of adjusting any excess or deficiency arising out of any previous deduction or failure to deduct

Provided further that unless the estimated total income under the head 'salaries' is likely to exceed two thousand rupees the option once exercised shall be final for the financial year ending on the 31st March of the year in respect of which the option has been exercised

9 Where during the course of the financial year it is found that the total income of a person under the head "salaries" is likely to exceed two thousand rupees the person responsible for paying the income tax shall, under the proviso to sub section (2) of section 18 of the Indian Income tax Act, 1922, adjust the deficiency arising out of the failure to deduct the proper amount of income tax, and, notwithstanding anything contained in the Indian Post Office Defence Savings Bank Rules the amount deposited in the name of such person during that financial year shall, at his option, be treated as part of the income tax appropriate to his total income and shall be transferred from the said deposit to the credit of income-tax revenue

10 Where the total income of a person from whose salary deduction has been made in accordance with rule 8 for deposit in the Indian Post Office Defence Savings Bank is found on assessment to exceed two thousand rupees, he shall be chargeable to tax in accordance with the provisions of the Indian Income tax Act 1922, and notwithstanding anything contained in the Indian Post Office Defence Savings Bank Rules the amount deposited, in respect of the income or part of the income included in the said assessment shall, at the option of the assessee, be treated as part of tax due, from him and shall be transferred from the said deposit to the credit of income tax revenue

11 All sums deducted under rule 8 shall, for the purpose of computing the total income of an assessee, be deemed to be income received

12 All sums deducted in accordance with the provisions of rule 8 shall be deposited within one week by the person making the deduction in the Indian Post Office Defence Savings Bank in the name of the person from whose salary the deduction is made

13 If any person does not deduct or after deducting fails to deposit the amount as required by rule 12, he shall, without prejudice to any other consequences

which he may incur, be deemed to be an assessee in default in respect of the amount of income tax that was deductible by him under sub-section (2) of section 18 of the Indian Income tax Act 1922

Provided that the Income tax Officer shall not make a direction under sub-section (1) of section 46 of the Indian Income-tax Act, 1922, for the recovery of any penalty from such person unless satisfied that such person wilfully failed to deduct and deposit the appropriate amount

14 In the case of income chargeable under the head "salaries" where deduction in accordance with rule 8 is not made by or on behalf of Government the person making the deduction shall forthwith send to the Income tax Officer *within whose jurisdiction the deduction is made (or where there is more than one Income tax Officer having jurisdiction in the same area to the Income tax Officer specified by the Commissioner of Income tax in accordance with rule 11 (1) of the Indian Income tax Rules 1922), a statement in Form B annexed to these rules*

15 In the case of income chargeable under the head "salaries" where deduction under rule 8 is made by or on behalf of Government, a return under section 21 of the Indian Income tax Act 1922 shall be prepared and submitted by the person specified in rule 15 of the Indian Income tax Rules 1922. The return will be in the form prescribed by rule 17 of the said rules with the modification that in column 14 thereof the amount deposited during the year shall be shown

FORM A

Form of return of 'total income' annexed to rule (3) of Indian Finance (Income-tax) Rules 1942

(See Rule 3)

Name

Status

Address

In compliance with the public notice under section 22 (1) calling for returns of income by the 194 I declare that my/the family's/the firm's the Association's total income for the year ending amounted to Rs as follows —

Salaries	Rs
Interest on Securities	Rs
Property	Rs
Business Profession and Vocation	Rs
Other sources—	
(a) Interest ground rent etc	Rs
(b) Dividends	Rs
Total	Rs

2 In discharge of my/its liability to be assessed I/the family/the firm/the Association have/has deposited on the of 194, a sum of Rs in the Defence Savings Bank Account at the Post Office as per certificate attached

3 I hereby declare that to the best of my knowledge and belief the information given above is correct and complete

Signature

Status

Note 1 —The alternatives which are not required should be scored out

Note 2 —The declaration shall be signed—

- (1) in the case of an individual by the individual himself
- (2) in the case of a Hindu Undivided Family by the manager or Karta
- (3) in the case of a firm by a partner
- (4) in the case of any other Association by a member of the Association

FORM B,
(See rule 14)

Name of employer

Address

Month

194

Serial No	Name of employee	Estimated total yearly income under the head "Salaries"	Amount of salary paid			Amounts deposited in the Indian Post Office Defence Savings Bank			Remarks.
			For the period prior to the month to which this statement relates.	For the month to which this statement relates	Total	For the period prior to the month to which this statement relates	For the month to which this statement relates	Total	
1	2	3	4	5	6	7	8	9	10

INDIAN FINANCE (INCOME TAX) RULES, 1943

FINANCE DEPARTMENT (CENTRAL REVENUES) NOTIFICATION
NO 48 (24) I T 42, DATED THE 3RD APRIL, 1943

No 48 (24) I T 42 In exercise of the powers conferred by sub section (9) of section 5 of the Indian Finance Act, 1943 (VIII of 1943), the Central Government is pleased to make the following rules for prescribing the manner and conditions referred to in sub-section (5) of section 5 of the said Act, namely —

1 (1) These Rules may be called the Indian Finance (Income tax) Rules, 1943

(2) They apply to the whole of British India including British Baluchistan and those excluded and partially excluded areas to which the Indian Finance Act 1943, has been or may hereafter be applied by notification under sub section (1) of section 92 of the Government of India Act 1935

2 The Indian Finance (Income tax Rules 1942 prescribed for the purposes of sub-section (5) of section 8 of the Indian Finance Act 1942, shall apply for the purposes of sub section (5) of section 5 of the Indian Finance Act 1943 subject to the following modifications and additions namely —

In the said Rules—

(a) for the words brackets and figures "sub-section (5) of section 8 of the Indian Finance Act, 1942" wherever they occur the words brackets and figures "sub section (5) of section 5 of the Indian Finance Act 1943" shall be substituted

(b) for the second proviso to rule 3 the following proviso shall be substituted, namely—

"Provided further that in the case of a person whose total income includes any income chargeable under the head 'salaries' or under the head 'interest on securities' from which tax has been deducted under section 18 of the Indian Income-tax Act 1922 (XI of 1922) or dividends in respect of which he is deemed under section 49 B of the said Act to have paid income tax himself in British India, the amount of the tax deducted or paid at source may, if he elects to discharge his

liability to tax by making a deposit, be transferred wholly or in part, as the case may be, to his income tax Defence Savings Bank account and credited to the deposit referred to in the foregoing provisions of this rule. If the amount of tax deducted at source is less than the minimum deposit required to be made in respect of his total income the deficiency shall be made good by him by making a deposit in the manner required by this rule. If the amount of tax is in excess of the minimum deposit, the excess shall on his application be refunded to him.

(c) in rule 3 after the new second proviso the following further proviso shall be inserted namely—

'Provided further that a person whose total income of the previous year includes any income chargeable under the head salaries in respect of which the option of having the appropriate portion of the deposit deducted from his salary was exercised by him under any rule for the time being in force may make a further deposit if necessary to cover the liability if any in respect of his total income including salary

(d) in rule 6, the words 'and is not a person from whose salary a deposit has been deducted under rule 8' shall be omitted

(e) in Form A annexed to the said Rules for the figures '1942' the figures '1943' shall be substituted and the following shall be added to paragraph 2 thereof—

In respect of the income from salaries|interest on securities|Dividends shown in paragraph 1 a sum of Rs _____ has been deducted or is deemed to have been paid at source and therefore the balance of Rs _____ only|no amount has been deposited in the Defence Savings Bank account "

ORDINANCE NO LX OF 1942

(Published in the Gazette of India Extraordinary on the 14th November 1942)

AN

ORDINANCE

to remove certain difficulties caused by the destruction of documents and records pertaining to the collection of Income-tax and Excess Profits Tax

Whereas an emergency has arisen which makes it necessary to remove certain difficulties caused by the destruction of documents and records pertaining to the collection of Income tax and Excess Profits Tax

Now therefore in exercise of the powers conferred by section 72 of the Government of India Act as set out in the Ninth Schedule to the Government of India Act 1935 (26 Geo 5 c 2) the Governor General is pleased to make and promulgate the following Ordinance—

1 Short title and commencement—(1) This Ordinance may be called the Income tax and Excess Profits Tax (Emergency) Ordinance 1942

(2) It shall come into force at once

2 Power to issue notices and to secure returns—(1) Where documents to records pertaining to the assessment collection or payment of income tax or excess profits tax have been damaged lost or destroyed as a result of riot or civil commotion the authority authorised under the Ind an Income tax Act 1922 (XI of 1922) or the Excess Profits Tax Act 1940 (XV of 1940) as the case may be to issue any notice for any of the purposes of either Act may notwithstanding any thing contained in either of the said Acts and notwithstanding that such notice has already been issued or has already been issued and has been or is alleged to have been complied with or where such notice has already been issued that the time within which the notice is to be issued has already expired, may reissue such notice and any notice so reissued shall in all respects have the same effect as if it were the original notice, and any proceedings that could have been taken in pursuance of or subsequent to the original notice may be taken in like manner in pursuance of or subsequent to the notice so reissued

Provided that in respect of assessments or reassessments made in the course of any proceedings taken under the powers conferred by this subsection the

periods of eight and four years mentioned in sub section (2) of section 34 of the Indian Income tax Act 1922 (XI of 1922), shall be deemed to commence on and to run from the date on which the notice under sub section (2) of section 22 or sub section (1) of section 34 of that Act is reissued under the powers conferred by this sub-section

Provided further that where a person proves to the satisfaction of the Income tax Officer or the Excess Profits Tax Officer as the case may be, that he has already been assessed in respect of the income or the excess Profits in respect of which notices under section 22 or section 34 of the Indian Income tax Act 1922 (XI of 1922) or under section 13 or section 15 of the Excess Profits Tax Act 1940 (XV of 1940) have been reissued and that he has paid the tax, he shall not be subject to fresh assessment

(2) Any return or information required or which could be required under the provisions of either of the said Acts to be furnished by any person shall if the Income tax Officer or the Excess Profits Tax Officer so requires at any time be again furnished by such person notwithstanding that it may have been or is alleged to have been already furnished and any failure to comply with any such requirement by an Income tax Officer or Excess Profits Tax Officer shall involve the same consequences as if the return or information had been altogether withheld

3 Settlement of doubts —If any question arises whether a document or record has been damaged lost or destroyed as a result of riot or civil commotion the matter shall be referred to the Commissioner of Income tax or to the Commissioner of Excess Profits Tax as the case may be and his decision shall be final

4 Power to make rule —The Central Government may make rules providing for any matter necessary to carry into effect the purposes of this Ordinance

ORDINANCE No IV of 1943

(Published in the Gazette of India Extraordinary, dated the 16th January, 1943)

AN

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ORDINANCE

to establish the validity of certain appointments as Income tax Officer of, and certain proceedings under the Indian Income tax Act 1922 taken by persons designated as Assistant Income-tax Officers

Whereas an emergency has arisen which makes it necessary to establish the validity of certain appointments as Income tax Officer of and certain proceedings under the Indian Income tax Act 1922 (XI of 1922) taken by persons designated as Assistant Income tax Officers

Now therefore in exercise of the powers conferred by section 72 of the Government of India Act as set out in the Ninth Schedule to the Government of India Act 1935 (26 Geo 5 c 2) the Governor General is pleased to make and promulgate the following Ordinance —

1 Short title and commencement —(1) This Ordinance may be called the Income tax Proceedings Validity Ordinance 1943

(2) It shall come into force at once

2 Validity of appointments as Income tax Officer or Assistant Income-tax Officers and of proceedings taken by them —Where whether before or after the commencement of this Ordinance any person designated as an Assistant Income tax Officer has been appointed to be or to discharge the functions of an Income-tax Officer for any of the purposes of the Indian Income tax Act 1922 (XI of 1922) and where, whether before or after the commencement of this Ordinance a person designated as an Assistant Income tax Officer appointed to be or to discharge the functions of an Income tax Officer has given or served any notice or taken any action whatsoever under the said Act for the purpose of or in connection with the making of an assessment under the said Act such person shall be deemed to be and always to have been validly appointed as an Income tax Officer

for the purposes of the said Act and no act purporting to have been done by such person as an Income tax Officer and no notice purporting to have been given or served by such person as an Income tax Officer shall be called in question merely on the ground of any irregularity or defect in the manner of his appointment as an Income tax Officer

ORDINANCE No XXXIII of 1944

(Published in the Gazette of India Extraordinary dated the 8th July 1944)

AN

ORDINANCE

to amend the Indian Finance Act, 1944

Whereas an emergency has arisen which makes it necessary to amend the Indian Finance Act 1944 for the purposes hereinafter appearing

Now therefore, in exercise of the powers conferred by section 72 of the Government of India Act as set out in the Ninth Schedule to the Government of India Act 1935 (26 Geo 5 c 2) the Governor General is pleased to make and promulgate the following Ordinance—

1 Short title and commencement—(1) This Ordinance may be called the Indian Finance (Amendment) Ordinance 1944

(2) It shall come into force at once

2 Amendment of Second Schedule Indian Finance Act, 1944—In paragraph D of Part II of the Second Schedule to the Indian Finance Act 1944—

(a) in the proviso for the words "the profits of the previous year" the words "the whole or part of the previous year" shall be substituted and shall be deemed always to have been substituted

(b) at the end of the proviso the following Explanation shall be inserted and shall be deemed always to have been inserted namely—

'Explanation—For the purposes of this proviso the expression "dividend" shall be deemed to include any distribution included in the expression "dividend" as defined in clause (6A) of section 2 of the Indian Income-tax Act, 1922, and any such distribution made during the year ending on the 31st day of March 1945 shall be deemed to have been made in respect of the whole or part of the previous year'

ORDINANCE No XLV of 1944

(Published in the Gazette of India Extraordinary on the 3rd October 1944)

AN

ORDINANCE

to remove doubts as to the validity of certain notices under the Indian Income tax Act 1922, and the Excess Profits Tax Act, 1940

Whereas an emergency has arisen which makes it necessary to remove doubts as to the validity of certain notices under the Indian Income tax Act, 1922 (XI of 1922) and the Excess Profits Tax Act, 1940 (LV of 1940)

Now, therefore in exercise of the powers conferred by section 72 of the Government of India Act as set out in the Ninth Schedule to the Government of India Act 1935 (26 Geo 5 c 2) the Governor-General is pleased to make and promulgate the following Ordinance—

1 Short title extent and commencement—(1) This Ordinance may be called the Income-tax and Excess Profits Tax (Validity of Notices) Ordinance, 1944

(2) It extends to the whole of British India, and applies also within the Indian States and the tribal areas in relation to the persons specified in subsection (2) of section 1 of the Indian Income tax Act 1922 (XI of 1922)

(3) It shall come into force at once

2 **Validity of certain notices**—For the removal of doubts it is hereby enacted that every notice published or issued whether before or after the commencement of this Ordinance * [but not later than the 19th day of May 1945]

(a) under sub section (1) of section 22 of the Indian Income tax Act, 1922 (XI of 1922) requiring a return to be furnished within sixty days from the date of the notice or

(b) under sub section (2) of the said section or under sub section (1) of section 34 of the said Act requiring a return to be furnished within thirty days of the receipt of the notice or

(c) under sub section (1) of section 13 of the Excess Profits Tax Act 1940 (XXV of 1940) requiring a return to be furnished within sixty days from the date of the service of the notice or

(d) under section 15 of the last mentioned Act requiring a return to be furnished within sixty days of the receipt of the notice—

shall notwithstanding any judgment or order of any Court, Appellate Tribunal or Income tax authority to the contrary and whether or not any specific date on or before which the return is to be furnished is or has been given in the notice as an alternative, be deemed to give or have given a period of notice in full compliance with law and no such notice shall be called in question or be deemed to be or at any time to have been invalid for any purpose whatsoever (including any proceedings criminal or otherwise instituted whether before or after the commencement of this Ordinance under or for a contravention of any of the provisions of either of the above mentioned Acts) on the ground merely that a period insufficient in law within which to carry out the requirements of the notice has been specified therein

ORDINANCE No 1X of 1945

(Published in the Gazette of India Extraordinary on the 28th April 1945)

AN

ORDINANCE

further to amend the Indian Income-tax Act 1922

Whereas an emergency has arisen which makes it necessary further to amend the Indian Income tax Act 1922 (XI of 1922) for the purposes hereinafter appearing

Now, therefore in exercise of the powers conferred by section 72 of the Government of India Act as set out in the Ninth Schedule to the Government of India Act 1935 (26 Geo 5 c 2) the Governor General is pleased to make and promulgate the following Ordinance—

1 **Short title and commencement**—(1) This Ordinance may be called the Indian Income tax (Amendment) Ordinance 1945

(2) It shall come into force at once

2 **Amendment of section 2 Act XI of 1922**—In section 2 of the Indian Income tax Act 1922 (hereinafter referred to as the said Act) after clause (6A) the following clause shall be inserted namely—

"(6AA) **earned income**" means any income of an assessee who is an individual Hindu undivided family unregistered firm or other association of persons not being a company a local authority a registered firm or a firm treated as registered under clause (b) of sub section (5) of section 23—

(a) which is chargeable under the head Salaries or

(b) which is chargeable under the head Profits and gains of business, profession or vocation where the business, profession or vocation is carried on by the assessee or in the case of a firm, where the assessee is a partner actively engaged in the conduct of the business, profession or vocation or

*These words and figures were inserted by Ordinance No XVI of 1945

(c) which is chargeable under the head "Other sources" if it is immediately derived from personal exertion or represents a pension or superannuation or other allowance given to the assessee in respect of his past services or the past services of any deceased person

and includes any such income which, though it is the income of another person, is included in the assessee's income under the provisions of this Act but does not include any such income which is exempt from tax under sub-section (2) of section 14 or under a notification issued under section 60

3 Insertion of new section 15A in Act XI of 1922 —After section 15 of the said Act, the following section shall be inserted namely —

"15A Exemption of portion of earned income —The tax shall not be payable by an assessee in respect of such portion if any of the earned income included in his total income as is directed by the annual Act of the Central Legislature fixing the rate or rates of tax for any year to be deducted in making an assessment for that year and for the purposes of determining the rates at which income tax (but not super tax) is payable by the assessee for that year his total income shall be deemed to be the total income reduced by the said portion "

4 Amendment of section 16 Act XI of 1922 —To clause (a) of sub-section (1) of section 16 of the said Act the following shall be added namely —

"and any sum exempted under section 15 A shall also be included except for the purpose of determining the rates at which income tax (but not super tax) is payable by the assessee of whom the exemption is given "

5 Amendment of section 17 Act XI of 1922 —To section 17 of the said Act the following sub section shall be added namely —

"(5) Where the amount of the total income of any assessee is deemed to be, the total income reduced under the provisions of section 15-A by an allowance for earned income the expression 'total income' in this section shall for the purpose of determining the amount of income tax (but not super tax) payable by the assessee be deemed to refer to his total income so reduced "

6 Amendment of section 56 Act XI of 1922 —In section 56 of the said Act after the words "Except in cases to which" the words figures and letter "section 15 A applies or to which" shall be inserted

7 Amendment of section 58 Act XI of 1922 —In sub section (1) of section 58 of the said Act after the words and figures and sections 15" the figures and letter "15 A" shall be inserted

ORDINANCE NO XVI OF 1945

(Published in the Gazette of India Extraordinary on the 19th May, 1945)

AN

ORDINANCE

to amend the Income tax and Excess Profits Tax (Validity of Notices) Ordinance 1944

Whereas an emergency has arisen which makes it necessary to amend the Income tax and Excess Profits Tax (Validity of Notices) Ordinance, 1944 (XIV of 1944), for the purpose hereinafter appearing;

Now, therefore, in exercise of the powers conferred by section 72 of the Government of India Act, as set out in the Ninth Schedule to the Government of India Act, 1935 (26 Geo 5 c 2), the Governor General is pleased to make and promulgate the following Ordinance —

1 Short title and commencement —(1) This Ordinance may be called the Income tax and Excess Profits Tax (Validity of Notices) Amendment Ordinance, 1945.

(2) It shall come into force at once

2 Amendment of section 2 Ordinance XLV of 1944 —In section 2 of the Income tax and Excess Profits Tax (Validity of Notices) Ordinance, 1944 after the words '*commencement of this Ordinance*' where they occur for the first time, the words and figures but not later than the 19th day of May, 1945 shall be inserted

ORDINANCE NO XXIV OF 1945

(Published in the Gazette of India Extraordinary on the 14th July, 1945)

AN

ORDINANCE

to exempt certain war gratuities from liability to income tax

Whereas an emergency has arisen which makes it necessary to provide for exempting certain war gratuities from liability to income tax,

Now therefore in exercise of the powers conferred by section 72 of the Government of India Act, as set out in the Ninth Schedule to the Government of India Act 1935 (26 Geo 5 c 2) the Governor General is pleased to make and promulgate the following Ordinance —

1 Short title and commencement —(1) This Ordinance may be called the War Gratuities (Income tax Exemption) Ordinance 1945

(2) It shall come into force at once

2 Interpretation —In this Ordinance 'war gratuity' means any gratuity paid in respect of any person's service in His Majesty's Forces in connection with any hostilities in which His Majesty has been or may be engaged during the period commencing on the 3rd day of September 1939 and ending on such date as the Central Government may by notification in the official Gazette specify in this behalf but does not include a gratuity (by whatever name called) payable under a contract of service

3 Exemption of war gratuities from liability to income tax —Notwithstanding anything contained in the Indian Income tax Act 1922 (XI of 1922) any war gratuity paid whether after the commencement of this Ordinance or not to any person shall not for the purposes of that Act be included in the total income or world income of that person

APPENDIX I

ACTS BEFORE 1886

THE first general income tax was levied in 1860. Prior to this date there had been various local taxes on trade etc., which were really the survival of native *regimes*.

The Income tax Act of 1860 (Act XXII of 1860 amended by XXXIX of same year by XXI of 1861, by IX and XVI of 1862 by XXVII of 1863) remained in force till 1865.

The law of 1860 was modelled very closely on the English Income tax Law. In fact the schedules and various other provisions were *verbatim* reproductions of the sections in the English Acts.

Application—To all incomes and profits arising from property, professions, trades and offices not being less than Rs. 200 per annum, the non taxable limit was raised to Rs. 500 by Act XVI of 1862.

Rate of Assessment—Two per cent. on incomes, etc., between Rs. 200 and 500 per annum, 4 per cent. on incomes etc. above Rs. 500. 1 per cent. of the latter rate was intended to provide for Public Works Charges. The rate was reduced to 3 per cent. by Act XXVII of 1863.

Exemptions—(1) Military and Police officers whose pay was less than that of a Captain of Infantry (Rs. 415 a month).

(2) Naval and Indian Marine officers whose pay did not exceed that of a Naval Lieutenant (Rs. 175 a month).

(3) Cultivators of land, the rent value of which was less than Rs. 600 per annum.

(4) Religious and charitable institutions (thus last at the discretion of the Local Governments subject to the approval of the Governor General in Council).

2. A licence tax on trades, etc., carried on by men who did not fall within the scope of the Income tax Act or whose profits were less than Rs. 200 per annum was imposed by Act XVIII of 1861. Traders of this description were divided into three classes at the discretion of the assessing officers, which paid at the rate of Rs. 3, 2 and 1 per annum respectively.

This Act was repealed by Act II of 1862 the year in which the minimum taxable income under the Income Tax Act was raised to Rs. 500.

3. Licence Tax Act of 1867 (XXI of 1867), so called because all persons taxable thereunder had to take out a license on which the taxation prescribed by the Act was charged. But Government servants were not required to take out a licence, and the tax was deducted from their salaries before disbursement. Remained in force only till 1868.

Application.—To all persons exercising a profession or trade and whose income or profit was not less than Rs. 200 a year.

Rate of Assessment—The principle of a percentage rate was given up all ordinary assesses were divided into six classes according to amount of income or profit, and each class paid a fixed rate commencing at Rs 4 per annum on incomes between Rs. 200 and 500, and ending at Rs 500 on incomes above Rs 25 000 per annum (This was at the rate of 2 per cent on the minimum income in each class) Higher assessments than this were imposed only on certain large Companies which paid at Rs 1,000 and 2 000 according to the amount of paid up capital

Exemptions—(1) Military officers not in civil employ whose pay did not exceed Rs 6 000 per annum The Police Department was not civil employ for this purpose.

(2) Police officers drawing less than the pay of a Captain of Infantry (Rs 415 a month)

(3) All Government officers whose annual income was less than Rs 1,000

(4) Cultivators in respect of the produce of their lands unless they sold the same in a shop

(5) At the discretion of the Governor General in Council all persons assessed to any municipal or local tax—such as the Pandhari tax in the Central Provinces, on the exercise of any trade or profession to the extent they had paid under such tax

4 The Certificate Act of 1868 (XI of 1868)—This was on much the same lines as the licence tax of 1867 which it superseded (the authorisation for carrying on a taxable trade or profession was now called a certificate) as regards the general non-official tax payer though the classes and fees of assessment were somewhat altered and the limit of non taxable income raised, but as regards Government and Companies servants and (optionally) for Companies' profits, it introduced the important modification of a rateable tax on incomes

Application—To all incomes and profits derived from trades and professions not less in amount than Rs 500 per annum

Rate of Assessment—Servants of Government and Companies paid at 1 per cent on incomes Companies themselves had the option of paying 1 per cent on dividend or a fixed sum of Rs 500 for each place of business Other assesses were divided into 10 classes, each of which paid at a fixed rate from Rs 8 on an annual income of less than Rs 1,000 to Rs 6,400 on one of 4 lakhs and upwards (1 3/5 per cent on the minimum income of each class)

Exemptions—(1) Military and Police officers as in the 1867 Act, except that the Police officers' non taxable income was now raised to the same level as the military men's, viz, Rs 500 a month

(2) All servants and clerks on pay of less than Rs 1 000 per annum (The 1867 Act had given this concession only to Government servants)

(3) Cultivators as in the 1867 Act

5 The Income tax Act of 1869 (IX of 1869 amended by XXIII of same year)

Application—To all incomes and profits not being less than Rs 500 per annum.

Original Rate of Assessment—On Companies profits and on salaries drawn from Government Local Boards Companies and any other public bodies, 1 per cent

Other persons were divided into classes according to their income or profit and taxed at fixed rates varying from Rs 6 on an income between Rs 500 and Rs 750 to Rs 1140 on an income between Rs 11000 with Rs 100 extra for every additional Rs 10000 (a little over 1 per cent on the minimum income of each class)

By the amending Act (XXIII of 1869) these rates were raised as follows —

On Companies to $1\frac{1}{4}$ per cent

On Government servants etc. to $2\frac{1}{2}$ per cent

On other persons to 150 per cent of the rates previously scheduled

Exemptions—(1) Military officers as under the previous Act but the exemption in favour of Police officers disappeared

(2) Property solely applied to religious and charitable purposes

(3) The exemptions previously allowed to cultivators and to clerks and servants on less than Rs 1000 per annum have now disappeared

6 Income tax Act of 1870 (XVI of 1870)

Application—As before to all incomes and profits not being less than Rs 500 per annum

Rate of Assessment—All incomes and profits other than those under Rs 2000 per annum and not derived from service under Government or Local Board or Company or other public body were now taxed rateably at 6 pies in the rupee ($3\frac{1}{8}$ per cent). The excepted incomes under Rs 2000 were arranged into four classes paying fixed rates and varying from Rs $19\frac{1}{2}$ on incomes between Rs 500 and 750 to Rs 54 on those between Rs 1500 and Rs 2000 (about $3\frac{1}{8}$ per cent on the minimum income in each class)

Exemptions—As in the 1869 Act

7 Income tax Act of 1871 (XII of 1871)—This followed the Act of 1870 with the following alterations —

(1) The limit of non taxable income was raised to Rs 700 per annum

(2) The rate of assessment was reduced to 2 pies per rupee (a little over 1 per cent) and this was a universal rate that is the fixed rate for incomes under Rs 2000 under the previous Act were done away with

8 Income tax Act of 1872 (VIII of 1872)—This followed the Act of 1871 with the exception that the limit of non taxable income was raised to Rs 1000 per annum. The Act lapsed on 31st March 1873

9 We next come to the Licence Tax Acts of 1877 1880

(1) Act VIII of 1877 (India) applied only to the North Western Provinces and taxed all trades and commercial dealings other than those which were (a) purely agricultural or (b) produced a net annual profit of less than Rs 200. Exemption (a) was with reference to the fact that in 1877 78 additional cesses were imposed on land throughout Northern India to meet the famine assurance grant.

Persons taxable were assessed without any reference to income but simply with reference to the nature of their occupation according to a Schedule under which they paid fixed fees of Rs. 2 Rs. 8 or Rs. 16 per annum (the case might be).

(2) Act II of 1878 (India) applies to the North Western Provinces and the Punjab. Like the Act of 1877 it taxed all trades and dealings other than those which were purely agricultural and exempted a man otherwise taxable if his annual income or profit was below a certain amount. Section 26 of the Act left this amount to be fixed by the Local Government with the sanction of the Government of India and the non-taxable limit adopted was Rs. 200 a year for the North Western Provinces and Rs. 100 for the Punjab.

As compared with the Act of 1877, this not only raised fees other than the lowest very largely, but provided grades taxed at different rates within each class. The class of an assessee was determined by his vocation his grade within it by the Collector. The grading was evidently to be made on a rough estimate of assumed earnings, and no one was to be charged in excess of 2 per cent. thereof. This accounts for the provision of the Schedule that a man who would naturally fall under Class I or II might be reduced to a lower class by reason of insufficient earnings.

Thus while the Act of 1877 taxed employment without reference to profits except in so far as the low scale of these might justify total exemption the Act of 1878 began by taxing employment but varied the assessment with reference to profits also.

(3) Bengal Act I of 1878 was similar in its application to the Northern India Act as applied to the Punjab while there were two schedules of taxation—one for Calcutta and one for the rest of the Province.

In Calcutta the Northern India system of taxing by occupation was applied, but without the refinement of grades within the trade classes except in Classes I and VI. But here also a man could be put below his proper class if it could be shown that he would otherwise pay more than 2 per cent. on his earnings.

In the districts the principle of taxation by occupation was maintained only as regards certain lucrative trades entered in Class I of the Schedule. Other persons were classed at the Collector's discretion which was no doubt exercised with reference to assumed profits.

(4) Bombay Act III of 1878 extended to all trades and dealings other than those which were purely agricultural. Assesseees were divided into 15 classes which paid fees varying from Rs. 2 to 200 per annum. Classification was made by the Collector with reference to assumed profits but no one could be taxed at a higher rate than 2 per cent. thereon. This involved exemption of incomes less than Rs. 100 per annum.

(5) Madras Act III of 1878 went on the same lines as the Bombay Act but with the following differences—

(1) The exemption limit was Rs. 200 per annum.

(2) The fees were higher, assesseees being arranged in 12 classes which paid fees according to profits at rates varying from Rs. 4 on an income of between Rs. 200 and 500 to Rs. 800 on an income of Rs. 40,000 and upwards. The rates fixed came to 2 per cent. on the lowest income in each class.

(6) By Act III of 1880 (Madras) the Madras classes were changed to 8, varying from incomes between Rs 500 and Rs 1250, which paid Rs. 10, to those of Rs 25,000 and upwards which paid Rs 500

10 Other amending Acts of 1880 (VI of 1880), India, (II of 1880), Bengal—These raised the limit of non taxable income to Rs 500 a year throughout India and altered previous Schedules in certain details

11. The Licence Tax Acts thus amended remained in force till 1886.

APPENDIX II

STAMPS AND COURT FEES

Affidavits.—An affidavit is not exempt from stamp duty on the ground that it is required for the immediate purpose of being filed or used in any Income tax proceedings or before the Income tax Officer or the Assistant Commissioner or the Commissioner, as none of these officers is a Court except to the extent specified in section 37 of the Income tax Act [see Exemption (b), Article 4, Schedule I, Indian Stamp Act]

Copies or Extracts—Under Article 24, Schedule I, Indian Stamp Act, all copies or extracts issued by officers in the Income tax Department are liable to pay stamp duty if under the law they are not chargeable with Court-fees

Authorisation letters—If a letter authorising a clerk or some one else to appear before an officer of the Income tax Department on behalf of the assessee is so written as to make it a 'power of attorney', i.e., to make it safe for the Income tax authority to treat the agent as though he were the principal, it should be stamped as an authority to act in a single transaction [Article 48 (c) of Schedule I] There is however nothing to prevent an Income tax Officer permitting a representative to appear without acting on behalf of an assessee, i.e., merely to produce or explain accounts, etc., and in such a case, the authorisation will not be dealt with as a power-of-attorney

Orders—Copies of—Under Schedule I, Article 6, of the Court-fees Act, every copy of an order passed by an officer in the Income-tax Department in respect of any proceedings under the Act is chargeable with Court-fees

Under Article 9 of the same Schedule, every copy of an Income-tax proceeding or order (not otherwise provided for by the Court fees Act) or copy of any account, statement, report or the like taken out of an office in the Income-tax Department is liable to pay Court fees.

Article 6 of Schedule I of the Court-fees Act applies to quasi judicial orders, e.g., assessment orders including orders enhancing assessments, orders under section 27, orders imposing penalties under section 25 (2) and section 28 (1) and all appellate and revisional orders generally, and Article 9 to other orders

The fifth paragraph of the Second Schedule of the Court fees Act applies to every case in which a judgment, decree or order has been passed by any Court, Board or Officer capable of passing such judgment, decree or order In view of the words "or when presented to any Civil, Criminal or Revenue Court or to any Board or Executive Officer" and "judgments,

decrees or orders passed by such Court, Board or Officer", applications to an Assistant Commissioner for copies of orders should bear Court fees, *Basantlal Ramji v Commissioner of Income tax, B & O*, 10 Pat 40, A I R. 1932 Pat 103, 5 I T C 383

Petitions—Applications—Under Article 1 of Schedule II every application or petition presented to 'any Executive Officer' (which presumably includes any officer in the Income tax Department) for the purpose of obtaining a copy or translation of any order passed by such officer or any other document on record in such office is chargeable with Court fees

Under Article 1 (b) of the same Schedule, Court fee is chargeable on every application or petition when presented to a Collector or any Revenue Officer having jurisdiction equal or subordinate to a Collector and not otherwise provided for by the Court fees Act It is doubtful, however, whether this Article will apply to applications presented to officers in the Income tax Department

Under Article 1 (c) of the same schedule, an application or petition presented to the Central Board of Revenue is chargeable with Court fee

Vakalatnama—Under Article 10 (a) and (c) of the same schedule, a Mukhtarnama or Vakalatnama presented for the conduct of any one case to an officer in the Income tax Department or the Central Board of Revenue is chargeable with Court fee

Appeal—Memorandum of—Under Article 11 (a) and (b) a memorandum of appeal presented to an officer in the Income tax Department or the Central Board of Revenue is chargeable with Court fee

Refunds.—Applications for refunds under section 48 of the Indian Income-tax Act are exempt from payment of Court fees See clause (xx) of section 19 of the Court-Fees Act, under which all applications for payment of money due by Government are exempt from Court-fees

Court-fees—Computation of—In all those cases where the Court fee is *ad valorem*, the monetary value for the purpose of determining the Court fee is the amount of tax or penalty levied by the Income-tax Officer

Copies for assessee's information—Gratis—For his own information, however, the assessee can under departmental orders have copies of any of the orders free, but they may not be used for any purpose except on payment of Court fees An assessment order for instance cannot be used for appeal unless stamped with Court fees but the assessee can have a copy for his own private use gratis

Rates of duties—Stamp duties and Court fees vary from Province to Province.

APPENDIX III

List of Notifications relating to the application of the Indian Income-tax Act, 1922, to various areas outside British India

Serial No.	No. and date of the Notification.	Areas to which applicable.	The extent to which the Act is applicable
1	507-1, dated 6th February, 1922, read with Notification No. 3 Fed./1, dated 1st April 1937—Political Department.	Railway lands in the Mysore State occupied by— (1) the Bangalore Branch of the M & S M Railway, (2) the Mysore State Railway from (and inclusive of) Bangalore Station to the Hubli and Tungabhadra bridge at Harihar, and (3) from and inclusive of Yerwanipour Junction Railway Station to the frontier of the Mysore State on the Bangalore Hindupur section	The whole of the Indian Income-tax Act, 1922 for the time being in force in the Civil and Military Station of Bangalore with the following modifications and restrictions— (1) Omit sub-sections (2) and (3) of section 1 (2) In clause (8) of section 2 for "Central Government" substitute "Resident" (3) Omit sections 7 (2), 46 (6) and 64 (4) After section 60 insert the following new section— "Go-A. Notwithstanding anything contained in this Act, the Crown Representative may, by notification in the Official Gazette, apply to the Civil and Military Station of Bangalore any rules under section 59 and any exemptions, reductions in rate or other modifications under section 60 of the Indian Income-tax Act, 1922, for the time being in force in British India subject to any amendments to which such rules, exemptions, reductions or modifications are for the time being subject in British India and with such modifications or restrictions as may be specified in the notifications and any rules, exemptions, reductions or modifications so applied shall have effect in the Civil and Military Station of Bangalore as if made under this Act." (5) For sub-section (9) of section 66 substitute— "(6) For the purposes of this section 'the High Court' means 'the High Court of Judicature at Madras'."

Serial No	No and date of the Notification	Areas to which applicable	The extent to which the Act is applicable.
2	485 I, dated 3rd October 192 (as amended by Notification No 31 I, B, dated 3rd February 1936)—Political Department	Lands within the Miraj (Senior) State occupied by the Kolhapur Railway (Madras and Southern Mahratta Railway)	The whole of the Indian Income-tax Act, 1922 (as applicable to the district of Satara)
3	474 I, B, dated 12th August 1936—Foreign and Political Department	Lands within the Sangli and Miraj (Senior) States occupied by the Sangli Railway Railway lands occupied by the Vasud Katana Branch of the Bombay, Baroda and Central India Railway in the Baroda State	The whole of the Indian Income tax Act, 1922 (as applicable to the district of Belgaum) The whole of the Indian Income tax Act, 1922, for the time being in force in the Kaira District of the Bombay Presidency
4	202 I, B, dated the 15th June 1939, 104 I, B, dated the 23rd April 1940 and 140-I B, dated the 30th May 1940—Political Department	Lands within the States specified in the second column of the Schedule hereto annexed occupied by the Railways specified in the corresponding entry in the first column of the said Schedule	The whole of the Indian Income tax Act, 1922, for the time being in force in the districts specified in the corresponding entry in the third column of the said Schedule
Schedule			
	Railway	State	District
	1	2	3
	(1) Shoranur Cochin Railway	Cochin and Travancore	Malabar
	(2) Trichunopoly Manamadura branch of the South Indian Railway	Pudukkotta	Trichunopoly
	(3) Fortwall Kanuvhalli or Kanuvhalli Swamiali Extension of the Madras and Southern Mahratta Railway	Sandur	Bellary
	(4) Cochin Harbour Railway and the Railway Extension from Iddappalli to link with the Harbour Railway	Cochin and Travancore	Malabar

5 203 I, B, dated 15th June 1939 and No 385 I B, dated 13th October 1913
—Political Department

Lands within the States specified in the second column of the Schedule hereto annexed occupied by the Railways specified in the corresponding entry in the first column of the said Schedule

The whole of the Indian Income tax Act, 1922, for the time being in force in the districts specified in the corresponding entry in the third column of the said Schedule

Schedule

Railway	State	District
1	2	3
(1) <i>Ban Light Railway System</i> — Kurdowadi Kalam Road Section Kurdowadi Pandharpur Section Pandarpur Miraj Extension	Hyderabad Miraj (Senor) Miraj (Senor) Jath Sangli	Sholapur Sholapur Satara Sholapur Satara Belgaum Satara Satara
(2) <i>B, B & C I Railway System</i> — Ahmedabad Prantj Railway— Ahmedabad Khedbrahma	Miraj (Junior) Kolhapur	
Ahmedabad Dholka Dhanduka Railway—	Daroda from mile 7 1398 to 8-1099 Bavasi Thana from mile 31 1283 to 32-2378	Ahmedabad
Ahmedabad Dhanduka Dhanduka Botad Line Anand Godhra Branch Line Petlad-Cambay Railway— Anand Cambay Tapti Valley Railway— Surat Bhadbhunja	Lambdi Ankevalia Bhavnagar Baroda Pandur Mewas Baroda Cambay Sachin Baroda	Ahmedabad Ahmedabad Panch Mahals Katra Surat

Serial No.	No. and date of the Notification	Areas to which applicable	The extent to which the Act is applicable
	Railway	State	District
	1	2	3
	D B & C. I. Railway Main Line—		
	Bombay-Paley	{ Jawahar Baroda	Thana
		{ Sachin Baroda	Surat and Broach.
	Vased-Kharagodha	{ Patdi Baroda	Surat.
		{ Bahjana Baria	Kaira
	Baktol-Dohad	{ Lunavada Baroda	Ahmedabad.
	Godhra-Lunavada Railway	{ Baroda Baroda	Ahmedabad
	Champaner-Siuvrajpur Light Railway.	{ Baroda Baroda	Panch Mahals
	Siuvrajpur-Parsi Extension	{ Chhoti Udepur Baroda	Panch Mahals.
		{ Baroda Baroda	Panch Mahals.
	(3) Bulimora-Waghzi Railway	{ Katosan Ijpura	Surat
	Mehsana Railway—	{ Baroda Baroda	
	Mehsana-Virangam	{ Katosan Ijpura	Ahmedabad
	(4) G. I. P. Railway System—		
	South East Main Line—		
	Hongt-Hyderabad Frontier	{ Alkalkot Kurundwad (Junior).	
	Hongt-Kurundwad Section	{ Hyderabad Hyderabad	Sholapur.
	Dhond Nannad Branch	{ Hyderabad Hyderabad	Sholapur.
	(5) M & S M Railway system—		
	(Meter Gauge Main Line) Gadag.	{ Hyderabad Hyderabad	Ahmednagar.
	Hospet.		
	Bijapur Branch—		Dharwar.
	Gadag Hongt	{ Raundurg Sangli	Dharwar.
		{ Alkalkot Alkalkot	Bijapur.
			Sholapur.

6 204 I B dated 15th June 1939—Political Department	Lands within the States specified in the second column of the Schedule hereto annexed occupied by the Railways specified in the corresponding entry in the first column of the said Schedule	The whole of the Indian Income tax Act, 1922, for the time being in force in the districts specified in the corresponding entry in the third column of the said Schedule
Railway 1	State 2	District 3
(1) <i>Bengal Doars Railway</i> — (Southern extension Barnes Baura) (2) <i>Eastern Bengal Railway</i> — Parbatipur Jalpaiguri Kaunia Dhubri	Cooch Behar Cooch Behar Cooch Behar	Jalpaiguri Jalpaiguri Rangpur
7 205 I B, dated 15th June 1939—Political Department	Lands within the States specified in the second column of the Schedule hereto annexed occupied by the Railways specified in the corresponding entry in the first column of the said Schedule	The whole of the Indian Income tax Act, 1922, for the time being in force in the districts specified in the corresponding entry in the third column of the said Schedule

Harihar Branch— Hubli Harihar end of the Tungabhadra Bridge at Harihar	Jamkhandi Miraj (Junior) Savanur	Dharwar
Poona Branch— Londa Miraj	Kurundwad (Senior) Kurundwad (Junior) Kolhapur Sangli Miraj (Senior)	
Miraj Poona	Miraj (Junior) Sangli Aundh Jamkhandi Phaltan	Belgaum and Satara
		Satara

Serial No.	No and date of the Notification	Areas to which applicable		The extent to which the Act is applicable
		Railway 1	State 2	
Schedule				
	(1) <i>Be gal and North Western Railway System—</i>	Benares		Benares
	(2) <i>B, B and C I Railway—</i> Cawnpore Achneta section	Bharatpur		Muttra
	(3) <i>G I P Railway—</i> Agra Delhi Chord Railway	Bharatpur		Muttra
	Midland section— Talpur Chambal River	Khandhana, Orchha, Datta and Gwalior		Jhansi
	Cawnpore branch Manikpur branch	Samthar Orchha, Alipura, Garrauli Patra and Taraon		Jhansi Jhansi Banda
	(4) <i>East Indian Railway—</i> Main line	{ Benares Rampur		Benares Moradabad
	(5) <i>Rohitkund and Kumaon Railway—</i> Lal kua Kasbipur	Rampur		Moradabad

8 206-I B., dated 15th June 1939 read with Nos 318-I B., dated 24th August 1939, 242 I B., dated 14th September, 1939 and 247 I B., dated 25th May 1944—Political Depart-
ment

Lands within the States specified in the second column of the Schedule hereto annexed occupied by the Railways specified in the corresponding entry in the first column of the said Schedule

The whole of the Indian Income-tax Act, 1922, for the time being in force in the districts specified in the corresponding entry in the third column of the said Schedule

Schedule

Railway 1	State 2	District 3
(1) <i>Bombay Baroda and Central India Railway System—</i>		
Ahmedabad Delhi Section	.. Nabha	} Gurgaon Hissar Hissar
Rewari Bhatinda Fazilka	.. Patandi	
	.. Patiala (up to the outer signal of Railway Station, Bhatinda towards Sher Garh)	
Ditto	.. Patiala (from outer signal of Railway Station Bhatinda towards Sher Garh up to Patiala-Faridkot frontier)	
Faridkot Ironrter Muktsar	.. Faridkot	} Ferozapore.
	.. Nabha	
(2) <i>North Western Railway Station—</i>		
Delhi Ambala Kalka Railway	.. Patiala	} Ambala
Maun line—	.. Kalra	
Ambala Khanna	.. Patiala	} Ambala
Khanna Ludhiana	.. Nabha	
Ludhiana Amritsar	.. Patiala	Ludhiana.
Racwind Bhatinda Branch	.. Kapurthala	Jullundur
	.. Faridkot	} Ferozapore
	.. Nabha	
	.. Patiala	
Jammu Kashmir Section—	.. Kashmir	Sialkot
Sialkot Jammu	.. Bahawalpur	Multan
Bhatinda-Sargodha	.. Sialkot	Ferozapore
McLeodganj Fazilka	.. Bahawalpur	Multan
Adamwahau Reti	.. Do	Do

Serial No.	No and date of the Notification	Areas to which applicable	The extent to which the Act is applicable
9	207 I B, dated 15th June 1939—Political Department	Lands within the States specified in the second column of the Schedule hereto annexed occupied by the Railways specified in the corresponding entry in the first column of the said Schedule	The whole of the Indian Income tax Act, 1922, for the time being in force in the districts specified in the corresponding entry in the third column of the said Schedule
<i>Schedule</i>			
		Railway	State
		1	2
			3
(1) <i>Bengal Nagpur Railway—</i>			
		Barra frontier near Sanakhan Purulia	Kharaswan
		Calcutta extension	Serai Kella
		Sini Kalimati (Tatanagar)	Serai Kella
		Gombarra Kandra Chord	Do
		Amda janda Branch line	Do
		Kalimati (Tatanagar)—Gurumahasant Branch	Kharaswan
		Gurumahasan Mines extension	Keonjhar
		Onajori Badampahar extension	Mayurbhanj
			Do
			Do
10	208-I B., dated 15th June 1939—Political Department	Lands within the States specified in the second column of the Schedule hereto annexed occupied by the Railways specified in the corresponding entry in the first column of the said Schedule	The whole of the Indian Income tax Act, 1922, for the time being in force in the districts specified in the corresponding entry in the third column of the said Schedule

Schedule

District.

State

Railway

3

2

1

1. Bombay Baroda and Central India Railways—

Amalwara to Indore section (up to the northern end of the Narula Bridge)	Indore	Nimar
2. Great Indian Peninsula Railway— Bombay & Nagpur Main Branch	Panna	Saugor
Bombay-Guna Baran Railway	Gwalior	Saugor
Gwalior Frontier south of Pitha Bina.	{ Gwalior Bhopal Kurwai }	{ Saugor Bilaspur Bilaspur Bilaspur }
3. Nagpur & Nagpur Railway— Bilaspur to Jabalpur Section	{ Sakin Raigarh Rena Korea }	
Katni Bilaspur Branch		
Central India Coalfields Railway		

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Laid with in the States specified in the second column of the Schedule hereto annexed occurred by the Railways specified in the corresponding entry in the first column of the said Schedule

The whole of the Indian Income Tax Act, 1922 for the time being in force in the districts specified in the corresponding entry in the third column of the said Schedule

Schedule

Railways

State

District

1

2

3

(1) Nagpur & Nagpur Railways—
Nagpur & Nagpur

Fakher	Cuttack
Blunder	Bilaspur
Aligarh	
Dhenkanal	
Mayurbhanj	

Kharagpur-Bilaspur

Serial No.	No. and date of the Notification	Areas to which applicable	The extent to which the Act is applicable
<i>Schedule (Contd.)</i>			
Railway	State	District	
Messrs Villiers Limited & Talcher Colliery assisted siding Madras and Southern Mahratta Railway Colliery assisted siding Bengal Nagpur Railway Talcher Colliery sidings and Branch entry lines	Talcher	Cuttack	3
Raipur-Vizianagaram section	Patna	Nawapara Sub-division of Sambalpur District Koraput	
Main line—	Kalahandi	Sambalpur	
Gangpur frontier near Janga Jharu guda	Gangpur	Sambalpur	
Jharsuguda frontier of Bamra (near Sonakhan)	Gangpur Bamra	Sambalpur	
Bagra frontier near Sonakhan—Purulia Paoposh Raipura Extension (Rourkela Pernitrapur)	Gangpur	Sambalpur	

12 210-I B dated 15th June 1939—Political Department.

Lands within the States specified in the second column of the Schedule hereto annexed occupied by the Railways specified in the corresponding entry in the first column of the said Schedule

The whole of the Indian Income-tax Act, 1922, for the time being in force in the districts specified in the corresponding entry in the third column of the said Schedule.

North Western Railway System— Kotri Rohri			Railway 1	State 2	Distret 3
			Kharpur		
			Sukkur		
12-A	No 442 I, B, dated the 11th November 1942—Political Department	The Punjab States Railway Lands (of late F & P Deput Notn No 345 I, dated and July 1924)			The Indian Income tax Act, 1922 (XI of 1922), subject to any amendments to which the enactment is for the time being generally subject in British India and the following modification — Omit sub-sections (2) and (3) of section 1 The whole of the Indian Income-tax Act, 1922, is applied to any person other than the Siem of Myllem, his Khan subjects and the Khan subjects of other Chiefs in the Khasi Hills The whole of the Indian Income tax Act, 1922 (as in force in the Cantonment of Shillong)
13	61-1011, dated 26th September 1923—Political Department	Portion of Myllem State which falls within a radius of three miles from the Court of the Deputy Commissioner, Khasi and Jaintia Hills, at Shillong			
14	529 I, dated 2nd October 1928—Political Department	Shillong (RIFLE RANGE) Cantonment		Ditto	ditto
15	344 I, dated 8th June 1932—Political Department	Shillong (Umlong) Cantonment			
16	148-I B, dated 27th April 1942—Political Department	Civil and Military Station of Bangalore			The Indian Income-tax Act, 1922 (XI of 1922), subject to any amendments to which the enactment is for the time being generally subject in British India and the following modifications and restrictions — (1) Omit sub-sections (2) and (3) of section 1 (2) In clause (3) of section 2 for "Central Government" substitute "Resident" (3) Omit sections 7 (2), 46 (5) and 64 (4) After section 60 insert the following new section — "60-A Notwithstanding anything contained in this Act, the Crown Representative may, by notification in the Official Gazette, apply to the Civil and Military Station of Bangalore any rules under section 29 and any exemptions reductions in rate or other modifications under section 60 of the Indian Income tax Act, 1922 for the time being in force in British India subject to any amendments to which such rules, exemptions, reductions or modifications are for the time being subject in

- 18 191-J B, dated 25th April 1944—Political Department
- Central India Administered Areas
- The Indian Income-tax Act, 1922 (XI of 1922), subject to any amendments to which the enactment is for the time being generally subject in British India and the following modifications and restrictions :—
- (1) Omit sub sections (2) and (3) of section 1
 - (2) In clause (8) of section 2 for " Central Government " substitute " Resident "
 - (3) Omit sub section (2) of section 7, sub section (6) of section 46 and section 64
 - (4) After section 60 insert the following section :—
- " 60-A Notwithstanding anything contained in this Act, the Crown Representative may, by notification in the Official Gazette, apply to the Central India Administered Areas any rules under section 59 and any exemptions, reductions in rate or other modifications under section 60 of the Indian Income-tax Act, 1922, for the time being in force in British India, subject to any amendments to which such rules, exemptions, reductions or modifications are for the time being subject in British India and with such modifications or restrictions as may be specified in the notifications, and any rules, exemptions, reductions or modifications, so applied shall have effect in the Central India Administered Areas as if made under this Act "
- Western India States Administered Areas
- The Indian Income-tax Act, 1922 (XI of 1922), subject to any amendments to which the enactment is for the time being generally subject in British India and the following modifications and restrictions :—
- (1) In section 1 for sub section (2) substitute " (2) It extends to the Civil Stations of Rajkot, Wadhwan and the Sadra Bazar ", and omit sub-section (3)
 - (2) In clause (8) of section 2 for " Central Government " substitute " Resident "
 - (3) Only so much of the Act shall apply as relates to the assessment and collection of income-tax on salaries received by persons who are in the service of the Crown or British subjects who are in the service of a local authority established in the exercise of the powers of the Crown Representative in that behalf
- 19 413-I B, dated 26th October 1942 and No 145-J B, dated 27th March 1944—Political Department

Serial No.	No and date of the Notification	Areas to which applicable.	The extent to which the Act is applicable.
20	27 th I B, dated 9th August 1943—Polit cal Department	Baroda Cantonment	(4) References to the Commissioner of Income-tax shall be read as referring to the Commissioner of Income-tax, Bombay, appointed under section 5 of the Act as in force in British India .. The Indian Income-tax Act, 1922 (XI of 1922), subject to any amendments to which the enactment is for the time being generally subject in British India and the following modifications and restrictions — (1) Omit sub-sections (2) and (3) of section 1 (2) In clause (8) of section 2 for "Central Government" substitute "Resident" (3) Only so much of the Act shall apply as relates to the assessment and collection of income-tax on salaries received by persons who are in the service of the Crown or British subjects who are in the service of a local authority established in the exercise of the powers of the Crown Representative in that behalf .. The whole of the Indian Income-tax Act, 1922 (as in force in the District of Sumla), .. The Indian Income-tax Act, 1922 (XI of 1922), subject to any amendments to which the enactment is for the time being generally subject in British India and the following modifications and restrictions — (1) Omit sub-sections (2) and (3) of section 1. (2) In clause (8) of section 2 for "Central Government" substitute "Resident". (2 a) For sub-sections (2) and (3) of section 5, substitute— "(2) The Crown Representative may appoint a Commissioner, an Appellate, Assistant Commissioner and an Inspecting Assistant Commissioner of Income-tax for the Hyderabad Administered Areas. (3) The Resident may appoint an Income-tax officer for the Hyderabad Administered Areas"
21	73-I B, dated 1st April 1939—Political Department	Naasumpti area in Keonjhar State	
22	286-I B, dated 20th June 1944 and 503-I C, dated 18th December 1944—Political Department	Hyderabad Administered Areas	

(3) *Omni* sub-section (2) of section 7, sub-section (5) of section 46 and section 51.

(4) *After* section 60 *insert* the following section :—

" 60 A Notwithstanding anything contained in this Act, the Crown Representative may, by notification in the Official Gazette, apply to the Hyderabad *Administered Areas* any rules under section 59 and any exemptions, reductions in rate or other modifications under section 60 of the Indian Income-tax Act, 1922, for the time being in force in British India, subject to any amendments to which such rules exemptions, reductions or modifications are for the time being subject in British India and with such modifications or restrictions as may be specified in the notifications, and any rules, exemptions, reductions or modifications so applied, shall have effect in the Hyderabad *Administered Areas* as if made under this Act "

The Indian Income-tax Act, 1922 (XI of 1922) subject to any amendments to which the enactment is for the time being generally subject in British India and the following modifications and restrictions —

(1) *Omni* sub-sections (2) and (3) of section 2.

(2) In clause (b) of section 2 for "Central Government" substitute "Resident".

(3) Only so much of the Act shall apply as relates to the assessment and collection of income-tax on salaries received by persons who are in the service of the Crown

" The whole of the Indian Income-tax Act, 1922 (as in force in British Baluchistan).

21 21st J. B., dated 15th July 1913—Political Deptt.
1913

Gwalior Residency Area

21 26th J. B., dated 3rd May 1917—Political Deptt.
1917

Edulchistan Leased Areas

Serial No.	Persons	Officer appointed to perform the functions of					Commissioner of Income tax
		Income tax Officer	Inspecting Assistant Commissioner of Income-tax	Appellate Assistant Commissioner of Income-tax			
1	2	3	4	5	6		
9	Persons (excluding those who fall under S. No. 70) not resident in British India whose total income is made up of income wholly taxed at source or dividends or both	Income-tax Officer Non Residents fund Circle, Bombay	Inspecting Assistant Commissioner of Income-tax, D Range, Bombay City	Appellate Assistant Commissioner of Income-tax, D Range, Bombay City	Commissioner of Income-tax, Bombay City		
10	Pensioners who draw their pensions in the United Kingdom and reside in Indian States	Income-tax Officer Non Residents fund Circle, Bombay	Inspecting Assistant Commissioner of Income-tax, D Range, Bombay City	Appellate Assistant Commissioner of Income-tax, D Range, Bombay City	Commissioner of Income-tax, Bombay City		
11	Pensioners who draw their pensions through Post Offices in Indian States and reside in those States	Income tax Officer, Non Residents fund Circle, Bombay	Inspecting Assistant Commissioner of Income-tax, D Range, Bombay City	Appellate Assistant Commissioner of Income-tax, D Range, Bombay City	Commissioner of Income-tax, Bombay City		
12	Religious and charitable institutions outside British India not liable to income tax under section 4 (3) (i) and (ii) of the Indian Income tax Act 1922, applying for refund of tax deducted at source on interest on securities or for exemption certificates in respect thereof	Income tax Officer, Non Residents fund Circle, Bombay	Inspecting Assistant Commissioner of Income-tax, D Range, Bombay City	Appellate Assistant Commissioner of Income-tax, D Range, Bombay City	Commissioner of Income-tax, Bombay City		
13	"Thana Funds administered by Political Agents in Kathiawar	Income-tax Officer, Non Residents fund Circle, Bombay	Inspecting Assistant Commissioner of Income-tax, D Range, Bombay City	Appellate Assistant Commissioner of Income-tax, D Range, Bombay City	Commissioner of Income-tax, Bombay City		

14	Local or Thana Funds administered by Government officers in Indian States or in British administered areas in those States which are either not liable to income tax or have been exempted under section 60 of the Act, when application is made on their behalf for refund of tax deducted at source on interest on securities or for exemption certificate in respect thereof	Income-tax Officer, Non Residents' Revenue Fund Circle, Bombay	Inspecting Commissioner of Income-tax, D Range, Bombay City.	Appellate Commissioner of Income-tax, D Range, Bombay City	Commissioner of Income-tax, Bombay City.
15	All persons assessed under section 44 G of the Act	Income-tax Officer, Non Residents' Revenue Fund Circle, Bombay	Inspecting Commissioner of Income-tax, D Range, Bombay City.	Appellate Commissioner of Income-tax, D Range, Bombay City.	Commissioner of Income-tax, Bombay City.
16	Employees of the Bombay, Baroda and Central India Railway and the Great Indian Peninsula Railway except those under the audit of the Controller of Supply Accounts, Calcutta	Income-tax Officer, Section I, Salaries, Bombay	Inspecting Commissioner of Income-tax, E Range, Bombay City	Appellate Commissioner of Income-tax, E Range, Bombay City	Commissioner of Income-tax, Bombay City
17	Government servants employed under the Director General of Observatories, Poona, the Directors, Madras and Kodakanal Observatories, the Meteorologist Upper Air Observations, Agra, and the Meteorologist, Karachi, who are under the audit of the Accountant General, Bombay	Income-tax Officer, Section I, Salaries, Bombay	Inspecting Commissioner of Income-tax, E Range, Bombay City.	Appellate Commissioner of Income-tax, E Range, Bombay City.	Commissioner of Income-tax, Bombay City.
18	Naval employees under the audit control of the Controller of Naval Accounts, Bombay	Income-tax Officer, Section I, Salaries, Bombay.	Inspecting Commissioner of Income-tax, E Range, Bombay City	Appellate Commissioner of Income-tax, E Range, Bombay City.	Commissioner of Income-tax, Bombay City.
19	Members of the Entertainments National Services Association serving in India.	Income tax Officer, Section I, Salaries, Bombay.	Inspecting Commissioner of Income-tax, E Range, Bombay City.	Appellate Commissioner of Income-tax, E Range, Bombay City.	Commissioner of Income-tax, Bombay City.

Serial No.	Persons	Income tax Officer	Inspecting Assistant Commissioner of Income tax	Appellate Assistant Commissioner of Income-tax	Commissioner of Income tax
1	2	3	4	5	6
20	Employees of the Rajputana Minerals Company, Limited	Income-tax Officer, Section II, Salaries, Bombay	Inspecting Assistant Commissioner of Income-tax, E Range, Bombay City	Appellate Assistant Commissioner of Income-tax, E Range, Bombay City	Commissioner of Income-tax, Bombay City
21	Staff of Geologists and Geophysicists under Burma Oil Company Limited, engaged in survey in North India having centres at Karachi and Digboi	Income-tax Officer, Dibrugarh	Inspecting Assistant Commissioner of Income-tax, Bengal Range No V and Assam	Appellate Assistant Commissioner of Income-tax, Dacca Range	Commissioner of Income-tax, Assam
22	European employees in British India and Bihar and Indian employees in Bengal, Bihar, Orissa, Assam and the United Provinces of Messrs Ralli Brothers	Income-tax Officer, District Calcutta, III A	Inspecting Assistant Commissioner of Income-tax, Range No II, Calcutta	Appellate Assistant Commissioner of Income-tax, 'A' Range	Commissioner of Income-tax, Calcutta
23	European employees of the Imperial Tobacco Company (India) Limited and the Indian Leaf Tobacco Development Company, Limited in the Provinces of Bombay, Madras, United Provinces, Punjab, Bengal, Bihar, Orissa and Assam	Income-tax Officer, District Calcutta, III A	Inspecting Assistant Commissioner of Income-tax, Range No II, Calcutta	Appellate Assistant Commissioner of Income-tax, 'A' Range	Commissioner of Income-tax, Calcutta
24	European employees of the Tobacco Manufacturers (India) Limited, and the Printers (India) Limited, in the Provinces of Bombay, Madras, United Provinces, Punjab, Bengal, Bihar, Orissa and Assam	Income-tax Officer, District Calcutta, III A	Inspecting Assistant Commissioner of Income-tax, Range No II, Calcutta	Appellate Assistant Commissioner of Income-tax, 'A' Range	Commissioner of Income-tax, Calcutta
25	Employees of the "Statesman Limited" stationed at Lahore and Delhi	Income-tax Officer, District Calcutta, III-A	Inspecting Assistant Commissioner of Income-tax, Range No II, Calcutta	Appellate Assistant Commissioner of Income-tax, 'A' Range.	Commissioner of Income-tax, Calcutta.

26	Employees of Messrs Burnah Shell Oil Storage and Distributing Company of India, Limited, stationed at Delhi	Income tax Calcutta, III-A	Officer, District	Inspecting Commissioner of Income-tax, Range No II, Calcutta	Assistant Commissioner of Income-tax, Range 'A' Range	Appellate Commissioner of Income-tax, Calcutta	Commissioner of Income-tax, Calcutta.
27	Employees of the Bata Shoe Company, Limited, stationed anywhere in British India.	Income tax Calcutta, III A.	Officer, District	Inspecting Commissioner of Income-tax, Range No II, Calcutta.	Assistant Commissioner of Income-tax, Calcutta	Appellate Commissioner of Income-tax, Calcutta	Commissioner of Income-tax, Calcutta
28	All Government employees and pensioners under the audit of the Accountant General, Bengal, who are serving or residing in Bengal other than those who carry on business on their own account and those who are within the jurisdiction of the Income-tax Officer, Railways and Miscellaneous Salaries Circle, Calcutta	Income-tax Central Circle, Calcutta	Officer, Salaries	Inspecting Commissioner of Income-tax, Range No IV, Calcutta	Assistant Commissioner of Income-tax, Range 'A' Range	Appellate Commissioner of Income-tax, Calcutta	Commissioner of Income-tax, Calcutta
29	Pensioners, other than pensioners of the Central Government residing outside Bengal who are under the audit of the Accountant General, Bengal.	Income-tax Central Circle, Calcutta	Officer, Salaries	Inspecting Commissioner of Income-tax, Range No IV, Calcutta	Assistant Commissioner of Income-tax, Range 'A' Range	Appellate Commissioner of Income-tax, Calcutta	Commissioner of Income-tax, Calcutta
30	(i) All Government employees and pensioners who were till 1900-01 under the audit of the Accountant General, Central Revenues, but are now under the audit of the Accountant General, Bengal, Calcutta, (ii) all military officers and pensioners whose salaries are audited by the Controller of Army Factory Accounts, Calcutta (iii) all civil pensioners of the Central Government under the audit of the Accountant General, Bengal, and (iv) all Government officers serving in and pensioners from the offices	Income-tax Railways and Miscellaneous Circle, Calcutta	Officer, Salaries	Inspecting Commissioner of Income-tax, Range No IV, Calcutta	Assistant Commissioner of Income-tax, Range 'A' Range	Appellate Commissioner of Income-tax, Calcutta	Commissioner of Income-tax, Calcutta.

Serial No.	Persons	Officer appointed to perform the functions of				Commissioner of Income-tax
		Income-tax Officer	Inspecting Assistant Commissioner of Income-tax	Appellate Assistant Commissioner of Income tax		
1	2	3	4	5		6
	of the Government Inspectors of Railways, Circles I & II, and in the offices of the Government Examiners of Accounts, Bengal and Assam Railway, East Indian Railway, and Bengal Nagpur Railway,					
	who are serving or residing in Bengal other than those who carry on business on their own account					
31	Employees of the Bengal Nagpur Railway,	Income tax Railways & Miscellaneous Salaries Circle, Calcutta	Inspecting Commissioner of Income-tax, Range No IV, Calcutta	Appellate Commissioner of Income-tax, 'A' Range	Commissioner of Income-tax, Calcutta	
32	Employees of the East Indian Railway	Income tax Railways & Miscellaneous Salaries Circle, Calcutta	Inspecting Assistant Commissioner of Income-tax, Range No II, Calcutta	Appellate Commissioner of Income-tax, 'A' Range	Commissioner of Income-tax, Calcutta	
33	Central Government servants serving outside Bengal and Central Government pensioners residing outside Bengal who are under the audit of the Accountant General, Bengal	Income-tax Railways & Miscellaneous Salaries Circle, Calcutta	Inspecting Assistant Commissioner of Income-tax, Range No IV, Calcutta.	Appellate Commissioner of Income-tax, 'A' Range	Commissioner of Income-tax, Calcutta	
34	Employees under the audit of the Controller of Ordnance Factory Accounts and the Controller of Leather and Clothing Factory	Income-tax Railways & Miscellaneous Salaries Circle, Calcutta	Inspecting Assistant Commissioner of Income-tax, Range No IV, Calcutta	Appellate Commissioner of Income-tax, 'A' Range.	Commissioner of Income-tax, Calcutta	

Accounts and all staff of the Factory Accounts Branch of the Military Accounts Department under the Chief Controller of Factory Accounts, Controller of Ordnance Factory Accounts, Controller of Leather and Clothing Factory Accounts and Controller of Accounts, Military Railway Claims	Income tax Railways & Miscellaneous Circle, Calcutta	Officer, Miscellaneous Salaries	Inspecting Commissioner of Income-tax, Range No IV, Calcutta	Appellate Commissioner of Income-tax, 'A' Range	Commissioner of Income-tax Calcutta
33 Pensioners whose pensions are payable from Defence Services Loans through the Controller of Military Accounts and Pensions Lahore, who reside in Bengal	Income tax Railways & Miscellaneous Circle, Calcutta	Officer, Miscellaneous Salaries	Inspecting Commissioner of Income-tax, Range No IV, Calcutta	Appellate Commissioner of Income-tax, 'A' Range	Commissioner of Income-tax Calcutta
36 Employees of the Bengal and Assam Railway	Income tax Railways & Miscellaneous Circle, Calcutta	Officer, Miscellaneous Salaries	Inspecting Commissioner of Income-tax, Range No IV, Calcutta	Appellate Commissioner of Income-tax, 'A' Range	Commissioner of Income-tax Calcutta
37 All employees and pensioners of the Posts of Telegraphs Department under the audit of the two Deputy Accountants General, Posts and Telegraphs (Postal and Telegraph Branches), Calcutta	Income tax Railways & Miscellaneous Circle, Calcutta	Officer, Miscellaneous Salaries	Inspecting Commissioner of Income-tax, Range No IV, Calcutta	Appellate Commissioner of Income-tax, 'A' Range	Commissioner of Income-tax Calcutta
38 Employees of the India General Navigation and Railway Company Limited and River Steam Navigation Company Limited working in Bengal, Bihar, Orissa and Assam, except those who carry on business in addition	Income-tax District cutta	Officer, V.A., Calcutta	Inspecting Commissioner of Income-tax, Range No II, Calcutta	Appellate Commissioner of Income-tax, 'A' Range	Commissioner of Income-tax, Calcutta
39 Employees of W T Henley's Telegraph Works Company Limited stationed at Bombay, Karachi, Lahore, Delhi and Madras	Income-tax District cutta	Officer, V.A., Calcutta	Inspecting Commissioner of Income-tax, Range No II, Calcutta	Appellate Commissioner of Income-tax, 'A' Range	Commissioner of Income-tax, Calcutta
40 Employees of the Oudh Tirhut Railways	Income tax Gorakhpur	Officer, V.A., Calcutta	Inspecting Commissioner of Income-tax, Range No II, Calcutta	Appellate Commissioner of Income-tax, 'A' Range	Commissioner of Income-tax, United Provinces & Ajer-Merwara

Serial No.	Persons	Officer appointed to perform the functions of					Commissioner of Income-tax
		Income-tax Officer	Inspecting Assistant Commissioner of Income tax	Appellate Assistant Commissioner of Income tax	Commissioner of Income-tax		
1	2	3	4	5	6		
41	Employees of the Peshawar Company Limited	Income-tax Officer, Gorakhpur.	Inspecting Assistant Commissioner of Income-tax, Lucknow Charge.	Appellate Assistant Commissioner of Income tax, Benares Range	Commissioner of Income-tax, United Provinces & Ajeer-Merwara.		
42	Persons under the audit of (i) the Chief Paymaster British Troops (India) Meerut, and (ii) the Controller of Military Accounts, Central Command, Meerut	Income-tax Officer, Military Meerut	Inspecting Assistant Commissioner of Income-tax, Meerut Charge	Appellate Assistant Commissioner of Income tax, Agra Range	Commissioner of Income-tax, United Provinces & Ajeer-Merwara.		
43	Government servants under the audit of the Deputy Accountant General, Posts and Telegraphs, Nagpur.	Income-tax Officer, Salary Circle, Nagpur	Inspecting Assistant Commissioner of Income-tax, Central Provinces & Berar	Appellate Assistant Commissioner of Income tax, Central Provinces & Berar, Nagpur	Commissioner of Income-tax, Central Provinces & Berar		
44	Officers of the Women's Medical Service and of the Junior Branch of the same.	Income-tax Officer, Simla.	Inspecting Assistant Commissioner of Income-tax, Delhi.	Second Appellate Assistant Commissioner of Income-tax, Delhi Range, Ludhiana.	Commissioner of Income-tax, Punjab North-West Frontier and Delhi Provinces		
45	Members of the Nursing Staff of the Lady Minto's Indian Nursing Association	Income-tax Officer, Simla	Inspecting Assistant Commissioner of Income-tax, Delhi	Second Appellate Assistant Commissioner of Income-tax, Delhi Range, Ludhiana	Commissioner of Income-tax, Punjab North-West Frontier and Delhi Provinces.		

46	Government servants under the audit of the Accountant General, Central Revenues (excluding Government servants in the Indian Audit and Accounts Service attached to Railways and Postal Audit Offices), the Military Accountant General, the Deputy Accountant General, lots and telegraphs, Delhi, Controller of Food Accounts or the Controller of Supply Accounts and Government servants residents in the Andamans who are subject to the audit of the Deputy Accountant General, Posts and Telegraphs, Madras	Income tax Salary Circle, Delhi	Officer,	Inspecting Commissioner of Income tax, Delhi	Assistant Commissioner of Income-tax, Delhi	Appellate Commissioner of Income-tax, Delhi	Commissioner of Income-tax, Punjab, North-West Frontier and Delhi Provinces
47	Persons not (being ex enemy nationals) paid through the Controller, Local Clearing Office (Agency Debts)	Income tax Salary Circle, Delhi	Officer	Inspecting Commissioner of Income tax, Delhi	Assistant Commissioner of Income tax, Delhi	Appellate Commissioner of Income tax, Delhi	Commissioner of Income-tax, Punjab, North-West Frontier and Delhi Provinces
48	Military pensioners resident in the States of Mewar, Bharatpur, Bikaner, Jaipur, Marwar, Alwar and Bhopal who are under the audit of the controller of Military Accounts and Pensions, Lahore	Income tax Salary Circle, Delhi	Officer	Inspecting Commissioner of Income tax, Delhi	Assistant Commissioner of Income tax, Delhi	Appellate Commissioner of Income tax, Delhi	Commissioner of Income-tax, Punjab, North-West Frontier and Delhi Provinces
49	Pensioners who draw their pensions from the Hyderabad (Deccan) Treasury, and are under the audit of the Accountant General, Central Revenues	Income tax Salary Circle, Delhi	Officer,	Inspecting Commissioner of Income tax, Delhi	Assistant Commissioner of Income tax, Delhi	Appellate Commissioner of Income tax, Delhi	Commissioner of Income-tax, Punjab, North-West Frontier and Delhi Provinces
50	Employees of the Eastern Group Supply Council and of the Central Provision Office	Income tax Salary Circle, Delhi	Officer,	Inspecting Commissioner of Income tax, Delhi	Assistant Commissioner of Income tax, Delhi	Appellate Commissioner of Income tax, Delhi	Commissioner of Income-tax, Punjab, North-West Frontier and Delhi Provinces
51	(i) Persons under the audit control of the Controller of Accounts, Air Force, Delhi Division	Income tax Ambala	Officer,	Inspecting Commissioner of Income tax, Delhi	Assistant Commissioner of Income tax, Delhi	Appellate Commissioner of Income tax, Delhi	Commissioner of Income-tax, Punjab, North-West Frontier and Delhi Provinces

Officers appointed to perform the functions of

Serial No.	Persons	Income-tax Officer	Inspecting Assistant Commissioner of Income-tax	Appellate Assistant Commissioner of Income-tax	Commissioner of Income-tax
1	2	3	4	5	6
(ii) All employees, whether civil or military, who are members of or are attached to the Military Accounts Department and are under the audit control of the Field Controller of Military Accounts, other Rank, Ambala.		Income-tax Ambala	Inspecting Assistant Commissioner of Income-tax, Delhi	Appellate Assistant Commissioner of Income-tax, Delhi	Commissioner of Income-tax, Punjab, North-West Frontier and Delhi Provinces
52	(i) Military employees under the audit control of the Controller of Military Accounts, Northern Command, Rawalpindi	Income-tax Military Rawalpindi	Inspecting Assistant Commissioner of Income-tax, Lahore Division, Lahore	Appellate Assistant Commissioner of Income-tax, Rawalpindi, Rawalpindi	Commissioner of Income-tax, Punjab, North-West Frontier and Delhi Provinces, Lahore
(ii) Military employees excluding those who are covered by any one of the other items in this Schedule, who are under the audit control of the Controller of Military Accounts and Pension, Lahore.		Income-tax Military Civil Rawalpindi	Inspecting Assistant Commissioner of Income-tax, Lahore Division, Lahore	Appellate Assistant Commissioner of Income-tax, Rawalpindi, Rawalpindi	Commissioner of Income-tax, Punjab, North-West Frontier and Delhi Provinces, Lahore
53	Employees of the North Western Railway except those under the audit of the Controller of Supply Accounts, Calcutta	Income-tax Salary Circle, Lahore	Inspecting Assistant Commissioner of Income-tax, Lahore Division	Appellate Assistant Commissioner of Income-tax, Lahore	Commissioner of Income-tax, Punjab, North-West Frontier and Delhi Provinces, Lahore
A	Employees of the Church Missionary Society, Church of England Zenana Missionary Society, and Church and Mission of Central	Income-tax D-W and Lahore	Inspecting Assistant Commissioner of Income-tax, Lahore Division	Appellate Assistant Commissioner of Income-tax, Lahore	Commissioner of Income-tax, Punjab, North-West Frontier and Delhi Provinces, Lahore

55	Council of the Church Missionary Society residing in the Punjab, North-West Frontier Provinces, Sind and Baluchistan	Employees of the American United Presbyterian Mission residing in the United Provinces, in the Punjab and the North West Frontier Province	Income-tax Gujranwala	Officer,	Inspecting Commissioner of In- come-tax, Lahore Division	Assistant Commissioner of In- come-tax, Lahore.	Appellate Commissioner of In- come tax, Lahore.	Commissioner of Income- tax, Punjab, North-West Frontier and Delhi Pro- vinces, Lahore
		Government Employees under the audit control of the Accountant General, Punjab, residing in Indian States	Income-tax Salary Circle, Lahore.	Officer,	Inspecting Commissioner of In- come-tax, Lahore Division	Assistant Commissioner of In- come-tax, Lahore.	Appellate Commissioner of In- come-tax, Lahore.	Commissioner of Income- tax, Punjab, North West Frontier and Delhi Pro- vinces, Lahore
		All Civil Gazetted employees of the Government of Burma under the audit of the Accountant General, Burma, and all Gazetted and non-Gazetted employees of the Posts and Telegraphs Department, Burma, under the audit of the Comptroller of Posts and Telegraphs Accounts, Burma	Income-tax Simla	Officer,	Inspecting Commissioner of In- come-tax, Delhi	Additional Assistant Commissioner of In- come tax, Delhi Range, Ludhiana	Second Appellate Assistant- Commissioner of In- come tax, Delhi Range, Ludhiana	Commissioner of Income- tax Punjab, North West Frontier and Delhi Pro- vinces, Lahore
		Employees of the Government of Burma excluding those who fall under Serial No. 37, and all Burma evacuees at Simla, excluding those who are covered by any of the other items in this Schedule	Additional Income tax Officer, Simla	Inspecting Commissioner of In- come tax, Delhi	Second Appellate Assistant Commissioner of In- come tax, Delhi Range, Ludhiana	Additional Assistant Commissioner of In- come tax, Delhi Range, Ludhiana	Second Appellate Assistant Commissioner of In- come tax, Delhi Range, Ludhiana	Commissioner of Income- tax, Punjab, North-West Frontier & Delhi Pro- vinces Lahore
59		Government servants under the audit of the Accountant General, It has excluding persons any part of whose income is derived from the exercise of a profession	Income tax Salaries Kanchi	Officer, Circle,	Inspecting Commissioner of In- come tax, Northern Range, Madras.	Assistant Commissioner of In- come tax, in their respective Ranges	Appellate Commissioner of In- come tax, in their respective Ranges	Commissioner of Income- tax, Bihar and Orissa

Serial No.	Persons	Officer appointed to perform the functions of				Commissioner of Income-tax
		Income tax Officer	Inspecting Assistant Commissioner of Income-tax	Appellate Assistant Commissioner of Income tax		
1	2	3	4	5	6	
60	Government pensioners under the audit of the Accountant General, Bihar, excluding persons any part of whose income is derived from the exercise of a profession	Income-tax Salaries Ranchi	Inspecting Assistant Commissioner of Income tax, Northern Range, Patna	Appellate Assistant Commissioner of Income tax, in their respective Ranges	Commissioner of Income-tax, Bihar and Orissa	
61	Employees of the F. I. Plate Company of India Limited, Golmuri near (Jamshedpur) excluding persons any part of whose income is derived from the exercise of a profession	Income tax Salaries Ranchi	Inspecting Assistant Commissioner of Income tax, Northern Range, Patna	Appellate Assistant Commissioner of Income tax, in their respective Ranges	Commissioner of Income-tax, Bihar and Orissa	
62	Employees of the Fata Iron Steel Company at Jamshedpur excluding persons any part of whose income is derived from the exercise of a profession	Income-tax Salaries Ranchi	Inspecting Assistant Commissioner of Income tax, Northern Range, Patna	Appellate Assistant Commissioner of Income tax in their respective Ranges	Commissioner of Income-tax, Bihar and Orissa	
63	Employees of the European Mental Hospital, Ranchi, excluding persons any part of whose income is derived from the exercise of a profession	Income tax Salaries Ranchi	Inspecting Assistant Commissioner of Income-tax Northern Range, Patna	Appellate Assistant Commissioner of Income-tax, in their respective Ranges	Commissioner of Income-tax, Bihar and Orissa	
64	Employees of the Indian Mental Hospital, Ranchi, excluding persons any part of whose income is derived from the exercise of a profession	Income tax Salaries Ranchi	Inspecting Assistant Commissioner of Income tax, Northern Range, Patna	Appellate Assistant Commissioner of Income-tax, in their respective Ranges	Commissioner of Income-tax, Bihar and Orissa	

65	Employees of the Lac Research Institute, Nambum (near Ranchi) excluding persons any part of whose income is derived from the exercise of a profession	Income tax Salaries Ranchi	Officer, Circle,	Inspecting Assistant Commissioner of Income-tax, Northern Range, Patna	Appellate Assistant Commissioner of Income-tax, in their respective Ranges	Commissioner of Income-tax, Bihar and Orissa
66	Government servants and pensioners under the audit of the Comptroller, Orissa, excluding persons any part of whose income is derived from the exercise of a profession	Income tax Salaries Ranchi	Officer, Circle,	Inspecting Assistant Commissioner of Income-tax, Northern Range, Patna	Appellate Assistant Commissioner of Income-tax, in their respective Ranges	Commissioner of Income-tax, Bihar and Orissa
67	Personnel paid from the Defence Services Estimates who are in the payment of the Controller of Military Accounts Eastern Command, Patna	Income tax Patna	Officer,	Inspecting Assistant Commissioner of Income-tax, Northern Range Patna	Appellate Assistant Commissioner of Income-tax, Patna	Commissioner of Income-tax, Bihar and Orissa
68	Persons not resident in British India assessed through statutory agents under section 43 of the Indian Income tax Act, 1922, whether their income arises in a single province or in more than one province	Income tax Officer of the district in which the statutory agent carries on the business by reason of which income tax is chargeable in his name under section 42 or where he resides, as the case may be	Inspecting Assistant Commissioner of Income-tax who has been appointed to perform the function of an Inspecting Assistant Commissioner in the area where the Income tax Officer referred to in column 3 has jurisdiction	Appellate Assistant Commissioner of Income-tax who has been invested with powers to hear appeals against the decision of the Income-tax Officer referred to in column 3	Commissioner of Income-tax, of the Province concerned	
69	Persons (excluding those who fall under S. No 70) not resident in British India who do not fall under serial Nos 6 and 9 and not assessed through statutory agents under section 43 with any income for direct assessment, e.g., house property, interest, etc.	The Income tax Officer of the Circle in which above the greater part of the income for assessment in 1929-30, or in the first year of assessment, which ever year is later provided that the same officer shall have jurisdiction for subsequent years so long as some income for direct assessment (not necessarily the	Inspecting Assistant Commissioner of Income-tax who has been appointed to perform the function of an Inspecting Assistant Commissioner in the area where the Income tax Officer referred to in column 3 has jurisdiction	Appellate Assistant Commissioner of Income-tax, who has been invested with powers to hear appeals against the decision of the Income tax Officer referred to in column 3	Commissioner of Income-tax of the Province concerned	

Officer appointed to perform the functions of

Serial No.	Persons	Income-tax Officer	Inspecting Assistant Commissioner of Income-tax	Appellate Assistant Commissioner of Income-tax	Commissioner of Income-tax
1	2	3	4	5	6
70	(1) Defence Services Employees under the audit control of the Field Controller of Military Accounts, Officers and Clearing House, Poona, and of the Field Controller of Military Accounts other Ranks, Ambala, excluding (a) employees, whether civil or military, who are members of or are attached to the Military Accounts Department, and (b) Employees who are partners in a firm in British India or who have income from business carried on in British India	greater part) continues to arise within his jurisdiction Income-tax Officer, attached to the Adjutant General's Branch, General Headquarters, India and stationed at Poona.	Inspecting Assistant Commissioner of Income-tax, Poona Range, Poona.	Additional Assistant Commissioner of Income-tax, Belgaum Range, Poona	Commissioner of Income-tax, Bombay Mofussil.

(11) Persons resident outside India who at the time of departure from India were Defence Services employees under the audit control of the Field Controller of Military Accounts, Officers and Clearing House Poona (or previously Field Controller of Military Accounts, Poona) or the Field Controller of Military Accounts, other Ranks,

Ambala and who are not under the audit control of any other Audit Officer in India in respect of accounting periods during which they were Defence Services employees in Indian Payment

(iii) Persons being widows or dependents of Defence Service employees, in the payment of the Field Controller of Military Accounts, Officers and Clearing House, Poona (or previously Field Controller of Military Accounts, Poona) or the Field Controller of Military Accounts, Other Ranks, Ambala.

71 Persons in the payment of Force 196, Dholpur House, New Delhi.

Income-tax attached to the Adjutant General's Branch, Headquarters (India) and stationed at Poona	Officer	Inspecting Assistant Commissioner of Income-tax, Poona	Additional Assistant Commissioner of Income-tax, Belgaum	Appellate Commissioner of Income-tax, Bombay	Commissioner of Income-tax, Bombay
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Income-tax Air Force, Bombay	Officer, Inspecting Assistant Commissioner of Income-tax, B Range, Bombay	Appellate Assistant Commissioner of Income-tax B Range, Bombay	Commissioner of Income-tax, Bombay City
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72 A.F. Forces employees whose accounts are maintained by the Base Accounts Office, Air Force, Bombay and the Indian Air Force Central Accounts Office, Bombay, and the employees of the office of the Base Auditor, Royal Air Force, Bombay

11

No. 32.—In pursuance of sub-section (4) of section 5 of the Indian Income tax Act, (XLI of 1922), and in supersession of its notification No. 58, Income tax, dated the 15th July, 1939, the Central Board of Revenue directs—

(i) that the Appellate Assistant Commissioners of Income tax of the Ranges specified in column 1 of the Schedule hereto annexed shall perform their functions in respect of all persons and incomes assessed to income-tax or super-tax in the Income tax Circles and wards specified in the corresponding entry in column 2 thereof, and

(ii) that the Appellate Assistant Commissioner of Income-tax of Bombay "D" Range shall also perform his functions in respect of persons appealing from orders of the Income-tax Officers of the Non-Residents Refund Circle.

SCHEDULE

SCHEDULE			
Range	Income-tax Circles and Wards	Range	Income-tax Circles and Wards
Madras Berwada	(1) Viz anagram. (2) Vizagapatam. (3) Cocanada. (4) Ra almundry (5) Ellore. (6) Manipatam (7) Berwada I (8) Berwada II (9) Guntur (10) Tenali (11) Bapatla (12) Kurnool (13) Bellary (14) Madras II (15) Madras V (16) Madras VI (17) Salem I (18) Salem II (19) Madras (Special) Central (20) Madras (Special) South (21) Nellore I (22) Nellore II	Cumbatore	(1) Cumbatore I (2) Cumbatore II (3) Cumbatore (Special) (4) Ootacamond (5) Palghat (6) Calicut. (7) Mangalore. (8) Coorg
Madras "A"		Trichinopoly	(1) Trichinopoly I (2) Trichinopoly II (3) Negapatam. (4) Tanjore (5) Dindigul (6) Madura (North) (7) Madura (South) (8) Kara kudi I (9) Kara kudi II (10) Virudhunagar (11) Tinnevely (12) Tutucorin. (13) Madura (Special) (14) Erode (15) Erode (Special)
Madras B	(1) Madras I (2) Madras III (3) Madras IV (4) Con cevaram (5) Cuddalore (6) Vellore. (7) Chittoor (8) Cuddappah (9) Anantapur (10) Madras (Special) North (11) Madras (Special) East.	II Bombay City Bombay "A"	(1) A I ward (2) A II ward (3) A III ward (4) A IV ward (5) A V ward (6) G ward (7) M ward (8) D I ward (9) D-II ward.

Bombay "B"

- (1) Companies Circle I
- (2) Companies Circle II
- (3) Companies Circle III
- (4) Companies Circle IV
- (5) Air Force Circle, Bombay

Bombay "C"

- (1) B-I ward
- (2) B-II ward
- (3) B-III ward
- (4) C-I ward
- (5) C-II ward
- (6) C-III ward
- (7) C-IV ward

Bombay "D"

- (1) Central Section I
- (2) Central Section II
- (3) Central Section III
- (4) Central Section IV
- (5) Central Section V
- (6) Central Section VI
- (7) Central Section VII
- (8) Central Section VIII
- (9) Central Section IX
- (10) Central Section X
- (11) Central Section XI
- (12) Central Section XII
- (13) F Ward

Bombay "E"

- (1) Bombay Circle I
- (2) Bombay Circle II
- (3) Bombay Circle III
- (4) Bombay Circle IV
- (5) Bombay Circle V
- (6) Bombay Circle VI
- (7) Bombay Circle VII
- (8) Bombay Circle VIII
- (9) Bombay Circle IX
- (10) Bombay Circle X
- (11) Bombay Circle XI
- (12) Bombay Circle XII
- (13) Bombay Circle XIII
- (14) Bombay Circle XIV

III Bombay Migrants

Ahmedabad

- (15) Bombay Circle XV
- (16) Bombay Circle XVI
- (17) Bombay Suburban District
- (18) Salaries Section I
- (19) Salaries Section II
- (20) Bombay Refund Circle

Belgaum

- (1) Ahmednagar District
- (2) Satara District
- (3) Sholapur District
- (4) Belgaum and Kanara below Chat Talukas
- (5) Dhavare and Kanara above Chat Talukas
- (6) Bijapur District
- (7) Kolaba and Ratnagiri District
- (8) Poona City
- (9) Poona District and Salaries
- (10) Nasik District
- (11) East Khandesh District
- (12) West Khandesh District
- (13) Thana District

IV—Sind and Baluchistan

Karachi

- (1) Karachi City and Taluka
- (2) Hyderabad District
- (3) Sukkur and Nawabshah Districts
- (4) Shikarpur and Upper Sind Frontier District
- (5) Larkana and Daidu District
- (6) Karachi and Thar Parter District (excluding Karachi Taluka)
- (7) British Baluchistan
- (8) Karachi

Range	Income-tax Circles and Wards	Range	Income tax Circles and Wards
V—Calcutta, Bengal Mo- fusil and Azam Calcutta 'A'	(1) Calcutta District I (1) (2) Calcutta District I (2) (3) Calcutta District II (1) (4) Calcutta District II (2) (5) Calcutta District III (1) (6) Calcutta District III (2) (7) Calcutta District III A (8) Calcutta District IV (1) (9) Calcutta District IV (2) (10) Calcutta District IV (3) (11) Calcutta District V A (12) Calcutta District V (13) Calcutta District VI (14) Companies Circle I Calcutta (15) Companies Circle II Calcutta. (16) Companies Circle III Calcutta (17) Companies Circle IV Calcutta (18) Non-companies Excess Profits Tax Circle, Calcutta (19) Central Salaries Circle, Calcutta (20) Railways and Miscellaneous Salaries Circle Calcutta. (21) Central Income tax Circle I to VI	Dacca	(1) Dibrugarh sub-division of Lakhimpur District and the Sodiya Frontier Tract (2) Sibasagar and Naga Hill Districts Manipur and North Lakhimpur sub-division of the Lakhimpur District (3) Nowgong Darang and Balpara Frontier Tract (4) Cachar and Lushai Hills Districts and Kamrang sub-divisions of Sylhet Districts (5) Kamrup, Goalpara Garo Hills (6) North Sylhet, South Sylhet Habagany and Sunamganj sub-division of Sylhet District and Khasi and Jaintia Hills District (7) Dacca (8) Bakarganj (9) Faridpur (10) Tipperah Noakhali (11) Mymensing (12) Chittagong
Calcutta B	(1) Parganas (2) Howrah (3) Khulna Jessore (4) Midnapur Bankura. (5) Burdwan Birbhum (6) Murshidabad Nadia. (7) Hoogly (8) Jalpaiguri Darjeeling (9) Dinajpur Malda (10) Rangpur Bogra. (11) Rajshahi Pabna (12) Central Income-tax Circle III Additional.	VI—United Provinces and Ajmer Merwara Cawnpore Lucknow	(1) Cawnpore. (2) Special Income tax cum Excess Profits Tax Circle, Cawnpore (3) Fatehgarh (1) Lucknow (2) Sitapur (3) Bareilly (4) Gonda (5) Puzabad (6) Allahabad (7) Central Circle, Allahabad

Meerut

- (1) Meerut
- (2) Military Circle, Meerut
- (3) Saharanpur
- (4) Dehra Dun
- (5) Moradabad.

Agra

- (1) Agra
- (2) Aligarh
- (3) Jhansi.
- (4) Ajmer-Merwara
- (5) Benares
- (6) Azamgarh
- (7) Gorakhpur

Benares

VII.—Central Provinces
and Bihar

Nagpur

- (1) Income tax cum Excess Profits Tax Circle, Nagpur
- (2) Akola
- (3) Khamsaon
- (4) Nagpur
- (5) Wardha
- (6) Yeomaal
- (7) Amraoti.
- (8) Salary Circle, Nagpur

Jabalpur

- (1) Jabalpur.
- (2) Saugor
- (3) Chhindwara
- (4) Raipur
- (5) Khandwa

VIII.—Punjab North-west
Frontier Provinces and
Delhi

Lahore

- (1) Lahore
- (2) Salween Circle, Lahore
- (3) Lyallpur
- (4) Gujranwala
- (5) Gujrat
- (6) Sargodha
- (7) Montgomery
- (8) Multan
- (9) Jhelum.

Rawalpindi,

- (1) Rawalpindi
- (2) Peshawar
- (3) Nowshera.
- (4) Dehra Ismail Khan

Amritsar

- (1) Amritsar
- (2) Jullundur
- (3) Gurdaspur
- (4) Sialkot.
- (5) Hoshiarpur
- (6) Delhi.
- (7) Salary Circle, Delhi
- (8) Hissar
- (9) Rohtak.

Delhi

IX.—Bihar and Orissa

Patna

- (1) Patna
- (2) Bhagalpur
- (3) Special Circle, Patna
- (4) Special Circle, Cuttack
- (5) Gaya
- (6) Shahabad Palamau Circle, Arrah.
- (7) South Bihar Parganas
- (8) Hazaribagh
- (9) Purnea

Purulia

- (1) Ranchi Manbhum Sadar
- (2) Singhbhum Sanal alpur
- (3) Cuttack Balasore
- (4) Gangjam Puri Koraput
- (5) Dhanbad

Muzaffarpur

- (1) Muzaffarpur
- (2) Saran.
- (3) Champaran
- (4) Darbhanga
- (5) Monghyr

III

No. 33.—In exercise of the powers conferred by sub-section (6) of section 5 of the Indian Income-tax Act, 1922 (XI of 1922), as applied to the Hyderabad Administered Areas and in supersession of its notification No. 2-D, dated the 2nd March 1910, the Central Board of Revenue appoints the officers specified in the 3rd, 4th 5th and 6th columns of the Schedule annexed hereto, to perform all the functions of an Income-tax Officer, Inspecting Assistant Commissioner of Income-tax, Appellate Assistant Commissioner of Income-tax and the Commissioner of Income-tax respectively, in respect of the persons specified in the corresponding entry in the 2nd column thereof.

SCHEDULE.

Officer appointed to perform the functions of

Serial No	Persons	Income-tax Officer	Inspecting Assistant Commissioner of Income-tax	Appellate Assistant Commissioner of Income-tax	Commissioner of Income-tax
1	2	3	4	5	6
1	All Government servants who are under the audit of the Deputy Accountant General, Posts and Telegraphs, Madras	Income-tax Madras Salaries Circle	Inspecting Assistant Commissioner of Income-tax, Central Range, Madras.	Appellate Assistant Commissioner of Income-tax, 'A' Range, Madras.	Commissioner of Income-tax, Madras
2	Military employees under the audit control of the Controller of Military Accounts, Southern Command, Poona	Income-tax Officer, Salaries and District, Poona	Inspecting Assistant Commissioner of Income-tax, Poona Range, Poona	Additional Assistant Commissioner of Income-tax, Belgaum Range, Poona	Commissioner of Income-tax, Bombay, Mofussil
3	Employees of the Great Indian Peninsula Railway	Income-tax Officer, Section I, Bombay	Inspecting Assistant Commissioner of Income-tax "E" Range Bombay City.	Appellate Assistant Commissioner of Income-tax, "E" Range, Bombay City.	Commissioner of Income-tax, Bombay City
4	All employees and pensioners of the Posts and Telegraphs Department under the audit of the two Deputy Accountants General, Posts and Telegraphs (Postal and Telegraph Branches), Calcutta	Income-tax Officer, Railways and Miscellaneous Salaries Circle, Calcutta	Inspecting Assistant Commissioner of Income-tax, Range No IV, Calcutta	Appellate Assistant Commissioner of Income-tax, 'A' Range.	Commissioner of Income-tax, Calcutta

5	Government servants and British subjects in the Service of a local authority established in exercise of the powers of the Crown Representative in that behalf who are under the audit of the Accountant General, Central Revenue	Income tax Salary Circle, Delhi	Officer, Inspecting Commissioner of Income-tax, Delhi	Assistant Commissioner of Income-tax, Delhi	Appellate Commissioner of Income-tax, Range	Assistant Commissioner of Income-tax, Delhi	Commissioner of Income-tax, Punjab, North-West Frontier and Delhi Provinces
6	Pensioners who draw their pensions from the Hyderabad (Deccan) Treasury and are under the audit of the Accountant General, Central Revenue	Income tax Salary Circle, Delhi	Officer, Inspecting Commissioner of Income tax, Delhi	Assistant Commissioner of Income tax, Delhi	Appellate Commissioner of Income tax, Range	Assistant Commissioner of Income tax, Delhi	Commissioner of Income tax, Punjab, North West Frontier and Delhi Provinces

IV

(Notification No 28, dated the 15th April, 1939)

In exercise of the powers conferred by sub-section (3) of section 5 of the Indian Income-tax Act, 1922 (XI of 1922), the Central Government is pleased to appoint the officers specified in column 1 of the schedule hereto annexed to be *ex officio* Appellate Assistant Commissioners of Income tax for the Province specified in the corresponding entry in column 2 thereof

SCHEDULE

Appellate Assistant Commissioners of Income-tax 1	Province 2
Assistant Commissioner for the time being of Ajmer Merwara	Ajmer Merwara.
Assistant Commissioner for the time being of Coorg	Coorg
Deputy Commissioner for the time being of Andaman and Nicobar Islands	Andaman and Nicobar Islands

[F D (C R) Notification No 2-Camp D, dated the 10th November, 1945]

In exercise of the powers conferred by sub-section (3) of section 5 of the Indian Income-tax Act, 1922 (XI of 1922), the Central Government is pleased to appoint the officers specified in column 1 of the schedule hereto annexed to be the respective Income-tax authorities specified in column 2 thereof, with effect from the date of resumption of Civil Administration of the Andaman and Nicobar Islands

SCHEDULE

1	2
The Chief Commissioner, Andaman & Nicobar Islands	Commissioner of Income-tax Andaman and Nicobar Islands
The Deputy Commissioner, Andaman Islands	Appellate Assistant Commissioner of Income-tax, Andaman Islands.
The Deputy Commissioner, Nicobar Islands	Appellate Assistant Commissioner of Income-tax, Nicobar Islands
The Revenue Assistant Commissioner, Andaman & Nicobar Islands	Income-tax Officer, Andaman and Nicobar Islands

V

(Notification No 29, dated the 15th April 1939)

In pursuance of sub-section (4) of section 5 of the Indian Income-tax Act, 1922 (XI of 1922) the Central Board of Revenue hereby directs that the Appellate Assistant Commissioners of Income-tax for Ajmer Merwara, Coorg and the Andaman and Nicobar Islands shall perform their functions in respect of all persons and of all incomes within their respective Provinces

(Notification No 3-Camp-D, dated the 10th November, 1945)

In pursuance of sub-section (4) of section 5 of the Indian Income-tax Act, 1922 (XI of 1922), the Central Board of Revenue directs that the Appellate Assistant Commissioners of Income-tax for the Andaman Islands and the Nicobar Islands shall perform their functions in respect of all persons and of all incomes assessed to income-tax and super-tax within their respective provinces.

In pursuance of sub-section (4) of section 5 of the Indian Income-tax Act, 1922 (XI of 1922), as applied to the And and Madras States of Bangalore, the Central Board of Revenue directs that the Appellate Assistant Commissioner of Income-tax for the said States shall perform his functions in respect of all persons and incomes assessed to income-tax and super-tax in the said States.

(Notification No. 70, dated the 25th September, 1939).

VIII

In exercise of the powers conferred by sub-section (3) of section 5 of the Indian Income-tax Act, 1922 (XI of 1922), the Central Government is pleased to appoint the Inspecting Assistant Commissioner of Income-tax, Northern Karnataka, to be the Inspecting Assistant Commissioner of Income-tax for the said district.

(Political Department Notification No. 205-LB, dated the 14th August, 1940)

In exercise of the powers conferred by sub-section (3) of section 5 of the Indian Income-tax Act, 1922 (XI of 1922), as applied to the District of Abu, the Crown Representative is pleased to appoint the Inspecting Assistant Commissioner of Income-tax for the said district.

(Political Department Notification No. 328-LB, dated the 31st August, 1939)

In pursuance of sub-section (4) of section 5 of the Indian Income-tax Act, 1922 (XI of 1922), as applied to the District of Abu, the Central Board of Revenue directs that the Appellate Assistant Commissioner of Income-tax for the said District shall perform his functions in respect of all persons and incomes assessed to income-tax and super-tax in the said District.

(Notification No. 75, dated the 30th September, 1939).

VII

In exercise of the powers conferred by sub-sections (2) and (3) of section 5 of the Indian Income-tax Act, 1922 (XI of 1922), as applied to the Madras Cantonment (the Crown Representative is pleased to appoint the Resident for Madras and Coimbatore, the Secretary to the Resident and the Assistant Secretary to the Resident, as the Commissioner of Income-tax, the Appellate Assistant Commissioner of Income-tax, and the Income-tax Officer, respectively, for the said Cantonment.

(Political Department Notification No. 325-LB, dated the 31st August 1939)

In pursuance of sub-section (4) of section 5 of the Indian Income-tax Act 1922 (XI of 1922), as applied to the Cantonment of Madras, the Central Board of Revenue directs that the Appellate Assistant Commissioner of Income-tax for the said Cantonment shall perform his functions in respect of all persons and incomes assessed to income-tax or super-tax in the said Cantonment.

(Notification No. 74, dated the 30th September, 1939)

VI

In exercise of the powers conferred by sub-section (3) of section 5 of the Indian Income-tax Act, 1922 (XI of 1922), the Central Government is pleased to appoint the person holding Central Range of the Province of Madras, to be the Inspecting Assistant Commissioner of Income-tax for Coorg.

(Notification No. 32, dated the 22nd June, 1940)

FINANCE DEPARTMENT (CENTRAL REVENUES)

In exercise of the powers conferred by sub-section (3) of section 5 of the Indian Income-tax Act, 1922 (XI of 1922), the Central Government is pleased to appoint the person holding Northern Division of the Bombay Presidency, Sind and British Baluchistan, to be the Inspecting Assistant Commissioner of Income-tax for Ajmer Merwara.

(Notification No. 39, dated the 28th July, 1939)

FINANCE DEPARTMENT (CENTRAL REVENUES)

(Political Department Notification No 329 I.B., dated the 31st August, 1939)

In exercise of the powers conferred by sub-section (3) of section 5 of the Indian Income-tax Act, 1922 (XI of 1922) as applied to the Civil and Military Station of Bangalore, the Crown Representative is pleased to appoint the Collector and District Magistrate, Civil and Military Station of Bangalore and the officer on Special Duty, Mysore Residency, Bangalore, as the Appellate Assistant Commissioner and the Inspecting Assistant Commissioner, respectively, for the said Station.

IX

(Notification No 86, dated the 25th November, 1939)

In pursuance of sub-section (4) of section 5 of the Indian Income-tax Act, 1922 (XI of 1922), as applied to the Administered Areas in the Western India States Agency, the Central Board of Revenue directs that the Appellate Assistant Commissioners of Income tax, Sabar Kantha Agency, Eastern Kathiawar Agency and Western Kathiawar Agency, shall perform their functions in respect of all persons and incomes assessed to income-tax or super tax in their respective Agencies.

(Political Department Notification No 408-I B., dated the 16th November, 1939)

In exercise of the powers conferred by sub-section (3) of section 5 of the Indian Income-tax Act, 1922 (XI of 1922), as applied to the Administered Areas in the Western India States Agency, the Crown Representative is pleased to appoint the officers specified in column 1 of the schedule hereto annexed to be *ex officio* Appellate Assistant Commissioners of Income-tax for the areas specified in the corresponding entries in column 2 thereof.

SCHEDULE

Appellate Assistant Commissioner of Income-tax	Area
1	2
Political Agent, Sabar Kantha Agency Political Agent, Eastern Kathiawar Agency Political Agent, Western Kathiawar Agency	Sabar Kantha Agency Eastern Kathiawar Agency Western Kathiawar Agency

X

(Notification No 1 D, dated the 13th January, 1945).

In pursuance of sub-section (4) of section 5 of the Indian Income-tax Act, 1922 (XI of 1922), as applied to the Central India Administered Areas, the Central Board of Revenue directs that the Appellate Assistant Commissioner of Income tax for the said Areas shall perform his functions in respect of all persons and incomes assessed to income-tax and super-tax in the said Areas.

XI

(Political Department, Notification No 396-I B., dated the 21st October, 1944)

In exercise of the powers conferred by sub-section (2) and (3) of section 5 of the Income-tax Act 1922 (XI of 1922) as applied to the Gwalior Residency Area, the Crown Representative is pleased to appoint the Commissioner of Income Tax, & Punjab, North West Frontier and Delhi Provinces the Appellate Assistant Commissioner of Income-tax, Delhi Range and the Income-tax Officer, Salary Circle, Delhi, as the Commissioner of Income-tax, the Appellate Assistant Commissioner of Income tax and the Income-tax Officer respectively for the Gwalior Residency Area.

EXTRACTS FROM THE CIVIL PROCEDURE CODE.

ORDER V

ISSUE AND SERVICE OF SUMMONS.

Issue of Summons

1. (1) When a suit has been duly instituted a summons may be

Summons

issued to the defendant to appear and answer the claim on a day to be therein specified.

Provided that no such summons shall be issued when the defendant has appeared at the presentation of the plaint and admitted the plaintiff's claim

(3) Every such summons shall be signed by the Judge or such officer as he appoints, and shall be sealed with the seal of the Court

3 (1) Where the Court sees reason to re-

quire the personal appearance of the defendant, the summons shall order him to appear in person in Court on the day therein specified

(2) Where the Court sees reason to require personal appearance of the plaintiff on the same day, it shall make an order for such appearance.

4 No party shall be ordered to appear in person unless he resides—

(a) within the local limits of the Court's ordinary original jurisdiction, or

(b) without such limits but at a place less than fifty or (where there is railway or steamer communication or other established public conveyance for five miles of the distance between the place where he resides and the place where the Court is situated) less than two hundred miles distance from the Court house

6 The day for the appearance of the defendant shall be fixed with reference to the current business of the Court, the place of residence of the defendant and the time necessary for the service of the summons, and the day shall be so fixed as to allow the defendant sufficient time to enable him to appear and answer on such day

9 (1) Where the defendant resides within the jurisdiction of the Court in which the suit is instituted, or has an agent resident within that jurisdiction who is empowered to accept the service of the summons, the summons shall, unless the Court otherwise directs,

Delivery or transmission of summons for service.

be delivered or sent to the proper officer to be served by him or one of his subordinates

(2) The proper officer may be an officer of a Court other than that in which the suit is instituted and, where he is such an officer, the summons may be sent to him by post or in such other manner as the Court may direct

10 Service of the summons shall be made by delivering or tendering a copy thereof signed by the Judge or such officer as he appoints in this behalf, and sealed with the seal of the Court

* * * * *

Service to be on defendant in person when practicable or on his agent

12 Wherever it is practicable service shall be made on the defendant in person, unless he has an agent empowered to accept service, in which case service on such agent shall be sufficient.

13 (1) In a suit relating to any business or work against a person who does not reside within the local limits of the jurisdiction of the Court from which the summons is issued, service on any manager or agent, who, at the time of service, personally carries on such business or work for such person within such limits, shall be deemed good service

Service on agent by whom defendant carries on business

(2) For the purpose of this rule the master of a ship shall be deemed to be the agent of the owner or charterer

* * * * *

15 Where in any suit the defendant cannot be found and has no agent empowered to accept service of the summons on his behalf, service may be made on any adult male member of the family of the defendant who is residing with him

Where service may be on male member of defendant's family

Explanation—A servant is not a member of the family within the meaning of this rule.

16 Where the serving officer delivers or tenders a copy of the summons to the defendant personally or to an agent or other person on his behalf he shall require the signature of the person to whom the copy is so delivered or tendered to an acknowledgment of service endorsed on the original summons.

Person served to sign acknowledgment.

17 Where the defendant or his agent or such other person as aforesaid refuses to sign the acknowledgment, or where the serving officer, after using all due and reasonable diligence, cannot find the defendant, and there is no agent empowered to accept service of the summons on his behalf, nor any other person on whom service can be made, the serving officer shall affix a copy of the summons on the outer door or some other conspicuous part of the house in which the defendant ordinarily resides or carries on business or personally works for gain, and shall then return the original to the Court from which it was issued with a report endorsed thereon or annexed thereto

Procedure when defendant refuses to accept service or can not be found

be delivered or sent to the proper officer to be served by him or one of his subordinates

(2) The proper officer may be an officer of a Court other than that in which the suit is instituted and, where he is such an officer the summons may be sent to him by post or in such other manner as the Court may direct

10 Service of the summons shall be made by delivering or tendering a copy thereof signed by the Judge or such officer as he appoints in this behalf and sealed with the seal of the Court.

* * * * *

12 Wherever it is practicable service shall be made on the defendant in person unless he has an agent empowered to accept service in which case service on such agent shall be sufficient

13 (1) In a suit relating to any business or work against a person who does not reside within the local limits of the jurisdiction of the Court from which the summons is issued service on any manager or agent who at the time of service personally carries on such business or work for such person within such limits shall be deemed good service

(2) For the purpose of this rule the master of a ship shall be deemed to be the agent of the owner or charterer

* * * * *

15 Where in any suit the defendant cannot be found and has no agent empowered to accept service of the summons on his behalf service may be made on any adult male member of the family of the defendant who is residing with him

Explanation—A servant is not a member of the family within the meaning of this rule.

16 Where the serving officer delivers or tenders a copy of the summons to the defendant personally or to an agent or other person on his behalf he shall require the signature of the person to whom the copy is so delivered or tendered to an acknowledgment of service endorsed on the original summons

17 Where the defendant or his agent or such other person as aforesaid refuses to sign the acknowledgment or where the serving officer after using all due and reasonable diligence cannot find the defendant and there is no agent empowered to accept service of the summons on his behalf nor any other person on whom service can be made the serving officer shall affix a copy of the summons on the outer door or some other conspicuous part of the house in which the defendant ordinarily resides or carries on business or personally works for gain and shall then return the original to the Court from which it was issued with a report endorsed thereon or annexed thereto

30 (1) The Court may, notwithstanding anything hereinbefore contained, substitute for a summons a letter signed by the Judge or such officer as he may appoint in this behalf where the defendant is, in the opinion of the Court, of a rank entitling him to such mark of consideration

(2) A letter substituted under sub rule (1) shall contain all the particulars required to be stated in a summons, and, subject to the provisions of sub rule (3), shall be treated in all respects as a summons

(3) A letter so substituted may be sent to the defendant by post or by a special messenger selected by the Court, or in any other manner which the Court thinks fit, and, where the defendant has an agent empowered to accept service, the letter may be delivered or sent to such agent

* * * * *

ORDER XVI

SUMMONING AND ATTENDANCE OF WITNESSES.

1 At any time after the suit is instituted, the parties may obtain, on application to the Court or to such officer as it appoints in this behalf, summonses to persons whose attendance is required either to give evidence or to produce documents

* * * * *

5 Every summons for the attendance of a person to give evidence or to produce a document shall specify the time and place at which he is required to attend, and also whether his attendance is required for the purpose of giving evidence or to produce a document, or for both purposes, and any particular document, which the person summoned is called on to produce shall be described in the summons with reasonable accuracy

6 Any person may be summoned to produce a document, without being summoned to give evidence and any person summoned merely to produce a document shall be deemed to have complied with the summons if he causes such document to be produced instead of attending personally to produce the same

7 Any person present in Court may be required by the Court to give evidence or to produce any document then and there in his possession or power

8 Every summons under this Order shall be served as nearly as may be in the same manner as a summons to a defendant and the rules in Order V as to proof of service shall apply in the case of all summonses served under this rule

9 Service shall in all cases be made a sufficient time before the time specified in the summons for the attendance of the person summoned, to allow him a reasonable time for preparation and for travelling to the place at which his attendance is required

24 Where the defendant is confined in a prison, the summons shall be delivered or sent by post or otherwise to the officer in charge of the prison for service on the defendant

Service on defendant in prison

25 Where the defendant resides out of British India and has no agent in British India empowered to accept service, the summons shall be addressed to the defendant at the place where he is residing and sent to him by post, if there is postal communication between such place and the place where the Court is situate

Service where defendant resides out of British India and has no agent

26 Where—

Service in foreign territory through Political Agent or Court

(a) in the exercise of any foreign jurisdiction vested in His Majesty or in the Central Government or the Crown Representative, a Political Agent has been appointed, or a Court has been established or continued, with power to serve a summons issued by a Court under this Code in any foreign territory in which the defendant resides or

(b) the Provincial Government has, by notification in the Official Gazette, declared, in respect of any Court situate in any such territory and not established or continued in the exercise of any such jurisdiction as aforesaid, that service by such Court of any summons issued under this Code by a Court of the Province shall be deemed to be valid service. The summons may be sent to such Political Agent or Court, by post or otherwise, for the purpose of being served upon the defendant, and, if the Political Agent or Court returns the summons with an endorsement signed by such Political Agent or by the Judge or other officer of the Court that the summons has been served on the defendant in manner hereinbefore directed such endorsement shall be deemed to be evidence of service

27 Where the defendant is a public officer (not belonging to His Majesty's military, naval or air forces) or is the servant of a railway company or local authority, the Court may, if it appears to it that the summons may be most conveniently so served send it for service on the defendant to the head of the office in which he is employed together with a copy to be returned by the defendant

Service on civil public officer or on servant of railway company or local authority

28 Where the defendant is a soldier, sailor or airman the Court shall send the summons for service to his Commanding Officer together with a copy to be retained by the defendant

Service on soldiers

29 (1) Where a summons is delivered or sent to any person for service under rule 24, rule 27 or rule 28 such person shall be bound to serve it if possible and to return it under his signature, with the written acknowledgment of the defendant, and such signature shall be deemed to be evidence of service

Duty of person to whom summons is delivered or sent for service

(2) Where from any cause service is impossible, the summons shall be returned to the Court with a full statement of such cause and of the steps taken to procure service, and such statement shall be deemed to be evidence of non service

30 (1) The Court may notwithstanding anything hereinbefore contained substitute for a summons a letter signed by the Judge or such officer as he may appoint in this behalf where the defendant is in the opinion of the Court, of a rank entitling him to such mark of consideration

(2) A letter substituted under sub rule (1) shall contain all the particulars required to be stated in a summons and subject to the provisions of sub-rule (3), shall be treated in all respects as a summons

(3) A letter so substituted may be sent to the defendant by post or by a special messenger selected by the Court or in any other manner which the Court thinks fit and where the defendant has an agent empowered to accept service the letter may be delivered or sent to such agent

* * * * *

ORDER XVI

SUMMONING AND ATTENDANCE OF WITNESSES.

1 At any time after the suit is instituted the parties may obtain, on application to the Court or to such officer as it appoints in this behalf summonses to persons whose attendance is required either to give evidence or to produce documents

* * * * *

5 Every summons for the attendance of a person to give evidence or to produce a document shall specify the time and place at which he is required to attend, and also whether his attendance is required for the purpose of giving evidence or to produce a document, or for both purposes, and any particular document which the person summoned is called on to produce shall be described in the summons with reasonable accuracy

6 Any person may be summoned to produce a document without being summoned to give evidence and any person summoned merely to produce a document shall be deemed to have complied with the summons if he causes such document to be produced instead of attending personally to produce the same

7 Any person present in Court may be required by the Court to give evidence or to produce any document then and there in his possession or power

8 Every summons under this Order shall be served as nearly as may be in the same manner as a summons to a defendant and the rules in Order V as to proof of service shall apply in the case of all summonses served under this rule

9 Service shall in all cases be made a sufficient time before the time specified in the summons for the attendance of the person summoned to allow him a reasonable time for preparation and for travelling to the place at which his attendance is required

10 (1) Where a person to whom a summons has been issued either to attend to give evidence or to produce a document fails to attend or to produce the document in compliance with such summons the Court shall, if the certificate of the serving officer has not been verified by affidavit and may, if it has been so verified, examine the serving officer on oath or cause him to be so examined by another Court, touching the service or non service of the summons

(2) Where the Court sees reason to believe that such evidence or production is material, and that such person has, without lawful excuse, failed to attend or to produce the document in compliance with such summons or has intentionally avoided service it may issue a proclamation requiring him to attend to give evidence or to produce the document at a time and place to be named therein and a copy of such proclamation shall be affixed on the outer door or other conspicuous part of the house in which he ordinarily resides

(3) In lieu of or at the time of issuing such proclamation, or at any time afterwards the Court may, in its discretion, issue a warrant, either with or without bail, for the arrest of such person and may make an order for the attachment of his property to such amount as it thinks fit, not exceeding the amount or the costs of attachment and of any fine which may be imposed under rule 12

Provided that no Court of Small Causes shall make an order for the attachment of immovable property

If witness appears attachment may be with drawn.

11 Where, at any time after the attachment of his property, such person appears and satisfies the Court—

(a) that he did not, without lawful excuse, fail to comply with the summons or intentionally avoid service, and

(b) where he has failed to attend at the time and place named in a proclamation issued under the last preceding rule that he had no notice of such proclamation in time to attend

the Court shall direct that the property be released from attachment and shall make such order as to the costs of the attachment as it thinks fit

12 The Court may, where such person does not appear, or appears but fails so to satisfy the Court, impose upon him such fine not exceeding five hundred rupees as it thinks fit having regard to his condition in life and all the circumstances of the case, and may order his property or any part thereof, to be attached and sold or, if already attached under rule 10 to be sold for the purpose of satisfying all costs of such attachment together with the amount of the said fine, if any

Provided that if the person whose attendance is required pays into Court the costs and fine aforesaid the Court shall order the property to be released from attachment

13 The provisions with regard to the attachment and sale of property in the execution of a decree shall so far as they are applicable be deemed to apply to any attachment and sale under this order as if the person whose property is so attached were a judgment debtor

14 Subject to the provisions of this Code as to attendance and appearance and to any law for the time being in force where the Court at any time thinks it necessary to examine any person other than a party to the suit and not called as a witness by a party to the suit the Court may of its own motion cause such person to be summoned as a witness to give evidence or to produce any document in his possession on a day to be appointed and may examine him as a witness or require him to produce such document

15 Subject as last aforesaid whoever is summoned to appear and give evidence in a suit shall attend at the time and place named in the summons for that purpose and whoever is summoned to produce a document shall either attend to produce it or cause it to be produced at such time and place

16 (1) A person so summoned and attending shall unless the Court otherwise directs attend at each hearing until the suit has been disposed of

(2) On the application of either party and the payment through the Court of all necessary expenses (if any) the Court may require any person so summoned and attending to furnish security to attend at the next or any other hearing or until the suit is disposed of and in default of his furnishing such security may order him to be detained in the civil prison

17 The provisions of rules 10 to 13 shall, so far as they are applicable be deemed to apply to any person who having attended in compliance with a summons departs without lawful excuse in contravention of rule 16

18 Where any person arrested under a warrant is brought before the Court in custody and cannot, owing to the absence of the parties or any of them give the evidence or produce the document which he has been summoned to give or produce the Court may require him to give reasonable bail or other security for his appearance at such time and place as it thinks fit and on such bail or security being given, may release him and in default of his giving such bail or security, may order him to be detained in the civil prison

19 No one shall be ordered to attend in person to give evidence unless he resides—

(a) within the local limits of the Court's ordinary original jurisdiction, or

(b) without such limits but at a place less than fifty or (where there is railway or steamer communication or other established public conveyance for five sixths of the distance between the place where he resides and the place where the Court is situate) less than two hundred miles distance from the Court house

* * * * *

ORDER XXVI

COMMISSIONS

Commissions to examine witnesses

1 Any Court may in any suit issue a commission for the examination on interrogatories or otherwise of any person resident within the local limits of its jurisdiction who is exempted under this Code from attending the Court or who is from sickness or infirmity unable to attend it

Cases in which Court may issue commission to examine witness

2 An order for the issue of a commission for the examination of a witness may be made by the Court either of its own motion or on the application supported by affidavit or otherwise of any party to the suit or of the witness to be examined

Order for commission.

Where witness resides within Court's jurisdiction

3 A commission for the examination of a person who resides within the local limits of the jurisdiction of the Court issuing the same may be issued to any person whom the Court thinks fit to execute it.

Persons for whose examination commission may issue

4 (1) Any Court may in any suit issue a commission for the examination of—

(a) any person resident beyond the local limits of its jurisdiction,
(b) any person who is about to leave such limits before the date on which he is required to be examined in Court, and

(c) any person in the service of the Crown who cannot in the opinion of the Court, attend without detriment to the public service

(2) Such commission may be issued to any Court, not being a High Court within the local limits of whose jurisdiction such person resides or to any pleader or other person whom the Court issuing the commission may appoint

(3) The Court on issuing any commission under this rule shall direct whether the commission shall be returned to itself or to any subordinate Court

5 Where any Court to which application is made for the issue of a commission for the examination of a person residing at any place not within British India is satisfied that the evidence of such person is necessary, the Court may issue such commission or a letter of request.

Commission or request to examine witness not within British India

Court to examine witness pursuant to commission

6 Every Court receiving a commission for the examination of any person shall examine him or cause him to be examined pursuant thereto

7 Where a commission has been duly executed it shall be returned, together with the evidence taken under it to the Court from which it was issued unless the order, for issuing the commission has otherwise directed in which case the commission shall be returned in terms of such order, and the commission and the return thereto and the

Return of commission with depositions of witnesses

evidence taken under it shall (subject to the provisions of the next following rule) form part of the record of the suit

* * * * *

Commissions for local investigations

9 In any suit in which the Court deem a local investigation to be requisite or proper for the purpose of elucidating any matter in dispute or of ascertaining the market value of any property or the amount of any mesne profits or damages or annual net profits the Court may issue a commission to such person as it thinks fit directing him to make such investigation and to report thereon to the Court

Provided that where the Provincial Government has made rules as to the persons to whom such commission shall be issued the Court shall be bound by such rules

10 (1) The Commissioner after such local inspection as he deems necessary and after reducing to writing the evidence taken by him shall return such evidence, together with his report in writing signed by him to the Court

(2) The report of the Commissioner and the evidence taken by him (but not the evidence without the report) shall be evidence in the suit and shall form part of the record but the Court or with the permission of the Court any of the parties to the suit may examine the Commissioner personally in open Court touching any of the matters referred to him or mentioned in his report or as to his report or as to the manner in which he has made the investigation

(3) Where the Court is for any reason dissatisfied with the proceedings of the Commissioner it may direct such further inquiry to be made as it shall think fit

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